Profindo Pte Ltd *v* Abani Trading Pte Ltd
[2013] SGHC 10

Case Number	: District Court Appeal No 5 of 2012
Decision Date	: 14 January 2013
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Gopalan Raman (G R Law Corporation) for the appellant; John Wang and Chong Li Lian (RHTLaw Taylor Wessing LLP) for the respondent.
Parties	: Profindo Pte Ltd — Abani Trading Pte Ltd

Commercial Transactions – *Sale of Goods*

14 January 2013 Judgment reserved.

Judith Prakash J:

Introduction

1 This is an appeal against the decision of the district judge ("the DJ") in *Profindo Pte Ltd v Abani Trading Pte Ltd* [2012] SGDC 176 ("the GD"). The primary issue on appeal is how demurrage is to be calculated as between a seller and a buyer in a "cost and freight" ("CFR") sale contract – *ie*, whether or not the calculation of laytime against the buyer is to be suspended when the vessel carrying the goods is forced to leave its berth halfway through the unloading process.

Facts

Background

2 The parties are both trading companies incorporated in Singapore. On 19 May 2009, the appellant, Profindo Pte Ltd, agreed to sell 2,750 metric tons of cement to the respondent, Abani Trading Pte Ltd. The cargo was to be loaded in China and delivered to a port in Madagascar. The terms of the sale are contained in a proforma invoice ("the Agreement").

3 The relevant clauses of the Agreement are as follows:

1. Product: Ordinary Portland Cement 42.5 R Conforming to China Standard GB 175-2007

2. Quantity: 2750 MT (+/- 5% at [the appellant's] option)

3. Unit Price: USD 101/MT CFR …

4. Total Price: USD 277,750.00 CFR …

…

15. Discharge rate: 1000MT per WWD SHEXC UU

16. Demurrage/Dispatch: USD 5500 per day or prorate/no dispatch

17. Port DA: Port DA at disport of maximum USD5000 is under [the appellant's] account. If [Port DA] exceeds USD5000, [the respondent is] to top up the difference and pay [the appellant]

Under the Agreement, it was the appellant's responsibility to procure a ship to carry the cargo.

4 Pursuant to cl 15 of the Agreement, the parties agreed that on arrival of the carrying vessel at the discharge port, the respondent would discharge the goods within the allowable laytime of 2.75 days (calculated on the basis that 2,750 metric tons of cargo would be discharged at the rate of 1,000 metric tons per day). Clauses 3 and 4 of the Agreement also made it clear that the parties contracted on a CFR (*ie*, cost and freight) basis. It is not disputed by the parties that a CFR contract is but a variation of a "cost, insurance and freight" ("CIF") sale contract, and that the differences between the two types of contract are not material for the purposes of this appeal.

5 The appellant chartered the *MV Athens* and having loaded the cargo, the vessel arrived at the discharge port of Diego Suarez, Madagascar on 28 June 2009. The vessel berthed on 29 June 2009 at 0700 hours and the respondent commenced discharge at 0805 hours the same day. Discharge continued on 30 June 2009. However, on 1 July 2009, the port authorities unexpectedly required the vessel to leave the berth and move to the anchorage to give priority to a tanker. As a result, no discharge took place on 1 July 2009 and 2 July 2009. On 2 July 2009 at about 3pm, Mr Jeremy Wong ("Mr Wong") of the appellant called Mr Jayes Damodar ("Mr Damodar"), director of the respondent, to inform the latter that the vessel had been anchored outside the port since 1 July 2009. Mr Wong offered Mr Damodar the option of allowing limited discharge to take place on 2 July 2009 as the vessel could return to berth that day.

6 However, as it was too late in the day for significant discharge to occur, Mr Damodar instructed Mr Wong to wait until the next day (*ie*, 3 July 2009) to berth the vessel. Mr Wong followed up with an email dated 2 July 2009 stating:

> As spoken, we will advise vessel to berth tomorrow instead of today as per your decision. Kindly note that time is to count whether vessel is berthed or not, and once demurrage, always in demurrage.

In his reply email on the same day, Mr Damodar simply replied:

> Let the [vessel] discharge then for 2 hours, if it does not make any difference.

7 Despite Mr Damodar's email, the vessel only returned to berth on 3 July 2009 and the respondent completed the discharge of the goods on the same day.

The parties' claims

8 Subsequently, the owners of the vessel ("the shipowners") imposed demurrage on the appellant who managed to negotiate a reduced charge of US$8,200 but wanted the respondent to pay the amount. The appellant alleged that pursuant to cll 2 and 15 of the Agreement, the respondent was responsible for the delay since laytime continued to run whether the vessel was berthed or not. The respondent disagreed, contending that laytime was suspended when the vessel left the berth and that it was not responsible for demurrage because it had completed the discharge within the allowable laytime of 2.75 days *when the vessel was berthed*.

9 The appellant eventually paid the shipowners. However, the appellant alleged that it was blacklisted by the shipowners for late payment of the demurrage. As a result, the appellant allegedly suffered a loss of earnings of US$57,500 because it was unable to charter any vessel from the shipowners to fulfil its agreement with another customer for cement to be shipped. The appellant claimed this sum of loss of earnings from the respondent.

10 The appellant also claimed reimbursement of disbursements payable at the port, *ie* the Port DA charges, of US$4,965.03. As the vessel was at the port for a longer time, the Port DA charges amounted to US$9,965.03. According to cl 17 of the Agreement, the respondent had agreed to pay the appellant for any excess above US$5,000 in respect of Port DA charges. However, the respondent refused to pay - alleging that the delay in discharge, for which it was not responsible, caused an unnecessary rise in these charges.

11 The respondent also filed a counterclaim against the appellant on two separate grounds relating to the cement delivered. First, the respondent claimed that the cement supplied was not of satisfactory quality. As a result, the respondent had had to compensate a subsequent buyer of the cement by paying it a sum of US$10,000. The respondent therefore sought to recover this sum from the appellant.

12 Second, the respondent claimed that there was a shortfall of four metric tons of cement as the total amount discharged from the vessel was 2,746 metric tons instead of the 2,750 metric tons as agreed in cl 2 of the Agreement. Relying on cl 3 of the Agreement, the respondent sought to recover US$404 (*ie*, US$101 x 4) from the appellant on the basis that it should not have to pay for the shortfall in the cement.

Decision below

13 The DJ held as follows:

(a) Laytime was suspended when the vessel was not berthed so the respondent was not liable for the appellant's claim for demurrage. The DJ came to her decision on the basis that that there was no express or implied term between the parties that the respondent would be liable for demurrage whether or not the vessel was berthed (see the GD at [16]).

(b) Even if laytime was not suspended, the appellant had not proven its claim for loss of earnings of US$57,500 because this was a loss which the appellant could not have reasonably foreseen. It was also a loss which the appellant could have taken reasonable steps to avoid. The claim for loss of earnings was thus not allowed.

(c) The appellant had supplied four metric tons less cement than the contractually agreed amount and the respondent was therefore entitled to its counterclaim of US$404.

(d) The respondent was liable to the appellant for any Port DA charge in excess of US$5,000, and therefore had to pay US$4,965.03 to the appellant.

(e) The respondent had not made out its case that the goods supplied were not of a satisfactory quality. Its counterclaim for US$10,000 was thus dismissed.

14 Finally, the DJ fixed costs of $10,000 in favour of the respondent on the basis that the majority of court time was spent on the issues relating to demurrage and loss of earnings, which the appellant did not succeed on.

15 The appellant appealed against the findings in paras 13(a), (b) and (c). It also appealed against the costs award.

Issues

16 The issues which arise for my consideration in this appeal are as follows:

(a) Did the DJ err in holding that the respondent was not liable for the appellant's claim for demurrage because laytime was suspended when the vessel was not berthed ("Issue 1")?

(b) Did the DJ err in holding that even if laytime was not suspended, the respondent could not be responsible for the loss of earnings amounting to US$57,500 allegedly suffered by the appellant ("Issue 2")?

(c) Did the DJ err in holding that the appellant was liable for the respondent's counterclaim for shortfall of cement ("Issue 3")?

(d) Did the DJ err in fixing costs at $10,000 to be paid by the appellant to the respondent ("Issue 4")?

My decision

Issue 1

17 In determining the issue of whether laytime was suspended in favour of the respondent, the DJ appeared to have shifted the burden of persuasion on to the appellant to show that laytime was *not* suspended when the vessel was not berthed. This could very well have been the result of the appellant's choice of arguments before the DJ on this issue – the appellant first argued that there was a separate agreement based on the email correspondence between Mr Damodar and Mr Wong that laytime would continue to run whether or not the vessel was berthed; and then it argued that there was an implied term in the CFR contract that the respondent would pay demurrage in such a case. As a matter of principle, however, the burden of persuasion should have been borne by the respondent. The Agreement merely stipulates, based on cll 2 and 15, that the respondent had a laytime of 2.75 days to discharge the goods (see above at [3] and [4]). Given that the respondent took more than 2.75 days to do so, it is the respondent who bore the burden of showing that the Agreement *allowed* for the suspension of laytime when the vessel had to leave the berth part way through discharge, notwithstanding the lack of an express provision to that effect in the Agreement.

18 In their submissions before me, both parties were unable to identify any case authority which *specifically* addresses the issue of whether laytime - as between a seller and a buyer who are parties to a CFR (or CIF) sale contract - is to be suspended when the vessel is forced to leave the berth and suspend discharging operations before completion through no fault of either the seller or the buyer. The authorities dealing with the allocation of risk arising from obstructions occurring within the prescribed laytime relate mostly to *contracts of carriage* between charterers and shipowners, as opposed to sale contracts between sellers and buyers (see Stephen Girvin, *Carriage of Goods by Sea*, 2d Ed (Oxford University Press, 2011) at para 32.46; *Triton Navigation Limited v Vitol SA* [2003] EWCA Civ 1715).

19 In its written submissions, the respondent referred to the following extract from *Benjamin's Sale of Goods*, 8th ed (Sweet & Maxwell, 2010) ("*Benjamin's*") at para 19-089:

> [I]n *Etablissements Soules et Cie v Intertradex SA* a c.i.f contract specified the rate at which the goods were to be discharged and went on to provide for demurrage at a specified daily rate, without making any reference to the charterparty. It was held that, on the true construction of this provision, demurrage began to run against the buyer under the contract of sale only from the time when the vessel berthed, even though it might have begun to run against the seller as charterer under the charterparty from the earlier time of the vessel's arrival at the port of discharge.

Based on this extract, the respondent submitted that since the vessel was not berthed on 1 and 2 July 2009, no discharge could occur on those dates and laytime must be suspended on these two days.

20 I am of the view, however, that neither the extract from *Benjamin's* nor the case cited - *Etablissements Soules et Cie v Intertradex SA* [1991] 1 Lloyd's Rep 379 ("*Intertradex*") - actually supports the respondent's position. The issue which the English Court of Appeal had to decide in *Intertradex* was whether laytime had *commenced* – as between a buyer and seller to a CIF contract – even before the vessel could berth. The seller argued that time should start counting from the moment the vessel had arrived in the port and notice of readiness was tendered, while the buyer contended that time could not start to count until the vessel had berthed. Although the CIF contract in *Intertradex* did not expressly state whether laytime would commence before the vessel was berthed, Lord Justice Neil held (at 388) that:

> The natural meaning to be placed on any stipulation as to the time of discharge between seller and buyer is that the time should run from the moment the seller places the goods at the disposal of the buyer. It is true that prima facie a c.i.f. contract is concerned with documents rather than with goods, but where there is a special provision as to discharge which imposes an obligation on the buyer which is enforceable by the seller it seems to me to follow that, in a port where discharge is at a berth, the time when that obligation takes effect is when the vessel reaches the berth at which the buyer's goods are to be discharged.

21 In my view, this case does not assist the respondent because the holding of Lord Justice Neil is specific to the issue of when laytime can be said to *commence* or "take effect". It is a separate question altogether as to whether laytime can be *interrupted or suspended* after it has already commenced. No authority has been cited by the respondent to show that, in the absence of clearly stipulated "excepted perils" in a contract, laytime can be suspended in favour of a buyer in a CIF/CFR contract when the vessel is made to leave the berth halfway through the discharge. In fact, Lord Justice Neil's comment that "the time should run *from the moment* the seller places the goods at the disposal of the buyer" (emphasis added) can even be construed as assisting the appellant since the goods in the present case had in fact been placed at the disposal of the respondent before the disruption occurred.

22 The appellant, on the other hand, submitted that I should give effect to the principle that "once demurrage has become payable no excepted peril can have effect on the duty to pay demurrage", citing Lord Chorley and O C Giles, *Shipping Law*, 6th Ed (Pitman Publishing, 1970) ("*Chorley*") as authority. The authority cited is not very helpful because the learned authors were referring to the specific (and, for the purposes of the present issue, irrelevant) situation of whether demurrage is payable if an excepted peril arises *after* laytime *has expired*. The learned authors explained that demurrage would still be payable in such a situation because "if the [buyer] had performed his obligation in time the perils would not have had any effect on the loading" (*Chorley* at p 153). In the present case, however, laytime had *not* expired when the disruption occurred, and thus the justification provided for imposing demurrage after laytime has expired is not apposite.

23 It is, however, worth remembering that the concept of demurrage as enunciated in demurrage clauses is based on the premise that the contract gives the cargo owner a specific period – the laytime – within which to unload his cargo and if discharge is not completed within the laytime, demurrage runs immediately from the expiry of the laytime and ends only when discharge ends.

24 In this particular case it is helpful to consider the matter *in light of the duties of a seller* in a CIF/CFR sale contract. In *Benjamin's* at para 19-010, the learned author explained that the duties of a CIF seller are:

> … first to ship (or procure a shipment of) goods in accordance with the contract and, where necessary, to appropriate such goods to the contract; secondly to procure or prepare the proper shipping documents, and thirdly to tender these documents to the buyer, or as the buyer directs. *He is not under any duty to ensure the actual physical delivery of the goods at the c.i.f. destination*, though he is under a duty not to take active steps to prevent such delivery.
>
> [emphasis added]

25 In my view, if the CIF/CFR seller (*ie*, the appellant) is not even "under any duty to ensure the actual physical delivery of the goods" at the port of discharge, it would be quite remarkable to hold that the *risk of delay in unloading the goods* at the port of discharge after laytime has commenced has to be borne by him. This is especially so when there is a demurrage clause in the contract since the *raison d'être* of the same must be to transfer the risk of delay in the discharge of goods to the buyer. It is more logical and more in line with commercial realities to hold that such risks, unless they have been expressly allocated to the seller by a specific term in the contract, are to be borne by the CIF/CFR buyer. Since the Agreement did not specify who the risk should fall on if the discharge of goods was to be interrupted after laytime had commenced, I hold that laytime continued to run during the period when the respondent could not have discharged the goods (*ie*, 1 and 2 July 2009) because the vessel had shifted away from the berth.

26 As a matter of contractual construction, I have also mentioned that the burden lies on the respondent to convince the Court that a suspension of laytime can be read into the Agreement (see above at [17]). This is because nowhere in the Agreement is the obligation of the respondent to pay demurrage so qualified. I note that this was the very basis upon which the DJ had decided that the respondent should be liable for the excess Port DA charges (see above at [13(d)]). At [28] of the GD, the DJ reasoned:

> The agreement between the parties simply states that [the respondent] was to pay any excess Port DA above USD 5,000 *without further qualification*. [The respondent] sought to imply a term that their liability for Port DA is limited to a reasonable sum and that they would not be liable for Port DA when discharge was delayed due to the unexpected departure of the vessel from berth. *However, [the respondent] did not elaborate on why such qualifications should be implied into the contract*. Consequently, I rejected their argument that they are not liable for the Port DA because the vessel was not berthed on 1 and 2 July 2009 and allowed [the appellant's] claim for Port DA of USD 4,965.03.
>
> [emphasis added]

27 There is no reason why the DJ's accurate analysis of the issue on excess Port DA charges should not apply to the issue of demurrage as well. Like the clause stipulating that the respondent was to pay any excess Port DA charges above US$5,000 (*ie*, cl 17), the laytime clauses in the

Agreement (*ie*, cll 2 and 15) were also framed "without further qualification". The respondent was effectively urging the Court to imply into the laytime clauses a qualification stating that "laytime will be suspended if the vessel is forced to leave the berth"; but it has similarly not "elaborate[d] on why such qualifications should be implied into the [Agreement]". As a matter of principle, if the respondent is to be liable for the excess Port DA charges notwithstanding the fact that "the vessel was not berthed on 1 and 2 July 2009", it must also be liable for demurrage even if laytime was only exceeded because the vessel was forced to leave the berth on 1 and 2 July 2009.

28 I should also point out that at the material time (*ie*, 2 July 2009), Mr Damodar did not raise any objection when Mr Wong wrote to him that "time is to count whether vessel is berthed or not" (see above at [6]). I would have thought that if, as the respondent now argues, it is "clear and undisputed" that demurrage only begins to run against a CIF/CFR buyer when the vessel is berthed and ready for discharge, Mr Damodar would have strongly objected to Mr Wong's email in his reply instead of merely stating: "[l]et the [vessel] discharge then for 2 hours …". A few days later, on 7 July 2009, Ms Vonny Fu Li Fang (of the appellant) emailed Mr Damodar requesting "demurrage payable of US$10,637". Instead of categorically denying any liability to pay demurrage, Mr Damodar replied on the same day merely to request for "a copy of [the charterparty with the shipowners], and detailed laytime calculation [from the shipowners]".

29 While the DJ held that agreement to pay demurrage cannot be inferred from Mr Damodar's conduct (see the GD at [11]), this holding was made in the context of the appellant having to prove that there was a separate agreement between the parties that laytime would continue to run whether or not the vessel was berthed. However, as stated, in my judgment no such burden lay on the appellant. It was the respondent's burden to show why the laytime clauses in the Agreement should be qualified in its favour. In this different context, Mr Damodar's conduct – in not categorically denying liability to pay demurrage at the earliest opportunities – suggests that the respondent's submission that "laytime is suspended when the vessel is not berthed" was likely an afterthought, rather than a reflection of a "clear and undisputed" legal or commercial understanding that existed between the parties.

30 For the above reasons, I allow the appellant's appeal in respect of its claim against the respondent for demurrage of US$8,200. Although the appellant had initially claimed the full sum of US$10,637 (*ie*, US$5,500 multiplied by 1.934 days) as the demurrage due, counsel for the appellant stated during oral submissions before me on 1 November 2012 that the appellant was willing to reduce its claim for demurrage to US$8,200 (*ie*, the sum which the shipowners had agreed to accept after negotiations with the appellant). In fact, on 25 August 2009, the appellant had invoiced the respondent only for the discounted demurrage sum of US$8,200.

31 For purposes of completeness, I should point out that had the appellant *consistently* claimed the full sum of US$10,637 in the present case, it might very well have succeeded notwithstanding its own reduced obligation to pay the shipowners US$8,200. This is because, as a matter of law, it could have been argued in the appellant's favour that the demurrage clause in the CFR sale contract between the parties was a free-standing provision of an independent contract unconnected with the contractual arrangements between the appellant and the shipowners (see *Fal Oil Co Ltd & Anor v Petronas Trading Corp Sdn Bhd* [2004] EWCA Civ 822; Charles Debattista, "Laytime and demurrage clauses in contracts of sale – links and connections" [2003] LMCLQ 508). As this issue was not properly ventilated before either the DJ or myself, and since the appellant had clearly manifested its willingness to reduce its claim for demurrage, I will only allow the appellant's reduced claim for demurrage of US$8,200.

Issue 2

32 While the appellant's reduced claim for demurrage against the respondent should be allowed, its claim for loss of earnings allegedly as a result of being blacklisted by the shipowners stands on a different footing. I agree with the DJ that the appellant has failed to satisfy the legal requirements of remoteness and mitigation in relation to this alleged loss (see above at [13(b)]).

33 When there is a breach of contract, the damages to be awarded must either be those: a) which arose naturally, according to the usual course of things from such breach of contract itself; or b) as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it (see *Hadley v Baxendale* (1854) 9 Exch 341 at 354). In its written case, the appellant attempted to show that the respondent knew or ought reasonably have known that blacklisting would take place if demurrage was not paid in time to the shipowners. However, none of the evidence relied on by the appellant substantiated its claim. The email correspondence between the appellant and the respondent shortly after the goods were discharged merely showed, at best, that the respondent was aware that the appellant was under some pressure by the shipowners to make payment for demurrage. As the respondent rightly submitted, this is a far cry from it having been actually informed that any late payment would jeopardize the appellant's alleged oral agreement with the same shipowners to charter a second vessel. The appellant's further allegations that the respondent was informed over the phone and that blacklisting by shipowners was "well known in the trade" were also unsubstantiated by any objective evidence.

34 Crucially, the appellant also failed to address the DJ's legitimate concern that this alleged loss of earnings was one which the appellant could have easily mitigated. It is a basic principle in the law of contract that a claimant cannot recover damages for reasonably avoidable loss (see *The Asia Star* [2010] 2 SLR 1154). No argument or evidence was advanced before me to explain why the appellant could not have *paid off the shipowners first* to avoid the alleged, greater loss of US$57,500 before claiming for demurrage against the respondent later. The appellant was therefore rightly described by the respondent as "authors of their own misfortune" with regards to the alleged loss of earnings.

35 In the result, I affirm the DJ's decision on the issue of the alleged loss of earnings and dismiss the appellant's appeal in respect of the same.

Issue 3

36 In finding that the appellant supplied four metric tons less cement than the contractually agreed amount and then holding that the respondent was entitled to its counterclaim of US$404, the DJ reasoned that the appellant could not charge for 2,750 metric tons of cement when it had *only discharged* 2,746 metric tons of the same (see the GD at [29]).

37 In my view, the DJ's reasoning rests on the presupposition that the seller in a CIF/CFR sale contract is responsible for the amount of goods discharged from the carrying vessel, such that the risk of a shortfall in goods at the point of discharge falls on the seller. With respect, I find this presupposition contrary to the authorities on the relationship between a seller and buyer of a CIF/CFR sale contract.

38 In Filippo Lorenzon, *CIF and FOB Contracts*, 5th Ed (Thomson Reuters, 2012) at para 2-010, the learned author stated that "unless otherwise agreed in the [CIF sale] contract, risk passes from seller to buyer *across the ship's rail at the port of loading*" (emphasis added). Similarly, in *Benjamin's* at para 19-073, it is mentioned (in the context of a CIF contract) that:

> Having shipped proper goods and tendered proper documents, the seller is not normally concerned

with what happens to the goods in transit: the buyer's remedies (if any) in respect of the failure of the goods to arrive are against the carrier or the underwriter, not against the seller.

39 In short, the authorities suggest that the appellant's delivery obligation was discharged at the port of loading, rather than at the port of discharge. It is common knowledge that in the context of the carriage of goods by sea, the bill of lading typically serves as a receipt of the quantity or weight of goods shipped. In the present case, the bill of lading which was signed by the agent of the master of the vessel *at the port of loading* records the weight of the goods shipped as follows:

GROSS WEIGHT: 2754.81 MTS

NET WEIGHT: 2750 MTS

40 Given that the documentary evidence clearly suggests that at least 2,750 metric tons of cement were in fact loaded and shipped at the port of loading, the burden fell on the respondent to show that notwithstanding the representation on the bill of lading, the appellant had in fact shipped less than 2,750 metric tons of cement. The respondent did not discharge this burden. It was not able to prove its case of short delivery since what it relied on was short discharge at Diego Suarez rather than evidence showing a shortfall in cargo delivered to the vessel. If the four metric tons of cement were lost in transit on the *MV Athens* or during the discharge process, the respondent's proper recourse would be to claim for short delivery *against the shipowners (as carriers)* instead.

41 For that reason, I reverse the DJ's holding that the respondent was entitled to its counterclaim of US$404. The appellant is not liable for the missing cement as it has fulfilled its delivery obligation towards the respondent by loading 2,750 metric tons of cement on to the *MV Athens*.

Issue 4

42 As the appellant has succeeded on Issue 1 and Issue 3, the DJ's costs order below (*ie*, $10,000 in favour of the respondent) will have to be set aside. Even if the appeal had not succeeded however, it is my judgment that the imposition of $10,000 of costs *in favour of the respondent* was incorrect given that, before the DJ, both parties were generally unsuccessful on the bulk of their claims. The respondent, for example, succeeded only in its counterclaim for the shortfall of cement (amounting to US$404) but lost on its much more substantial counterclaim of US$10,000 for the alleged unsatisfactory quality of cement (see above at [13(e)]).

43 I note that the DJ took into account the fact that the majority of time was spent on the issues relating to demurrage and loss of earnings, on which the appellant failed before her. However, the amount of time spent *per se* on a particular issue should not, in my view, be the sole determinant of the amount of costs a party should receive. The DJ should have considered whether the time spent on those issues was due to the appellant's witnesses being unreasonably evasive, or the cross-examination by the respondent's counsel being unnecessarily protracted. In any case, even if the former was true, this would still not have justified the respondent being awarded S$10,000 in costs given that the respondent had: a) failed in its defence against the appellant's claim for the excess Port DA charges; and b) failed in its counter-claim for the alleged unsatisfactory quality of cement. Some costs at least should have been awarded to the appellant on the basis that the costs generally follow the event and the victor is only deprived of costs if it has raised issues unreasonably or unduly prolonged the proceedings.

44 Given my holding that the DJ should have decided Issue 1 and Issue 3 in favour of the appellant, I set aside the DJ's costs order and award the costs of the trial fixed at $10,000 (on the

basis that the appellant succeeded in two out of its three claims and successfully resisted the counterclaims) plus reasonable disbursements in favour of the appellant. As the appellant has largely succeeded in this appeal (save for Issue 2), I fix the costs of the appeal at $5,000 plus reasonable disbursements and award them to the appellant as well.

Conclusion

45 For the foregoing reasons, I allow the appellant's appeal save for its claim for the alleged loss of earnings. There shall be judgment for the appellant for the sum of US$8,200 in addition to the US$4,965.03 awarded by the DJ together with costs as provided in [44] above.