The "Asia Star"
[2009] SGHC 91

Case Number : Adm in Rem 30/2004, RA 230/2008, 234/2008

Decision Date : 17 April 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Prem Gurbani and R Govin (Gurbani & Co) for the plaintiff; Thio Ying Ying and Alan Loh (Kelvin Chia Partnership) for the defendant

Parties : —

Damages

17 April 2009 Judgment reserved.

Judith Prakash J:

Introduction

1 In November 2003, the plaintiff, Pacific Inter-Link Sdn Bhd, entered into a voyage charterparty with the defendant, the owner of the vessel *Asia Star*, by which it was agreed that the vessel would load a minimum cargo of 21,500mt of refined palm oil for carriage to and delivery at ports in the Middle East/Turkey/ Black Sea. On 19 January 2004, the vessel's tanks were found to be unsuitable to receive the cargo and the plaintiff sent the defendant a message the same day holding the defendant responsible for its breach of the charterparty in failing to provide a vessel with suitable tanks. No cargo was ever loaded on to the vessel.

2 On 13 February 2004, the plaintiff commenced this action against the defendant claiming damages for the breach of the charterparty. The defendant resisted the action vigorously and the question of liability duly went to trial. The trial judge found that the defendant was in breach of the contract. The defendant's appeal against this decision was dismissed. The matter then went for assessment of damages. The plaintiff claimed the following as its loss and damage:

(a)	Losses incurred on account of cancellation of sale contracts for the cargo by the plaintiff's supplier PT Pacific Indomas("Indomas")	US$698,889.88
(b)	Claim by the plaintiff's buyer Agrima Ic Ve Dis Ticaret Pazarlama Ltd ("Agrima") as a result of the plaintiff's failure to deliver contracted cargo	US$823,800.00
(c)	Penalty charges imposed by the plaintiff's supplier PT Pacific Medan Industri ("Pamin") for delay in loading	US$209,990.83

(d) Various charges such as interest and storage, reprocessing, transportation and heating charges imposed by another supplier, Pacific Oil and Fats Industries Sdn Bhd ("Pacoil"). MYR558,467.31

3 The hearing of the assessment took place over several days before the Assistant Registrar. In his judgment, delivered in June 2008, the Assistant Registrar held that the plaintiff had failed to act reasonably to mitigate its loss and that it should have chartered an alternative vessel, the *Puma*, to carry its cargo to the discharge ports. As a result, the Assistant Registrar disallowed all the items of the plaintiff's claim. Instead, he held that the proper measure of damages to be awarded to the plaintiff would be the total amount of freight that it would have paid for the charter of the *Puma* less the amount of freight which the plaintiff had contracted to pay the defendant for the *Asia Star*. He calculated that amount as being US$302,000 and awarded this sum to the plaintiff as its damages. Subsequently, the Assistant Registrar ordered that the defendant was to bear ten percent of the plaintiff's costs of the assessment of damages.

4 Both parties were dissatisfied with the award and have appealed. The plaintiff contends that the Assistant Registrar erred in his holding that it had failed to mitigate and that it should be awarded its damages as originally claimed. It also contends that in any event, the calculation of the freight differential between the *Asia Star* and the *Puma* was wrong, that the correct figure should be US$399,500, and that, additionally, it should be entitled to recover the sums that it had to pay to Pamin and Pacoil as expenses incurred for the delay in shipping the consignments it had bought from them and had intended to ship on the *Asia Star*. The defendant's stand is that the plaintiff did not suffer any damages at all and that its claim for damages should be dismissed. Alternatively, the plaintiff is entitled to nominal damages only. In addition, the defendant wants the costs of the assessment hearing before the Assistant Registrar to be awarded to it.

Summary of relevant facts

5 By various contracts made in November 2003, the plaintiff agreed to sell the following Malaysian and Indonesian edible oil products to Agrima, a trader in palm oil products in Turkey:

(a) 10,100mt of palm oil;

(b) 3,500mt of palm stearin;

(c) 5,750mt of palm olein;

(d) 1,650mt of palm kernel oil; and

(e) 500mt of crude coconut oil.

The total quantity to be delivered to Agrima was, therefore, 21,500mt. Under the contracts, the plaintiff had to ship the products between 15 December 2003 and 15 January 2004.

6 Between October and December 2003, the plaintiff purchased a total of 24,500mt of palm oil and derivatives and crude coconut oil from three suppliers, Indomas, Pamin and Pacoil: 15,000mt were purchased from Indomas, 5,750mt were purchased from Pamin and 3,750mt were purchased from Pacoil. The plaintiff's case was that it had decided to ship all the oil from Pamin and Pacoil and 12,000mt of the quantity purchased from Indomas to Agrima to fulfil its contracts with the latter. The plaintiff further contended that it had arranged for these cargoes to be carried on the *Asia Star*. The agreed loading period in the charterparty was between 27 December 2003 and 4 January 2004 with the vessel to present itself at the plaintiff's nominated load ports in Indonesia/ Malaysia during that period. The plaintiff subsequently nominated Belawan port in Indonesia and Pasir Gudang in Malaysia with the vessel to call at Belawan first.

7 On 1 December 2003, the plaintiff sent Indomas a shipping instruction telling it to load a total of 12,000mt of various palm oil products on board the *Asia Star* at Belawan. A similar instruction was given to Pamin on 12 December 2003 telling it to load 5,750mt of cargo on the vessel at the same port. On the same day, the plaintiff instructed Pacoil to load its cargo of 3,750mt on the *Asia Star* at Pasir Gudang. In each of these shipping instructions, the "laycan" of the vessel (*ie* the period during which it was expected to be at the relevant port for loading) was said to be between 27 December 2003 and 4 January 2004.

8 The *Asia Star* did not arrive at Belawan during the originally agreed laycan. The defendant then asked for the time for commencement of loading to be extended to 15 January 2004 and the plaintiff agreed to this request.

9 On 5 January 2004, Indomas informed the plaintiff that up till that date the *Asia Star* had not arrived for loading. It asked for the correct estimated date of arrival of the vessel or, alternatively, the name of a substitute vessel on which the cargo could be loaded. The plaintiff replied immediately to inform Indomas that *Asia Star* had been delayed and would be arriving at Belawan very soon. The plaintiff asked for an extension of the shipment date up to 15 January 2004. Indomas accepted this request but asked that the vessel be presented for loading by 15 January 2004 as it had storage constraints in respect of the cargo purchased by the plaintiff. On 16 January 2004, a further letter from Indomas stated that *Asia Star* had still not arrived and that it had no option but to put the plaintiff on notice that it was holding the plaintiff to be in default of contract. The plaintiff then asked for a further extension of another week. In response, Indomas agreed "as a special case" to grant the plaintiff up to 21 January 2004 to lift the cargo and said that if this deadline was not met, it would hold the plaintiff to be in default and would cancel all its contracts for sale of the 12,000mt of cargo. It should be noted that the price of palm oil products had increased since the contracts had been made with the plaintiff and that the market was still rising at this time.

10 In relation to Pamin, upon receipt of the plaintiff's shipping instruction, it informed the plaintiff that it would not be held responsible and would charge the plaintiff if the *Asia Star* arrived in January 2004 rather than in December 2003. When the vessel did not arrive by 5 January 2004, Pamin wrote a further letter to the plaintiff stating that it would be charging the plaintiff a penalty for the delay in shipment in accordance with the contract between them. The plaintiff asked Pamin to waive the penalty but Pamin did not agree to do so.

11 The third supplier, Pacoil, also complained about the failure of the vessel to call at the load port within the nominated laycan period. In its letter of 9 January 2004, it informed the plaintiff that it would not be responsible for any deterioration in the quality of the oil. Subsequently, Pacoil wrote again to reserve its rights to charge the plaintiff for heating, storage, interest and other costs that might arise due to the delay.

12 There was also communication between the plaintiff and Agrima in relation to the delay in the arrival of the *Asia Star*. When it was clear that the vessel would not be able to load its cargo by the contractual shipment deadline of 15 January 2004, the plaintiff asked Agrima for an extension of the shipment deadline. It was granted an extension up to 21 January 2004.

13 In the meantime, the plaintiff had been communicating with the defendant on the cargo that it intended to load onto the *Asia Star*. On 12 January 2004, it sent out a cargo nomination setting out the breakdown of the intended cargo and asked for the defendant's confirmation as to whether the vessel could stow the cargo in accordance with this nomination. The master of the vessel responded by sending a revised stowage plan for the cargo nomination. Between 13 January 2004 and 19 January 2004, there were many e-mail exchanges because the plaintiff made changes to its cargo nominations and in response the vessel changed the loading and stowage plans. On 18 January 2004, the plaintiff advised the master of the *Asia Star* that its representative, one Mr Sharul, would board the vessel to discuss stowage plans.

14 The vessel berthed at Belawan on 19 January 2004. At about 9am that morning, the plaintiff's appointed surveyors reported that the vessel's tanks were not fit to load the cargo. Through its brokers, the plaintiff immediately gave notice to the defendant that it was unable to use the *Asia Star* for carriage of its cargo due to the high possibility of contamination arising from the poor tank condition. While holding the defendant responsible for all delays, costs and consequences arising from this breach of contract, the plaintiff suggested that the defendant may substitute another vessel acceptable to it to carry out the voyage. That evening (at 1824 hrs), the plaintiff's broker received a reply from the defendant which stated, *inter alia*:

> We are sorry to the findings by the surveyors as subject vessel loaded all kinds of vegoil … and animal oil/fat during the past two years without any problems …
>
> Due to this fact, we have no choice but to cancel this shipment with charterer. We already thought all other possible ways to rectify the situation but unfortunately the further tanks cleaning is doing no help to the coating. Further our other two small vessels Gold River/Silver River were all fixed with other cargo and they are all fully engaged in the near future, we are sorry to say that we are unable to substitute both ships to this shipment.
>
> Anyway, we thanks to charterer for their efforts so far & for their patience. Hope we can further co-op with charterer again.
>
> Await chtrs confirmation urgently, as to sail the vessel for other possible employment.

15 The plaintiff responded through its solicitors. The solicitors' letter dated Monday, 19 January 2004, put the defendant on notice that the vessel was unseaworthy by reason of the defective tanks.

16 On the evening of 20 January 2004, the defendant notified the plaintiff that during the previous 24 hours, the defendant had done what it thought it could to improve the tanks' condition. It invited the plaintiff to reinspect the tanks to determine whether the same could be accepted. The defendant

stated that if the plaintiff did not carry out the inspection before 8pm, it would take the necessary steps to prevent further delay and to protect its own interest. The plaintiff did not respond to this invitation and on 21 January 2004 at about noon, the defendant noted the plaintiff's lack of response and formally notified the plaintiff that it was withdrawing the vessel and would sail her away from Belawan immediately.

17 The plaintiff's solicitors responded the same day. In their letter, they asserted that the defendant's message of 19 January 2004 made it clear that the defendant had terminated the charterparty. Further, by failing to make the vessel seaworthy and cargoworthy, the defendant had breached the terms of the charterparty and this breach had been accepted by the plaintiff. The solicitors also said that the plaintiff was searching for an alternative vessel and once the claims had been compiled, would take the necessary proceedings to recover its loss.

18 While all this was going on, the plaintiff had been searching for an alternative vessel. It first started looking when the *Asia Star* did not meet the original laycan but was unable to find a vessel available for spot charter. On 19 January 2004, Sheik Abdul Malik Mohamed Kassim ("Mr Malik"), the head of chartering operations in the plaintiff asked his shipbroker, Mr Sivananthan Munusamy ("Mr Sivananthan"), of a company called Panasia Marine (Tankers) Pte Ltd ("Panasia"), to look out for a vessel to charter on an urgent basis which could pick up the cargo intended for shipment on *Asia Star*. The first response to this request was the offer, the same day, of a vessel called *Mount MacKinney*. This vessel was, however, not acceptable because its estimated date of arrival for loading was 3 or 4 February 2004 which was too late for the intended cargo.

19 On the night of 19 January 2004, Mr Sivananthan informed Mr Malik of another possible substitute vessel. This was the *Puma* which had a cargo carrying capacity of 40,000mt of cargo (almost double the carrying capacity of the *Asia Star*). The owners of the *Puma* indicated that it could start loading the cargo at Belawan by 27 or 28 January 2004 based on its estimated arrival date at Pasir Gudang of 26 or 27 January 2004. On 20 January 2004, the owners of the *Puma* proposed a freight rate of US$27.50 per metric tonne on the basis of one load port/one discharge port. There would be additional charges if a second load port and/or second discharge port were to be used. The demurrage quoted was US$17,000 per day.

20 On the evening of 20 January 2004, the plaintiff made a counterproposal to the owners of the *Puma*. The main terms of the offer were as follows: the plaintiff would load a minimum cargo of 36,000mt, the laycan would be between 25 and 31 January 2004, the freight would be US$25.50 per metric tonne on the basis of one load/one discharge port and the plaintiff would pay further specified charges for additional load and discharge ports, and finally, the demurrage was to be US$14,000 per day. According to Mr Malik, the *Puma* would have been a commercially viable vessel for the plaintiff provided that the owner agreed to the rates for lay time, freight and demurrage proposed by him and the vessel was able to arrive at Belawan by 25 January 2004. The owners of the *Puma* did not find the counteroffer attractive, however, and they did not respond to it. On 21 January 2004, Panasia tried to find another alternative ship but was not successful.

21 On 22 January 2004, Indomas cancelled all its sale contracts with the plaintiff on the basis that the plaintiff had not complied with the contractual shipment date. The plaintiff attempted to persuade Indomas to withdraw this cancellation and ship the cargo on the vessel *Chembulk Barcelona* which it had previously chartered to load cargo in early February. This request was refused. Indomas stated that it had space constraints and could not store the cargo for the plaintiff for an unspecified time. The plaintiff contended that it had suffered a loss of profit amounting to US$698,889.88 by reason of the cancellation of the Indomas contract. It computed its loss on the basis of the difference in contract prices between its purchase contracts with Indomas and its sale contracts with Agrima,

after taking into account the expenses of shipping the cargo to Turkey and insuring it.

22 On 23 January 2004, Agrima informed the plaintiff that it intended to cancel the bulk of the purchase contracts which had been due for shipment on the *Asia Star*. Agrima informed the plaintiff that it had required the cargo urgently and would be looking for replacement cargo from sources within Turkey. The plaintiff requested Agrima to agree to shipment of the cargo on the *Chembulk Barcelona* in February but Agrima agreed only to 5,750mt of palm oil being shipped on the *Chembulk Barcelona*. It bought 4,000mt of RBD palm oil from the domestic Turkish market and cancelled the contracts in respect of the remaining 11,750mt of cargo. Agrima then made a claim against the plaintiff for the additional cost of procuring cargo in Turkey to supply to its sub-purchasers. The original claim was US$969,200 but after negotiation Agrima agreed to reduce its claim to US$823,800. The plaintiff claimed reimbursement of this sum from the defendant.

23 As for Pamin and Pacoil, they agreed to extend the shipment date even after the *Asia Star* failed its inspection. They agreed also that the cargo could be shipped on the *Chembulk Barcelona* in early February 2004. These agreements were not free, however. Pamin required the plaintiff to pay all additional storage costs, heating costs and other expenses arising from the delayed shipment including interest under the terms of the contracts between them. The plaintiff negotiated with Pamin and managed to reduce the storage costs by one third. In the event the total amount claimed by Pamin from the plaintiff was US$209,990.83. As for Pacoil, it also required the plaintiff to pay additional charges under the contracts. Further, due to the delay in shipment, the quality of the cargo had deteriorated and it had to be reprocessed to bring it back to its original condition. Costs were sustained. The total loss arising from the delayed shipment of the Pacoil cargo was MYR$558,467.31.

The judgment below

24 The three arguments that the defendant mounted against the making of any award in the plaintiff's favour were:

(a) that the plaintiff had failed to prove that the damage suffered was as a result of the defendant's breach;

(b) that the plaintiff had failed to mitigate its loss; and

(c) the quantum of damages claimed by the plaintiff was wrong on the basis that some of it had been wrongly calculated and other portions were too remote.

The Assistant Registrar considered the first two arguments. In the light of his finding on the mitigation issue, he did not find it necessary to move on to the third point.

25 Dealing with the first argument, the Assistant Registrar examined whether the evidence presented by the defendant sufficiently proved its loss, on a balance of probabilities. The defendant had mounted a two-fold attack: first, that the plaintiff had not actually decided on 19 January 2004 to ship the cargo from the three suppliers to Agrima on the *Asia Star* and second, that the plaintiff had colluded with its suppliers and its buyer to present a sham case to the court. The Assistant

Registrar rejected both those arguments. He accepted that the evidence, both documentary and oral, established on a balance of probabilities that by the time of the defendant's breach, the plaintiff had made a firm decision to load the cargo from Indomas, Pacoil and Pamin on the *Asia Star* and use that vessel to deliver the cargo to Agrima in Turkey. He held that any loss occasioned by the defendant's failure to load the cargo and deliver it to Agrima within the material time period flowed directly from the defendant's breach of contract. As for the second argument, the Assistant Registrar rejected it on the basis that the allegation of fraud on the part of the plaintiff in presenting its claim had not been specifically pleaded. He also found the allegations that the witnesses had conspired to present a sham case to be entirely unmeritorious.

26 In dealing with the second issue, that of mitigation, the Assistant Registrar noted that whilst a plaintiff who is suing for damages arising from a breach of contract has a duty to take reasonable steps to mitigate the loss arising from the breach, the standard of reasonableness is not a high one and the plaintiff was not expected to do anything other than in the ordinary course of business. In judging the reasonableness of the plaintiff's conduct, the relevant circumstances to be considered are limited to those prevailing at the material time.

27 The Assistant Registrar then considered the evidence relating to the efforts made by the plaintiff through Mr Malik to obtain another vessel after the *Asia Star* failed the inspection on 19 January 2004. He came to the conclusion that Mr Malik had confirmed in court that the freight rate was the only factor which prevented him from chartering the *Puma* as a substitute for *Asia Star*. He also noted that when the owners of the *Puma* did not respond to the plaintiff's counteroffer, Mr Malik had given Mr Sivananthan instructions to find a new vessel which was able to carry 20,000mt to the East Mediterranean and 20,000mt to the Red Sea. Based on these facts, the Assistant Registrar found that the larger capacity of the *Puma* as compared to the *Asia Star* was not a major consideration for the plaintiff in deciding whether to charter it in place of the *Asia Star*. He considered that the plaintiff had simply tried to maximise the revenue which could be generated from chartering the *Puma* and that was why it did not immediately take her as a substitute vessel.

28 The Assistant Registrar also took note of the fact that by 19 January 2004, the plaintiff was already in default of its obligations under the shipping instructions given to the suppliers and the purchase contracts with Agrima. Yet it had neither informed these parties of the rejection of the *Asia Star* nor told them that there was a possible substitute vessel available. In his view, this should have been done forthwith and been accompanied by a request for a further extension of time. The Assistant Registrar did not find Mr Malik's explanation for failing to notify the counterparties of the situation to be a satisfactory one. Mr Malik had said that the reason for not informing the parties about the *Puma* was that the charter had not been confirmed and the plaintiff did not want to look stupid if the charter did not go through. At the same time, he thought that Mr Malik had taken contradictory views on whether there was flexibility between the parties at that time.

29 The Assistant Registrar then drew the inference that the plaintiff had taken it for granted that it would get further time extensions from both Agrima and the suppliers. He found this position to be unreasonable in the circumstances. Repudiation of the contract by the counterparties was a clear and present danger in the circumstances prevailing at the time and prompt action should have been taken by the plaintiff to reassure the other parties. The Assistant Registrar stated:

> 43 I further found that [the plaintiff] should have chartered the *Puma* at the freight rate of US$27.50 per MT, once they had arrived at a satisfactory laycan of 25 January 2004. At the minimum, they should have reserved the ship, pending confirmation of extensions of time being granted by the suppliers and Agrima. When the owners of the *Puma* did not respond to the counteroffer, I was of the view that [the plaintiff] should have chartered the *Puma* at the offered

> freight rate, rather than abandoning it altogether. A comparison of the monetary consequences fortified my view. Even assuming that [the plaintiff] failed to find available cargo for shipping to fill up the excess 14,500 MT capacity of the *Puma*, it would have had to pay a "dead freight" of US$398,750. However, it would have made savings of US$96,750, based on the lower freight of the *Puma*, compared to the US$32 per MT they had chartered the *Asia Star* for. This meant a potential loss of around US$302,000 at most.

The Assistant Registrar observed that the potential loss for cancellation of any, if not all of the contracts would have far outweighed the sum of US$302,000 since there was a rising market for palm oil products and the plaintiff would have been aware of this and the potentially ruinous damages it would have to pay if Agrima cancelled its contracts. He therefore found that a reasonable and prudent businessman in the plaintiff's position would have chartered the *Puma*, subject to negotiations for extensions of time and then negotiated for these extensions on the basis of the availability of the *Puma*. He considered that if extensions of time had not been granted, the plaintiff could have released its "option" to charter the *Puma* at no cost to itself. The plaintiff should also have chartered the *Puma* at the rate of US$27.50 per metric tonne instead of insisting on a lower rate.

30 The Assistant Registrar also found that the damages claimed in respect of Pacoil and Pamin would have been largely avoided by the charter of the *Puma* since there was no question that they would have granted extensions to the plaintiff. He rejected the plaintiff's argument that the charter of the *Puma* would have made no difference and that Agrima and Indomas would have repudiated their contracts in any event. In his view, the evidence showed, on a balance of probabilities, that both Argima and Indomas would have accepted the substitution of the *Puma* for shipment of the cargo.

31 In the judgment of the Assistant Registrar, all of the damages claimed by the plaintiff could have been avoided by it taking the reasonable and prudent steps of chartering the *Puma* on either 20 or 21 January 2004 and asking the suppliers and Agrima for extensions of time on that basis. The plaintiff had failed to mitigate its loss and was not entitled to the damages claimed. Instead, the proper measure of damages would be the total amount of freight that the plaintiff would have paid for the charter of the *Puma* less the amount of freight which it was originally bound to pay for the *Asia Star*. In his calculation, that figure was US$302,000. The Assistant Registrar also held that there was no evidence to establish that the plaintiff would easily have been able to secure additional goods to ship on the *Puma* to take up the excess space and therefore it would have had to pay dead freight in respect of 14,500mt of stowage space had it chartered the *Puma*.

The appeals

32 Since neither party was happy with the conclusion that the Assistant Registrar had reached, the appeals were in essence a reopening of all the issues considered before him. Both parties filed substantial submissions and went through the evidence and the law in a great deal of detail. The defendant's arguments were particularly prolix.

33 The plaintiff put forward the following contentions:

(a) as a matter of law, the plaintiff was under no duty to mitigate at the time the *Puma* was offered to it on 20 January 2004;

(b) the actions of the plaintiff were reasonable in the circumstances prevailing at the material time;

(c) even if the plaintiff had agreed to the freight rate asked of it by the owner of the *Puma*, no fixture could have been concluded by the plaintiff and the owner of the *Puma* on 20 or 21 January 2004;

(d) the plaintiff had not acted unreasonably in deciding not to inform Indomas and Agrima about (i) the rejection of the *Asia Star* promptly on 19 January 2004; and (ii) the availability of the *Puma* as a substitute ship on 20/21 January 2004;

(e) in any case Indomas and Agrima would have cancelled their contracts on 22 and 23 January 2004 and would not have further extended the shipment deadline had they been informed on 20/21 January about the availability of the *Puma*;

(f) even if the plaintiff had failed to mitigate, the measure of damages based on the difference in freight rates in chartering the *Asia Star* and the *Puma* was US$399,500 and not US$302,000; and

(g) the damages claimed in respect of the Pacoil and Pamin shipments would not have been largely avoided by the charter of the *Puma*.

34 The defendant's position was as follows:

(a) that in the light of the objective evidence produced, it was clear that the plaintiff's case as presented to court was improbable or untrue, and thus the plaintiff had failed to prove its damages on a balance of probabilities and should only be awarded nominal damages; and

(b) alternatively, that although the Assistant Registrar was correct in his finding that the plaintiff had failed to reasonably mitigate its losses by chartering the *Puma*, he erred when he decided that the plaintiff did not have additional cargo to fill up the *Puma*'s cargo capacity of 36,000mt. The evidence clearly suggested that the plaintiff did in fact have sufficient cargo to meet that capacity so that at the charter rate of US$27.50 per metric tonne, the plaintiff would not have suffered any loss whatsoever, and would only be entitled to an award of nominal damages.

Thus, the three main issues have to be considered all over again.

Did the plaintiff succeed, on a balance of probabilities, in establishing that the defendant's breach had caused it loss?

35 The defendant argued that the contemporaneous evidence showed that the plaintiff did not purchase the Indomas, Pamin and Pacoil products for resale to Agrima and that on 19 January 2004, it had yet to decide which cargoes to load on board the *Asia Star*. First of all, it noted that the plaintiff had not bought 21,500mt of palm oil products specifically for resale to Agrima. The plaintiff was in the business of forward trading in oil palm and derivatives and its witness, Ravi Kumar Nagar ("RKN"), the plaintiff's international trading manager, had testified that the plaintiff did not buy such products with a specific buyer in mind. He had also admitted that even though the plaintiff may have nominated the cargo for a particular vessel, the plaintiff would not have decided at the time of nomination which purchase contract that cargo was intended to fulfil.

36 In this case, the defendant said, the three shipping instructions issued to Indomas, Pamin and Pacoil for a total quantity of 21,500mt were not the only shipping instructions issued for *Asia Star*. RKN had agreed that the base cargo for the *Asia Star* was definitely more than that quantity and, therefore, the defendant argued there must have been other shipping instructions issued. It was noteworthy that during the period between 12 and 17 January 2004, the plaintiff notified the vessel of various cargo nominations which were significantly different in cargo type and quantities from the shipping instructions issued to Indomas, Pamin and Pacoil. For example, the 17 January 2004 cargo nomination reflected an extra 3,000mt of palm olein, an extra 2,000mt of palm stearin and an extra 100mt of coconut oil to be loaded at Belawan. This additional cargo could not have come from the Indomas or Pamin contracts. This showed that there must have been additional cargoes nominated for shipment on board the *Asia Star* and the shipping instructions for such additional cargoes would have been issued to the shippers at least 14 days prior to 15 December 2003 in accordance with the usual practice, as confirmed by RKN, that the vessel nomination must be sent to the shipper 14 days in advance of the vessel's arrival and such nomination is never sent out at the last minute.

37 The defendant also considered that the allegation that there were other cargoes nominated for the *Asia Star* was supported by evidence given by one Ms Cherie Thomas Toh, the manager of the Medan branch of Indomas, who stated that Indomas had purchased cargo from third party shippers for delivery to the plaintiff. According to the defendant's analysis of this evidence, various consignments which Indomas had purchased were not intended to be loaded on the *Asia Star* and other shippers were supplying cargo to be put on that vessel but not pursuant to the Indomas sales contracts. The defendant concluded that because the base cargo nominated for the *Asia Star* was larger than its carrying capacity, not all the cargo that was nominated would in fact be loaded on board the *Asia Star* and there would have to be "substitution of vessels for the cargo". Since a larger cargo base was nominated and RKN had confirmed that substitution was a common practice, the reality was, the defendant submitted, that the shipping instructions were not inviolable. It was a practice to earmark more cargo ahead of time as the suppliers required prior notification in order to get the cargo ready.

38 Further, the evidence of Mr Malik and the plaintiff's own correspondence with its shippers after the rejection of the *Asia Star* showed that the plaintiff could easily switch its cargo onto another vessel even after the shipping instructions had been issued for that vessel. This was demonstrated by the plaintiff's offering between 23 and 26 January 2004 to put 21,000mt of the *Asia Star* cargo on to the *Chembulk Barcelona* which had a laycan of 30 January 2004. The *Chembulk Barcelona* had been chartered earlier and the plaintiff must have already issued shipping instructions for that vessel before 23 January 2004 and yet it was eventually able to put 9,500mt of the *Asia Star* cargo onto the *Chembulk Barcelona*.

39 The defendant also argued that the evidence showed that the plaintiff always had flexibility with its shippers and buyers and was able to bring forward the date of shipments or postpone the date or cancel the shipments altogether depending on the situation.

40 The defendant took issue with the Assistant Registrar's finding that the evidence did not show that the plaintiff had decided affirmatively to deviate from the original cargo nomination made on 13 January 2004 and his further holding that the plaintiff's "actions in exploring ways of maximising their business should not preclude them from claiming for loss of a pre-arranged transaction, which the defendant's breach had unwound". The Assistant Registrar found the plaintiff was at the relevant time "ready, willing and able to ship the cargo from the three suppliers to Agrima in satisfaction of [the plaintiff's] obligations".

41 In the defendant's submission, these findings glossed over clear contemporaneous evidence showing that the plaintiff had been changing its cargo nominations notwithstanding the shipping instructions. The defendant argued that even by the plaintiff's own evidence, the cargo nominations set out the plaintiff's contemporaneous decisions as to what cargo to load on board the vessel following its decision as to the intended destinations of the vessel. These cargo nominations were not mere explorations of the way to maximise the plaintiff's business. The fact that the base cargo, which had been nominated for the *Asia Star*, was larger than that vessel's carrying capacity meant that part of the cargo would not be shipped on the *Asia Star* but would have to be put on a substitute vessel. This must mean that the cargo under each shipping instruction had not been matched with any particular resale contract. At the time of the rejection of the *Asia Star*, the plaintiff had not decided whether all 21,500mt of the Indomas, Pamin and Pacoil contracts were to be shipped to Agrima on board that vessel. It had not made up its mind whether to do this or whether to send 5,000mt to Odessa and deliver only the balance to Turkey. In the result, according to the defendant, the plaintiff had not been able to establish any loss suffered by reason of the failure of the *Asia Star* to load.

42 The plaintiff produced both documentary and oral evidence in support of its case that it had intended to ship 21,500mt of cargo on board the *Asia Star* for delivery to Turkey to satisfy its sale contracts with Agrima. Apart from the evidence of Mr Malik and RKN, oral evidence was also adduced from representatives of the plaintiff's suppliers and Agrima.

43 In my judgment, the Assistant Registrar's findings in relation to shipment were supported by the evidence. The documentary evidence established the purchase contracts between the plaintiff and its suppliers and the sale contracts between it and Agrima. It was accepted by the plaintiff that at the time these purchase contracts were concluded, they were not intended specifically to fulfil any sale contracts made by the plaintiff. This was because the plaintiff is a leading trader in edible oils and buys a vast quantity of such oils every month which it later allocates to various purchasers depending on the flow of its trade and the availability of suitable vessels. The plaintiff's evidence was that it was a forward trader and the defendant's expert witness, one Mr Raj Kumar Shah, testified that forward trading is very common in the palm oil trade. Mr Shah also testified that there could be no generalisation of the length of the time period between a purchase and a resale undertaken by a forward trader. Thus, the fact that the plaintiff did not have any designated sub-purchaser in mind when it contracted with Indomas, Pacoil and Pamin was not an indication that the plaintiff subsequently had no firm intention of shipping this cargo on the *Asia Star*.

44 The documentation also showed that in early December 2003, the plaintiff informed each of the relevant suppliers that it had nominated the *Asia Star* as the vessel on which its cargo was to be shipped. These shipping instructions indicated the amount of cargo purchased that had to be shipped and also the expected date of shipment. Thereafter, the shipping instructions remained unchanged right up to the rejection of the *Asia Star* on 19 January 2004. These shipping instructions were

reflected by the cargo nominations made by the plaintiff to the vessel on 13 January 2004, superseding an earlier nomination made the previous day. Whilst the plaintiff did subsequently explore various cargo combinations with the vessel, it did not at any time instruct the suppliers that it had changed its mind about how much cargo was to be loaded on that vessel at Belawan and Pasir Gudang. Instead, when the vessel was delayed, the plaintiff made it a point to ask the suppliers for extensions of the loading date. It appears that the plaintiff wanted to assure itself that this base cargo would be available for loading on the *Asia Star* in due course even though it was exploring other options. By 18 January 2004, according to RKN, the plaintiff had made a firm decision not to effect any changes to the intended shipments. Whilst the defendant criticised the credibility of this evidence, I am satisfied that those criticisms were not justified. The person in the plaintiff's organisation who was in charge of making the final decision as to what cargoes were to be shipped on the *Asia Star* was RKN and I accept as true his evidence that the plaintiff had by 19 January 2004 decided what quantities of each type of edible oil should be loaded and that he had deputed Mr Sharul to notify the master of this when he went on board the ship to supervise the loading.

45 As for where the cargo was going, I agree too that the evidence showed that at the material time in January 2004, it was intended to fulfil the plaintiff's contracts with Agrima. Under these contracts, shipment was to be effected between the second half of December 2003 and 15 January 2004. The original laycan of the *Asia Star* would have fallen within this period and the plaintiff decided in early December 2003 to ship the cargo intended for Agrima on that vessel. Even if the plaintiff had not originally intended the *Asia Star* to carry Agrima's cargo, by 15 January 2004, it must have formed a firm intention to do so since it had not shipped that cargo by any other vessel and, more pertinently, had asked Agrima for an extension of the shipment date. It is also worth noting that the plaintiff had informed Agrima that *Asia Star* was to be the carrier and that Agrima had in turn forwarded the vessel's name to its sub-purchasers who subsequently enquired as to the expected arrival date of the ship. Agrima had granted the extension but only up to 21 January 2004 and there was no other vessel at that time (on 18/19 January 2004) on which the plaintiff could have ensured that the cargo was loaded so as to meet the extended shipment deadline.

46 As for the defendant's submissions on the plaintiff's flexibility negating the possibility of loss arising from its breach, I cannot accept these. I agree that the evidence did show that the plaintiff had a certain amount of flexibility in the way that it allocated cargo to various buyers and nominated vessels to carry cargo to various ports. This was due partly to the amount of cargo purchased by the plaintiff and the number of ships under charter to it at any time. This flexibility was, however, limited by the terms of the agreements between the plaintiff and its suppliers/buyers and between the plaintiff and the various shipowners with whom it had entered into charterparties. Where there were no terms entitling the plaintiff to unilaterally extend a shipment date, the plaintiff's ability to be flexible was limited by the goodwill of the counterparties and their willingness to agree to changes. The plaintiff was not at liberty to unilaterally change contractual terms as it saw fit. Mr Malik, while he agreed in court that the plaintiff had the flexibility to bring shipment dates forward or to postpone them, did not assert that the flexibility was unlimited. It had to be a question of degree and subject to the agreement of the counterparties.

47 In the present case, the plaintiff's counterparties did demonstrate some degree of flexibility: Indomas agreed to extend the contractual shipment period by one week to 21 January 2004 and Agrima agreed to a similar delay in shipment. Additionally, Agrima agreed to postpone shipment of some of its cargo to the February vessel *Chembulk Barcelona*, and Pamin and Pacoil agreed to a delayed shipment of their cargo on that same vessel. In the event, Indomas was not prepared to agree to an extension to the shipment date so as to allow shipment on *Chembulk Barcelona* and it cancelled its contracts on 22 January 2004 and on the same day, sold off 10,500mt of the 12,000mt parcel so cancelled. Agrima cancelled part of the cargo, agreed to delayed shipment of another

portion but insisted that it be compensated in respect of non-delivery of a third portion. It cannot be denied that a certain amount of flexibility was displayed by the suppliers and buyer but the degree of the same was not within the plaintiff's control.

48 The extensions that were given were, in contractual terms, indulgences rather than entitlements. The plaintiff could not rationally have expected that on every occasion on which it requested a supplier or a purchaser to give it an extension that the request would be granted. Mr Shah, the defendant's witness, testified that the granting of time extensions is subjective and whether the extension is granted or not would depend on whether doing so would suit the supplier. The defendant as an experienced shipowner must have known that whilst there can be a certain amount of flexibility in business, such flexibility cannot be guaranteed and parties are always entitled to insist on the strict observance of their contractual rights. Its argument that the plaintiff possessed enough flexibility to entirely escape liability for non-shipment of cargo on board the *Asia Star* was against commercial sense, not to mention the facts of this case.

49 In my judgment, the Assistant Registrar was entirely correct in his finding that on a balance of probabilities, the plaintiff had suffered loss by reason of the defendant's breach of contract.

Mitigation

50 The Assistant Registrar's conclusion was that the plaintiff had failed to mitigate its loss when it did not avail itself of the opportunity of chartering the *Puma* to carry the cargo to Turkey. The plaintiff attacked this finding on two counts:

(a) the Assistant Registrar had failed to consider that as a matter of law, the plaintiff was under no duty to mitigate at the time the *Puma* was offered to it on 20 January 2004; and

(b) if the plaintiff had a duty to mitigate on that day, then the Assistant Registrar failed to apply the correct legal principles relating to the duty to mitigate and was wrong in his holding that the plaintiff had not acted reasonably in the circumstances when it failed to charter the *Puma*.

Had the duty to mitigate arisen?

51 In relation to the first contention, the plaintiff argued that it was not under a duty to mitigate during the period from 20 January 2004 to 21 January 2004 because at that time the plaintiff had not accepted the defendant's repudiation of the charter by failing or refusing to furnish a substitute vessel. Further, the plaintiff did not accept the defendant's repudiation of the charter arising out of the defendant's presenting the *Asia Star* in an unfit state until 21 January 2004. The Assistant Registrar had found that the defendant initially cancelled the charter on 19 January 2004 and had then relented and made further attempts to tender the vessel for loading before finally cancelling the contract on 21 January 2004. That being the case, the plaintiff submitted, the defendant finally cancelled the *Asia Star* contract at noon on 21 January 2004 when it sent the plaintiff an e-mail stating that up to that time it had not received any response or action from the charter in relation to its invitation to re-inspect the vessel's tanks and therefore it had "to formally inform you per governed charterparty, we are now withdrawing the ship and shall sail her from Belawan with immediate effect". This repudiation by the defendant was accepted by the plaintiff only on 21 January

2004 and the plaintiff's duty to mitigate did not arise until after that acceptance.

52 The issue of when the charterparty came to an end is a question of fact. It can only be decided by an examination of what happened at the material time. Since it was the defendant who was in breach of contract, what is important is to determine when it was that the plaintiff accepted that breach of contract. A summary of what occurred is set out in [14] to [17] above.

53 The plaintiff learnt of the problem with the tanks of the *Asia Star* on 19 January 2004 and immediately rejected the ship and suggested to the defendant that it provide a substitute vessel. The defendant's reaction, communicated on the evening of 19 January, was to state that it had no choice but to cancel the shipment and also that the further tank cleaning that it was conducting was not helping the coating of the tanks. It also made clear that it had no substitute vessel available. That reaction from the defendant was a clear notification to the plaintiff that at that moment, the defendant had no intention of performing the charterparty. The plaintiff as the innocent contracting party then had the choice of whether to continue to insist that the defendant perform its side of the bargain or to accept that the charter was ended and see what it could do to mitigate its loss arising from the breach.

54 The plaintiff instructed its Malaysian solicitors to put the defendant on notice that the vessel was unseaworthy and not fit to receive the cargo. The letter went on to state:

> Our clients note, from your message received through the brokers, your admission that the vessel failed due to her tank coating condition and that owners have refused to do further tank cleaning to rectify the situation and/or to offer a substitute seaworthy/cargoworthy vessel available on the open market in order to perform under the said charterparty. Further, our clients contend that owners' purported notice of cancellation is a wrongful repudiation of the charterparty and its obligations.
>
> In the circumstances our clients hereby hold owners fully responsible and liable for all loss and damage including delays and consequential loss. All our clients' rights and liberties are fully reserved.

55 The defendant back-pedalled when it received that message. The next morning, it stated that it was thinking that it should first resolve the problem by working with the plaintiff and asked the plaintiff to present some constructive suggestions in order to solve the problem. It also asserted that it was doing what it could to remove the rusty dust from the tanks in order to present the vessel for the cargo. Later that day, the defendant invited the plaintiff to re-inspect the tanks but the plaintiff did not respond to that invitation. This lack of response resulted in the formal withdrawal by the defendant on 21 January 2004 at noon.

56 On 21 January itself, the plaintiff's lawyers wrote to the defendant in the following terms:

> We refer to your message of the 20th of January 2004 which was sent through the brokers and was received by our clients at 1855hrs on the 20th January 2004.
>
> Your first message of the 19th of January 2004 (1824hrs) made it clear that you had terminated the abovementioned charterparty.
>
> Further or in the alternative, by failing to exercise due diligence to make the ship seaworthy and cargoworthy in accordance with the charterparty, you have already breached the terms of the charterparty *and this breach has been accepted by our clients*. Our client will state that the

termination of the charterparty on your part is unlawful.

Without detracting from the above, we will also state that your notice is of no purpose since there was no question of you intending to tender the vessel for re-inspection after any alleged cleaning. Further the timeframe given for our clients to reinspect the vessel for acceptance was unreasonable and unrealistic.

In view of your further breach of the charterparty by failing or refusing to provide a substitute vessel, our client is searching for an alternative vessel and once the claims have been compiled, will commence such necessary proceedings to enforce their loss caused by your breach of the charterparty and/or the unlawful termination/repudiation of the charterparty. In the interim, all our client's rights and liberties are reserved.

(Emphasis added)

It would appear from the first paragraph of the letter that it was written (if not delivered) before the defendant gave notice that it was withdrawing the vessel.

57 Having considered the circumstances and the correspondence, I have come to the conclusion that on the evening of 19 January 2004, the plaintiff had accepted the defendant's repudiation of contract and had thereby brought the contract to an end. Whilst it may be argued that the lawyers' letter of 19 January 2004 was equivocal in that it did not expressly accept the defendant's repudiation of the contract although it held the defendant liable for all loss and damage arising from the defendant's repudiation, the view that the lawyers themselves took on 21 January 2004 was that their earlier letter constituted an acceptance of the defendant's breach. This is apparent from the italicised portion of the third paragraph of that letter as quoted above. Although now the plaintiff realises that it might have been precipitate in accepting the defendant's repudiation, I think it is too late for the plaintiff to change its position. Accordingly, I consider that the contract ended on the evening of 19 January 2004 and therefore the obligation to mitigate arose the next day.

58 This brings us squarely to the issue on which the Assistant Registrar decided against the plaintiff below.

Did the plaintiff act reasonably in not chartering the Puma?

59 It is established law as noted in *McGregor on Damages* (17th Ed, London Sweet & Maxwell 2003) at para 7-064 that in the case of a breach of contract, the injured party is only required to act reasonably when mitigating his loss and that the standard of reasonableness is not high since the defendant is an admitted wrongdoer. At para 7-076, the same text notes that the criterion for reasonableness is, per James L.J. in *Dunkirk Colliery Co v Lever* (1878) 9 Ch.D. 20, that the claimant is not "under any obligation to do anything other than in the ordinary course of business". It is also pertinent, having regard to the facts of this particular case, that according to para 7-072 of *McGregor*, one of the rules on what a claimant need not do in order to attain the required standard of reasonableness is that he need not risk his money too far. The passage reads:

(i) A claimant need not risk his money too far. In *Lesters Leather and Skin Co v Home and Overseas Brokers* the claimant bought snakeskins from the defendant to be delivered at a United Kingdom port, and properly rejected them on their arrival as being not merchantable. The Court of Appeal awarded the claimant damages for his loss of profits, rejecting the defendant's argument that the claimant should have mitigated by buying skins available in India on the ground that this was a risk which he was not bound to take. … Similarly, in *Jewelowski v Propp* [1944] K.B. 510,

where the claimant was induced by the defendant's fraudulent misrepresentation to advance money on a debenture to a company which later went into liquidation, it was said that he could not be required to buy the company's assets so that, by reselling them afterwards at a higher amount than he had paid for them, he would reduce his loss. Lewis J. said that a claimant "cannot be called on to spend money to enable him to minimise the damages"; this would be "going far beyond the rule".

The above legal principles are not controversial. In this case, the main dispute revolves around an assessment of the facts in relation to these principles.

60 The defendant contended that the plaintiff failed to take all reasonable steps to mitigate its loss because it:

(a) failed to confirm the fixture and charter of the *Puma* on or about 20 January 2004;

(b) failed to notify Indomas and Agrima of the difficulty and failed to try to obtain their agreement to allow the plaintiff to perform the contracts by shipping the consignments on board the *Puma*; and

(c) failed to procure a replacement 12,000mt of the same products for the cancelled Indomas contracts.

The Assistant Registrar had agreed that the plaintiff's failure in relation to the first two points meant that it had not acted reasonably in mitigation.

61 I have found above that the plaintiff's obligation to mitigate arose on 20 January 2004. It was clear from the evidence of both Mr Malik and Mr Sivananthan that in fact the plaintiff had not waited till 20 January 2004 to look for another vessel. Instead, as soon as Mr Malik had found out on the morning of 19 January about the state of the *Asia Star*'s tanks, he instructed Mr Sivananthan to look for an alternative vessel. As a result of the searches made, the plaintiff was offered first the *Mount MacKinney* and subsequently the *Puma*. The first vessel was rejected and the defendant had no quarrel with that rejection.

62 As regards the *Puma*, the defendant contended that the evidence showed that it was available to the plaintiff on 20 January 2004. It said that the plaintiff could, and should have, confirmed and entered into a fixture for the *Puma* because:

(a) the owners of the *Puma* had agreed to a laycan of 25-31 January 2004 with a minimum of 36,000mt of cargo to be loaded or paid for and the plaintiff was willing to accept such a laycan as evidenced by Panasia's e-mail of 20 January 2004 sent at 1732 hours;

(b) the fact that the plaintiff had accepted the proposed laycan led to the irresistible inference that the plaintiff had either obtained or was confident of obtaining an agreement from Indomas to

an extension of their respective contractual shipment/delivery dates; and

(c) the only terms that had not been agreed on 20 January at 1732 hours were freight and demurrage and these were questions of dollars and cents, the difference in freight being US$2 per ton and the difference in demurrage being US$2,000 per day.

In the defendant's view, it was unreasonable for the plaintiff not to have accepted the *Puma* at US$27.50pmt when it became clear that its offer of US$25.50pmt was not acceptable to the *Puma*'s owners. The more pressing need was to avoid cancellation from Agrima by accepting the nearest prompt vessel (*ie* the *Puma*) which had a realistic chance of delivering the Agrima cargo by the agreed shipment date of mid February 2004.

63 The plaintiff, however, took the view that it had been presented with a number of problems related to the chartering of the *Puma* which militated against an unconditional acceptance of the offer made by the owners of the vessel on 20 January 2004. The first problem was that this vessel was much bigger than the *Asia Star* and although the owners of the *Puma* were agreeable to charging the plaintiff freight for 36,000mt instead of the vessel's full capacity of 40,000mt, even this concession meant that the plaintiff would have to find an additional 14,500mt of cargo or pay dead freight for that amount of cargo. This meant, as Mr Malik testified, that if the plaintiff was going to take the *Puma* it would have to ensure that it could purchase, on an urgent spot basis, the additional cargo. This additional cargo would have been priced at the then prevailing market price plus a premium for spot delivery. As at 20 January 2004, the plaintiff had not yet looked for the additional cargo. The second problem was that it was necessary for the vessel to arrive at Belawan by 25 January 2004 in order to avoid additional penalties payable to the shippers. Thirdly, there was the concern of the plaintiff to reduce its extra expenditure as much as possible which was why it thought chartering the *Puma* would be more commercially viable if the owners agreed to the lay time, freight and demurrage rates proposed by Mr Malik. The plaintiff also considered that it might have a problem finding alternative storage facilities for the additional cargo at the discharge ports in case it was not able to sell the additional cargo before the vessel's arrival at the discharge ports. As at 20 January 2004, the plaintiff had no ready buyer for the additional cargo and was not certain that it would be able to effect a quick resale of the cargo.

64 It would appear from the evidence that despite this plethora of problems, Mr Malik was satisfied that it would be in the plaintiff's interests to charter the *Puma* if its owners would accept the freight, demurrage and lay time rates that he proposed on 20 January evening. The owners of the *Puma*, however, were not interested in this offer and failed to respond to it either that day or the next. In my view, it was reasonable on the part of the plaintiff to put forward a counteroffer to the one made by the owners of the *Puma* since the hiring of the *Puma* would give the plaintiff the various problems enumerated in [63] above. The defendant made much of the fact that there was only a two dollar difference in the freight rate proposed by the owners of the *Puma* and that proposed by the plaintiff. That, however, was not the only perspective from which the matter had to be viewed. Mr Malik stated that in the absence of additional cargo, the dead freight loss would be between US$400,000 and US$500,000 if the *Puma* was chartered. In fact, the dead freight would have amounted to US$464,000 if it would have to be computed on a cargo of 14,500mt. This was because the owners of the *Puma* had offered freight at US$27.50 on the basis of one load port/one discharge port only. The plaintiff's intention all along was that there would be two load ports (Belawan and Pasir Gudang) and three discharge ports (Mersin, Izmir and Crebze) and therefore the actual freight rate would have been US$32pmt (US$27.50 + US$1.50 x 3) based on the *Puma* offer. The counteroffer put forward by

the plaintiff was lower overall in that quite apart from the base freight rate being US$25.50pmt, for additional ports, the plaintiff would pay only US$20,000 as a lumpsum per load port and US$23,000 per discharge port. There would therefore have been a substantial difference between the amount due to the *Puma* under the plaintiff's proposal and that due under the owners' proposal.

65 Acting reasonably in mitigation does not mean that the plaintiff had to accept the terms offered by the *Puma* without negotiation. It would be recalled that mitigation principles do not require the injured party to incur extraordinary expenditure or act otherwise than in the ordinary course of business. In the ordinary course of business, a charterer of a ship will negotiate with the shipowner to get the best possible terms he can in the prevailing market. In this case, Mr Malik's testimony was that at the material time, he was of the view that the freight rate of US$27.50 quoted by the *Puma* was too high because the additional cargo, if the plaintiff was able to procure the same, would be sent to Red Sea ports and at that time the freight for such ports was about US$20. He therefore considered that his offer of US$25.50 on the entire cargo to be shipped (including the *Asia Star* cargo) was reasonable. In this respect, I note that the defendant did not call any evidence on what the then prevailing freight rates were for cargo destined for the Red Sea and Turkey. The defendant used the *Asia Star* freight as comparison but this was not a proper comparison as the *Asia Star* was concluded in November 2003 more than two months earlier and the *Asia Star* charter was an advance charter and not a spot charter.

66 As for the demurrage rate, the *Asia Star*'s demurrage rate was US$11,000 per day and the owners of the *Puma* had initially offered US$17,000 per day and then reduced that to US$16,000 per day while the plaintiff counter-offered US$14,000 per day. No evidence was led by the defendant as to what the demurrage of the *Puma* ought to be or whether the plaintiff was acting unreasonably in counter-offering US$14,000 per day.

67 As there was no evidence on what the market freight rate and demurrage rate were on 20 January 2004, it was not correct for the Assistant Registrar to conclude that the plaintiff was only trying to maximise profit when it negotiated to try and obtain reduced rates. It was not put to the plaintiff that its only reason to negotiate with the *Puma* was that it was trying to maximise its profit. Nor was there any basis to say that the plaintiff was acting unreasonably in this respect. The plaintiff was in an extremely difficult position: it would not be able to meet the extended agreed shipment dates and even if its suppliers and buyer agreed to further extensions, it faced the prospect of paying almost half a million US dollars more for a replacement ship. Mr Malik kept repeating in court that this was a big drain on the plaintiff's resources and that the plaintiff was in a dilemma. He said that at that time, that amount of money looked very big and there was no one who was coming forward to help the plaintiff out. By "no one", I assume he was referring to the defendant.

68 In the events that happened, the plaintiff was faced with a huge claim from Agrima and also suffered a substantial loss of profit in respect of the cancellation of part of Agrima's order. It turned out that the plaintiff would have lost less had it chartered the *Puma* and paid the dead freight on the basis of the rates quoted by the owners. This result cannot mean that the plaintiff was unreasonable in putting forward a counteroffer. On 20 January 2004, the plaintiff knew that it was faced with a substantial additional expenditure for the *Puma* but did not know what the reaction of its suppliers and buyer would be. It had up to that date managed to obtain extensions from both parties and was hopeful that they would be equally indulgent once it could give them confirmation that it had chartered a substitute vessel with a confirmed lay time within January 2004. I do not think that it was unreasonable in so hoping bearing in mind its previous relationship with these parties and the flexibility previously shown by them. On the other hand, chartering the *Puma* was a risky and difficult decision to make. If it had chartered the vessel, the plaintiff would have been exposed to very substantial dead freight and would have had to risk expense in buying additional cargo at spot prices in the hope

that it would be able to sell that cargo at its destination. Such a sub-sale might not have made a profit for it because, as the defendant's expert on palm oil trade testified, back-to-back buying/selling on the spot market usually did not give a trader any profit margin due to the fact that it was a very open market. In order to make a profit, most companies would take a position in that they would either buy in advance if they thought the market was going up or they would sell in advance if they thought the market was going down. Spot trading was not a desirable activity.

69 Another factor that has to be borne in mind when considering whether or not the plaintiff acted reasonably in not immediately accepting the *Puma*'s offer is the influence that the defendant's conduct would have had on it. On that day, the defendant had informed the plaintiff that it still hoped to resolve the problem itself and also wrote to the plaintiff that it was trying to solve the problem with the plaintiff. Mr Malik testified in answer to a question from the court that this e-mail had given him an expectation that the defendant might be able to give him a substitute vessel. Therefore, the plaintiff submitted, on 20 January 2004, when Mr Malik was negotiating to charter the *Puma*, he was also keeping in mind the possibility that the defendant or various brokers that he had approached would revert with other vessel options which were more suitable than the *Puma*. In the event, no other options were made available over the next few days. The plaintiff, however, would not have known that on the evening of 20 January 2004 when it made its counteroffer in respect of the *Puma*. It was therefore reasonable for it not to grab the *Puma* but to follow its usual procedure of negotiating for the best possible terms.

70 The defendant submitted that the plaintiff ought to have made a comparison of the losses it would suffer if no shipment at all took place against the additional expense of chartering the *Puma* at a freight rate offered by the *Puma* owners before abandoning the *Puma* charter altogether. The plaintiff's response was that this contention was flawed because:

(a) the plaintiff did not abandon the idea of chartering the *Puma*. It was negotiating terms but the owners of the *Puma* did not revert on the plaintiff's last offer made on the evening of 20 January 2004; and

(b) it was not reasonable to expect the plaintiff to undertake, between 19 and 21 January 2004, the exercise of quantifying its total losses from non-shipment of the cargo because:

(i) the plaintiff could not have predicted that Indomas would insist on cancelling its contracts after 21 January 2004;

(ii) equally the plaintiff would not have been able to predict Agrima's cancellation of a substantial part of its contracts;

(iii) the plaintiff would not have known during this period that it would have a claim for loss of profits from the contract cancellation;

(iv) the plaintiff would not have known during this period whether Indomas or Agrima would eventually make claims against it for non-performance and would definitely not know what amount would be claimed by these parties;

(v) assuming that the plaintiff should have expected the cancellation of all these contracts, the plaintiff's own loss of profit was the only claim that it could have worked out to compare with the costs of chartering the *Puma*. That loss of profit would have been approximately US$698,889.88 and to avoid that loss of profit, the plaintiff would have had to incur dead freight expenses of US$399,500 after taking into account the savings derived from the fact that the *Asia Star* freight rates were higher than those of the *Puma*.

71 Looking at the difference between the loss of profit that the plaintiff might reasonably have contemplated in January 2004 and the additional expenses it would have incurred to avoid that loss of profit, the plaintiff submitted that it would not be reasonable to expect the plaintiff to spend such a sum to avoid the loss. In a Canadian case, *Costello v Calgary (City)* [1995] A.R. Lexis 5614, the plaintiff wanted to develop a hotel but the defendant city authority purported to expropriate its land at a price of $74,000. Eventually the land was not expropriated but the authority wrongfully froze its development. The plaintiff claimed damages for trespass and was awarded $1,928,061 being the loss of revenue from the hotel. The authority had suggested that the plaintiff should have mitigated its loss of revenue by buying another similar piece of land on which to build its hotel. The cost of the same would have been between $226,570 (plaintiff's valuation) and $179,000 (defendant's valuation). The court made the following observations in relation to the plaintiff's duty to mitigate:

> … although the evidence also established that the Costellos had sufficient credit capability to make such a purchase had they so wished. However, the point is that the argument of the City must be rejected because it has failed to establish that other comparable property was available at equivalent compensation as the City was offering, and the law is clear that the plaintiffs need not incur unreasonable expenses to mitigate a loss caused by the Defendant. (per Rooke J at [67])

Earlier in his judgment, Rooke J had also cited textbook authority to the effect that the fact that the expenditure of money was required to avoid a larger loss, would not excuse the plaintiff from making that expenditure if it was reasonably small and the chances of avoiding the greater loss were favourable but that "the plaintiff is not bound to embark on a speculative venture for the defendant's benefit".

72 This case is similar to *Costello v Calgary* in the sense that the expenditure required to avoid the loss was a substantial amount and it would have been unreasonable to require the plaintiff to undertake it. The difference between the expenditure to be incurred and the loss sustained in *Costello v Calgary* was a much smaller difference than that between the expenditure that the plaintiff here would have incurred and the loss of profit that it could have contemplated on 20 January 2004 and yet the judge there found that Costello was not obliged to incur that expense. Further there is some merit in the plaintiff's point that taking on the charter of the *Puma* would have been a speculative venture in the absence of consent from Agrima and Indomas to an extension of time.

73 This brings me to the other finding of the Assistant Registrar which was that the plaintiff's failure to inform its counterparties of the rejection of the *Asia Star* and the availability of the *Puma* on

20 and 21 January 2004 was unreasonable. The plaintiff's position on this issue was that on the contrary if it had told Indomas and Agrima on 19 January that that vessel's tanks were unsuitable, such notification would have triggered off immediate cancellations of the contracts because at that date there was no suitable substitute vessel. It had therefore acted reasonably and prudently in not conveying this information until it had had a chance to put forward a viable alternative to its counterparties. I accept this argument. Indomas and Agrima had already given the plaintiff two extensions of the shipment deadline and if they had been told that *Asia Star* was unfit to carry the cargo without at the same time being told that a new vessel had been fixed with acceptable laycan dates, there was a good chance that they would not have wanted to proceed with their contracts with the plaintiff. As far as the *Puma* was concerned, it would have been premature for the plaintiff to inform these parties about it until the vessel had been fixed even on a "subject to" basis. It was the plaintiff's intention, if its counteroffer to the *Puma* owners was accepted, to confirm the vessel subject to the following term:

> Subject to stem/suppliers/receivers/terminals/chtrs management approval declarable by 2000hrs Singapore on 21st January 2004.

If the plaintiff had been able to do that, it could then have ascertained from Indomas and Agrima whether the *Puma*'s laycan was acceptable to them before lifting the "subject to" term. However, the *Puma* owners did not revert on 20 January 2004 and there was no evidence that the vessel was still available for charter on 21 January 2004 had the plaintiff then wished to accept the owners' last offer. It should be noted that the broker Mr Sivanathan gave evidence that vessels could be chartered in a time span ranging between five minutes and two to three hours. There is no reason why the owners of the *Puma* would have not been negotiating with other parties at the same time as they negotiated with the plaintiff. The fact that they did not bother to respond to the counter-offer, not even to reject it, could well have been because they had already found better alternative employment for their vessel. It would have damaged the plaintiff's credibility with its contracting parties had it told them anything about the *Puma* before the fixing was firmed up.

74 The Assistant Registrar found that Indomas and Agrima would not have cancelled their contracts and would have further extended the shipment deadline had they been informed about the availability of the *Puma* on 20 or 21 January 2004. I am persuaded that this finding was against the weight of the evidence. The Assistant Registrar had first found that the cargo would have to be loaded (*ie* loading completed) by around 23 January 2004 in order for the vessel to arrive in Turkey for delivery by mid February 2004 as required by Agrima. There was nothing wrong with that finding but he then went on to infer, in my view incorrectly, that Agrima would have agreed to a substitute vessel with a laycan of 25 to 31 January 2004. He based this finding on the evidence of Ms Kestelli Isinsu, the managing director of Agrima, who testified on behalf of the plaintiff. In my view, as the plaintiff submitted, the Assistant Registrar misconstrued Ms Isinsu's evidence.

75 Ms Isinsu's testimony was that it took about 20 to 22 days for a vessel sailing from Malaysia to arrive at the first load port in Turkey. In her affidavit, she said that the shipment of the goods she had purchased from the plaintiff was to be effected from Indonesia and Malaysia by 15 January 2004 and was expected to arrive in Turkey within the first half of February. It was on that basis that Agrima itself had contracted with its sub-buyers to deliver the cargo to them by mid February 2004. She said that on 23 January 2004, she received information that the *Asia Star* was cancelled and that was why that same day Agrima sent a letter to the plaintiff putting it on notice that it was in breach of contract. The plaintiff had then asked Agrima whether it could postpone the shipment and ship the cargo on *Chembulk Barcelona* but Agrima had rejected that suggestion as that vessel would not arrive in Turkey until early March. According to Ms Isinsu, on 23 January 2004 she took the view that it was impossible for the plaintiff to obtain a new vessel that would be on time to deliver the cargo in

accordance with the plaintiff's contracts with Agrima. She testified that if the vessel sailed on 23 January 2004, it might arrive on time. The defendant's counsel then asked her:

> Q I put it to you that if the plaintiffs had obtained a substitute vessel with a laycan of 25th to 31st January, they would have still been able to deliver your cargo by the middle of February. Do you agree?

To this Ms Isinsu answered:

> If they could have, we could have delivered, yes, and there wouldn't be any problem. There was no ship.

The Assistant Registrar took that last answer as meaning that Ms Isinsu had agreed that a vessel with a laycan of 25 to 31 January would have been able to deliver Agrima's cargo by the middle of February.

76 However, he did not bear in mind that what it would have taken for a vessel to comply with a laycan of between 25 and 31 January 2004 would simply have been for the vessel to arrive at the designated load port on 31 January 2004. That vessel would not have completed loading and sailed for some days thereafter. The question put to Ms Isinsu by counsel for the defence suggested a situation which did not accord with the Assistant Registrar's own finding that loading would have to be completed by 23 January for the vessel to arrive in Turkey by mid February 2004. What counsel suggested was that a vessel with a laycan of 25 to 31 January would be able to deliver the cargo in Turkey by mid February 2004, Ms Isinsu answered that if that could be done ("if they could have"), Agrima could have made the delivery to its customers on time ("we could have delivered, yes, and there wouldn't be any problem"). This was consistent with the requirements in Agrima's contracts with its buyers that the cargo was to be delivered to them by mid February 2004. Ms Isinsu was agreeing that if the vessel could have delivered the cargo in Turkey by mid February 2004, there would have been no breach of contract. She was not agreeing to accept a substitute vessel with a laycan of 25 to 31 January 2004 *per se* because she had already testified that the voyage took between 20 and 22 days. This reading of Ms Isinsu's testimony must be the correct one because on 23 January 2004, she put the plaintiff on notice that it was in breach of contract and that she would be constrained to buy cargo locally to fulfil Agrima's commitment and all costs incurred thereby would be for the plaintiff's account. Further, she subsequently cancelled the majority of the contracts but was able to reschedule 5,750mt of goods and accept shipment for that amount via the *Chembulk Barcelona*.

77 As for the Assistant Registrar's finding that Indomas would have agreed to a shipment on the *Puma* had it been told of the availability of this vessel on 20/21 January 2004, that finding was contradicted by testimony given by one Ms Cherie Thomas Toh from Indomas. The Assistant Registrar disregarded Ms Toh's evidence because he found that there was some difficulty with her credibility and inconsistencies in other parts of her evidence. However, Ms Toh was the one in Indomas who cancelled all the contracts on 22 January 2004 and her testimony that Indomas would not have agreed to a further extension was corroborated by the prior correspondence between Indomas and the plaintiff in respect of the second time extension. Indomas had agreed reluctantly to the second extension and had threatened to cancel the contracts if the plaintiff failed to lift the cargo within the extended deadline given. The subsequent cancellation was consistent with the earlier threat. Further, Indomas' motive for cancelling was clear. The market was moving up and Indomas was able to resell all of the cargo it had previously assigned to the plaintiff. It is also noteworthy that Indomas did not make any claim for loss of profits or any other loss occasioned by the plaintiff's breach of contract thus indicating that it benefitted from the cancellation.

78 Having considered the evidence and the arguments therefore, I must disagree with the findings on mitigation made by the Assistant Registrar. In my judgment, the plaintiff acted reasonably in its attempt to mitigate the loss it was facing in the light of the defendant's breach of contract. It was not unreasonable for the plaintiff not to charter the *Puma* on the terms offered to it by the *Puma* owners on 20 January 2004.

Measure of damages

79 I now move to consider the issues of the correct measure of damages to be applied and remoteness.

80 To recap, the plaintiff's claim is for:

(a) loss of profits on the cancellation of the Indomas' contracts in the total sum of US$698,889.98;

(b) the sum of US$823,800 which the plaintiff allegedly paid to Agrima as damages; and

(c) various amounts paid to Pacoil and Pamin for the delayed shipment of their cargoes.

The first question that arises is whether as a matter of law the plaintiff is entitled to recover the sums claimed under paras (a) and (b) above. The defendant's submission is that the plaintiff cannot do so because these two claims are too remote and cannot be recovered under established principles.

81 The usual measure of damages applicable when a shipowner fails to carry out a contract to carry a cargo is either the difference between the market and charter rates of freight or relates to the value of the goods at the port of discharge. Alternatively, where the charterer has been able to load the goods on another vessel, he is entitled to claim the costs incurred in so doing. The legal basis of these principles was well discussed by Moore-Bick J in *The "Kriti Rex"* [1996] Q.B. 171. At pp 192–193, the judge said:

> I start from the principle that [the charterers] are entitled to recover the loss which flows naturally in the ordinary course of events from the breach of contract. In the case of a contract for the carriage of goods by sea the natural and obvious consequence of the shipowner's failure to load and carry the cargo is that the owner of the goods is deprived of the benefit of having them at the agreed destination when they ought to have arrived. Prima facie, therefore, the loss he suffers is represented by the market value of the goods at that time and place. However, he may be able to avoid or reduce that loss in one of two ways. If alternative shipping space can be obtained he may be able to mitigate his loss by having the goods carried by another vessel, in which case his loss will be confined to any additional cost of carriage and other expenses as well as any loss caused by the delay to the goods reaching their destination. Alternatively, he may be able to obtain substitute goods at the port of destination, in which case his loss will be measured by the cost of so doing, less the value of the goods left at the port of loading and expenses saved in connection with their transport. That does not mean, however, that in either case the sound arrived value of the goods does not remain the starting point for assessing damages, subject to the duty to mitigate.

As the judge pointed out, his summary of the law was supported by the authorities to which he was referred including the then current edition of *McGregor on Damages*, the case of *Nissho v Livanos* (1941) 69 Ll.L.Rep 125 and *A/S D/S Heimdal v Questier Co. Ltd*. (1949) 82 Ll.L.Rep 452. That there has been no change in those basic principles since 1996 when *The Kriti Rex* was decided is borne out by the 2003 edition of *McGregor on Damages* which states at para 27-047:

> Where the defendant has failed to carry the goods at all or has carried them to the wrong place, two alternative measures appear to be open to the claimant to put him in the position he would have been in had the carriage contract been performed. First, he may engage substitute transport to get the goods to the contractual place for delivery and claim as damages the cost of so doing less the price he would have paid under the contract with the defendant, *i.e*. market rate of freight less contract rate of freight, and in addition the amount by which the price at the place of delivery has fallen between the contractual time for delivery and the arrival of the goods by the substitute transport when this is necessarily later. Or, secondly, he may buy similar goods at the contractual place for delivery and claim the cost of so replacing less the sum of the value of the goods at the place of loading, the amount of freight and the amount of insurance.

McGregor also makes clear in the paragraphs that follow that the first measure is the relevant one where the second course of action is not open to the claimant because no market exists at the place of delivery in which he can buy replacements and the second measure is the relevant one where the first course of action is not open to the claimant because no suitable substitute transport is available. The same edition of *McGregor* also expressly endorses the decision reached in *The Kriti Rex*.

82 The defendant argued that because there was an available market in Turkey for the cargoes in question, the plaintiff was not entitled to claim its loss of profit in respect of the cancelled Indomas cargoes or to recover the damages it asserted it had had to pay Agrima. In support, the defendant cited *Rodocanachi Sons and Co v Milburn Brothers* (1886) XVIII QBD 67, *The Arpad* [1934] P 189, *The Pegase* [1981] 1 LLR 175 and various other cases. In *Heskell v Continental Express Limited* [1950] 1 All ER 1033, Devlin J, when considering whether a carrier who failed to deliver goods should be responsible for the injured shipper's loss of profits arising from a sub-sale or liability to damages in respect thereof, stated (at p1048-1049):

> I think that a distinction may fairly be drawn … between carriage by land and carriage by sea. … In the latter case, export and import is generally conducted by means of a sale; and the type of contract generally used, cif or fob, usually requires shipment by a particular ship or at a particular time. Accordingly, [counsel for the plaintiff] invites me to hold that Continental Express should have known that the process of exporting or importing would probably involve a contract of this type, and to say that if Continental Express knew that, it would follow that they must appreciate that a failure on their part to carry out their delivery instructions might well result in the plaintiff becoming liable to a third party. Lord Macnaghten in *Stroms v Hutchinson* ([1905] AC 524) seems to think that this degree of knowledge should be imputed to the carrier as an ordinary business man. I think that the decision in *The Arpad* and the earlier authorities referred to in it, preclude me from taking this view of a carrier's liability. I am, for my part, willing to hold that a carrier should recognise sub-sales by a consignor or consignee as a serious possibility, but that is not enough, as the leading case of *Horne v Midland Rly. Co*. shows. In *The Arpad* Maugham L.J., said ([1934] P.230):
>
> > "I suppose most vendors of goods and most carriers might be taken to know that if the purchaser or consignee is a trader the goods will probably be sold, or are bought for sub-sale, but the authorities seem to show conclusively that something more than that is

necessary to enable the damages to be assessed by reference to a contract of sub-sale entered into before the date of delivery."

Under the ordinary rule the carrier is taken to know that the consignor will lose by non-delivery the value of the goods at the place of delivery, and I suppose that under ordinary market conditions that would compensate the consignee for any loss he incurs by purchases made at the place of delivery in order to fulfil any sale he may have made. To make the carrier liable for any higher measure of damages it seems to me to be necessary that he should have knowledge, actual or imputed, of something that makes the ordinary measure inadequate. Such knowledge may be derivable from the terms of the subcontract, or, possibly, from the market conditions at the place of delivery. The reason why, as noted by Asquith L.J., in *Victoria Laundry (Windsor), Ltd. v Newman Industries, Ltd*.([1949] 1 All ER 1001) the law is more ready to allow loss of profit as an item of damage against a vendor than against a carrier is because of the nature of the vendor's business. This is more likely to give him knowledge of the probable terms of a sub-contract or of the market conditions.

It would be noted from the above extract that where a claim against a carrier is concerned the law does not generally allow the shipper to claim loss of profit as an item of damage unless he is able to show that the carrier had knowledge, actual or imputed, of something that made the ordinary measure of damages inadequate.

83 The plaintiff accepted the general rule as set out above. It contended that in this case there were factors that displaced the ordinary rule. It was submitted that it was within the reasonable contemplation of the defendant at the time that its charter with the plaintiff was concluded that Indonesia and Malaysia are the largest producers and exporters of palm oil and that palm oil is a trade of commodity. The plaintiff further submitted that it would be within the defendant's knowledge at this time that the plaintiff is a Malaysian company and was in all probability selling or had sold the cargo to buyers in one or more of the foreign destinations named in the charter to which the plaintiff intended to ship the cargo. The fact that the plaintiff was loading part of the cargo in Indonesia also indicated that it would be within the defendant's reasonable contemplation that the plaintiff had bought the cargo from suppliers in Indonesia. It did not matter that the defendant might not have been aware of the actual terms of the plaintiff's purchase and resale contracts or may not have sighted the contracts. It followed that the defendant would be aware or it would be within the defendant's reasonable contemplation, at the time of concluding the charter, that if the defendant breached the charter by failing to tender a suitable ship to load the plaintiff's cargo, the plaintiff would suffer a loss of profits from non-shipment of the cargo as well as face claims from its suppliers at the load port and its buyers at the discharge port. The plaintiff's expert witness, Mr Dennis Butler, testifying from the perspective of a local shipowner in the palm oil carriage trade, opined that the shipowner would be aware that a charterer like the plaintiff would have bought the cargoes from suppliers in Indonesia or Malaysia and on-sold to buyers at the destination ports. Further, the plaintiff argued that the evidence of Mr Shah showed that even he would expect the defendant to be aware that the plaintiff would have bought the cargo from suppliers at the loadports and on-sold it to buyers at the discharge port.

84 I do not accept the plaintiff's submissions summarised above. The plaintiff has not proved any special knowledge on the part of the defendant that would take its responsibility for damages out of the ordinary rule. Shipowners obviously know that persons who charter their vessels to carry cargo from one port to another are likely to be trading in such cargo and will suffer loss if the cargo is not loaded in accordance with the charter. That of itself cannot impose liability for the specific loss incurred by cancellation of the charterer's subsales. The circumstances which the plaintiff adverted to as showing special knowledge were only matters of general knowledge and fell within the dictum of

Maugham LJ in *The Arpad* quoted in [82] above. There was no evidence that the defendant had knowledge, actual or imputed, of something which made the ordinary measure inadequate. Further, as the defendant submitted, the plaintiff was unable to show what special factor it was that existed in this case which would make it wrong to follow the ordinary measure of damages. Even if the defendant should have been aware that the plaintiff is a trader in the palm oil business, there was no evidence that it knew how the plaintiff carried on its business ie that it entered into its purchase and resale contracts on a forward basis rather than a spot basis or how it matched its purchase contracts with its resale contracts. Mr Shah had also testified that oil palm trading is speculative in nature and no one would know whether any particular trader would sell cargo immediately or hold on to it for sometime and, if the latter, for how long or whether the trader would even have made a profit on the transaction. In this case, only half of the Agrima contracts were concluded by 15 November 2003 and the Indomas contracts were not specifically nominated for shipment on board the *Asia Star* until 1 December 2003. Accordingly, as of 15 November 2003 when the *Asia Star* charter was concluded, the defendant could not reasonably have contemplated the losses that actually arose from its breach of contract. Further, RKN had testified that since the plaintiff has a large quantity of cargo available for shipment during any particular period, at the time of the charter, the plaintiff would not have decided on the port(s) of discharge or the cargo to be shipped on board the *Asia Star*.

85 Accordingly, I hold that the plaintiff is not entitled to recover damages on the basis of its loss of profits in respect of the cancelled Indomas contracts or on the basis of the damages that it had to pay Agrima for failing to deliver cargo by mid February 2004. Instead the ordinary measure of damages applies and I now turn to consider what the plaintiff should be entitled to recover on this basis in respect of that portion of the cargo which was cancelled by Indomas and Agrima and could not be shipped by the *Chembulk Barcelona*.

86 On the facts of this case, the ordinary measure of damages would be the difference between the market value of the cargo at its destination in Turkey at the time it ought to have arrived less the value of the cargo to the plaintiff at the agreed time and place of shipment with appropriate deductions for expenses saved such as freight and cargo insurance premium.

87 I shall consider each element. First one has to establish the market value of the cargo at its destination. If the *Asia Star* had commenced loading the cargo in Belawan in 19 January 2004, the vessel could not have arrived at the first discharge port in Turkey earlier than mid February 2004 given that it would have taken a few days for the vessel to load cargo at both Belawan and Pasir Gudang and the voyage itself would have taken 20 to 22 days. The plaintiff called an expert witness, one Mr Ferhan from a well-known trading house in Turkey, to testify as to the market prices of palm oil products in Turkey in February 2004. His evidence was based on record of prices for similar cargo kept by his company. He also mentioned that his evidence of the market price for the cargo could be counter checked with Reuters' Malaysian FOB prices plus US$60/- per tonne for freight and insurance including Malaysian sellers' profit (and another US$20/- to US$30/- per tonne for the spot purchase premium). The defendant did not call any expert evidence on the actual market prices of the various commodities in Turkey. The Turkish prices therefore have to be gleaned from the evidence of Mr Ferhan and Ms Isinsu.

88 The plaintiff introduced Mr Ferhan's evidence not for the purpose of using his mid/third week February 2004 market prices to calculate damages due to the plaintiff but to prove that the oil palm market was a rising market in January 2004 with prices expected to go higher in February 2004 and to show that the plaintiff's settlement of Agrima's claim was done to mitigate loss. Nevertheless this is the evidence before the court on Turkish market prices and the court is entitled to rely on it for the purpose of assessing the damages payable to the plaintiff. Mr Ferhan gave a range of prices for the various products in the month of February 2004. These were CIF prices on a per tonne basis. He also

said that spot market prices would be, per tonne, between US$20 and US$30 higher than the CIF prices. The plaintiff was so focussed on recovering special damages that it did not give me a calculation of what its damages would have been if calculated on the ordinary basis. As far as the market price in Turkey is concerned, I consider that this should be the average spot market price calculated on the basis of US$20 above the average CIF price for the product concerned during the weeks beginning 10 February 2004 and 17 February 2004.

89 The defendant submitted that the price should be ascertained as of 22 January 2004 as Ms Isinsu accepted that date as the date of default. I do not agree: taking the 22 January 2004 as the calculation date would not comply with the ordinary rule which requires the damages to be assessed on the basis of the value of the goods at the place of *delivery* at the time when they ought to have been delivered. It is for that reason too that I hold that it is the spot value in Turkey that has to be used. If the goods had been delivered in mid February 2004 and there had been no pre-existing contract for their sale or such contract had been cancelled, the plaintiff would have been able to sell the goods in Turkey, which had a ready market for the same, at their spot value and therefore the spot value reflected the value of the goods to the plaintiff at the time of *delivery*. The fact that the spot value reflects a profit margin does not detract from its use. Traders are expected to trade on a profit margin and the prevailing market price in any market will usually include an element of profit. In this particular case, all the evidence showed that the market for palm oil products was moving upwards at the material time and in such circumstances no trader would have wanted, or been required, to forgo his profit in order to get rid of his stock. As the plaintiff submitted, under the ordinary measure of damages, the market price of the cargo at destination at the time it ought to arrive there conceptually refers to the prevailing price in that market at time for delivery at that time it ought to arrive, and not for delivery at a later point of time. Hence, the market price conceptually refers to a spot price for purchase and delivery at the time the cargo ought to arrive at the destination. This position is confirmed by the case of *C. Sharpe & Co Limited v Nosawa & Co*. [1917] 2 KB 814 where merchants in Japan sold goods to be shipped in June at the price including cost, freight and insurance to London. Shipping documents relating to the last possible shipment in June would have reached London on July 21 and the goods themselves would have arrived on August 30. The goods were not shipped and the buyers sued for non delivery. It was held that the delivery intended by the contract was a constructive delivery by tender of the shipping documents and there was a breach of contract on July 21. The damages would be measured by the difference between the contract price and the market price on July 21 and since it was impossible to buy similar goods coming forward on a June shipment but possible to buy such goods on the spot, a merchant in the circumstances acting reasonably would have bought goods on the spot and the price of such goods should be regarded in measuring the damages.

90 The next point to be considered is how the value of the cargo to the plaintiff at the place and time of shipment is to be calculated. The defendant's submission was that the value of the cargo to the plaintiff at the time of shipment should be the market value at the load port between 19 and 21 January 2004. The plaintiff disagreed on the basis that the original laycan in the charter was between 27 December 2003 and 4 January 2004 and the defendant had breached the charter by failing to meet the original laycan. When the plaintiff extended the time for laycan to 15 January 2004, it did not tell the defendant that it was waiving its right to damages for the breach. Thus the original time of shipment had to be used for the calculation of damages rather than the extended time of shipment. It contended that its contracts with Indomas would evidence the market price of the cargo at the time of the original laycan. I am not sure that I agree with the plaintiff's argument because if the date of the original laycan were to be taken as the date for measuring the value of the goods on shipment, then one would also have to calculate the loading and voyage time from that date to ascertain the date when the goods ought to have been delivered to obtain the second price to determine damages. As I have found mid February to be the date when the goods ought to have

been delivered, I cannot accept the laycan of 27 December 2003 to 4 January 2004 as the time for ascertaining the value on shipment.

91 I do not agree, either, with the defendant's argument that the shipment value should be ascertained as at 19 to 21 January 2004. This is because the consequence of the non-shipment was not that the plaintiff still had cargo which it could sell to another third party, but that its seller Indomas cancelled its contract with the plaintiff so that the plaintiff lost the benefit of the agreed contractual purchase price for that 12,000 tonnes. I therefore agree with the plaintiff, albeit on a different ground, that the value of the cargo as at the time and place of shipment should be calculated on the basis of the contract price between the defendant and Indomas.

92 The next issue relates to the plaintiff's claim referred to in [80(c)] above to recover as damages the extra amounts that it paid to Pacoil and Pamin as costs of the extra expenses incurred by reason of the delay in the shipment of the cargoes supplied by these two suppliers. These sums amount to US$209,990.83 for Pamin and MYR$558,467.31 for Pacoil. The principle on which these claims were made is the alternative measure of damages which I have cited in [81] above.

93 Dealing first with the Pamin amount, the plaintiff submitted that the computation of the claim made by Pamin was purely mathematical and based on the PORAM standard terms of contract which were incorporated into Pamin's contract with the plaintiff. Mr Butler, who was a chartering manager in a major parcel tanker shipowner's office for over 20 years, testified that the Palm Oil Refiners Association of Malaysia (PORAM) has rules that regulate the sale and trade of palm oil products. He set out in his affidavit the standard late shipment penalty clause that is found in the PORAM FOB Contract. He also testified that the purpose of this clause is to deal with the damages and compensation that will be payable in the event of delays encountered in the readiness of the ship to load the cargo. Such a provision would standardise the trade and create some degree of certainty about what damages are payable for late shipment and how they are to be arrived at.

94 The amount of US$209,990.83 which the plaintiff paid Pamin was made up of 3 components: penalty charges, interest and storage charges.

95 The penalty charged was based on clause 5 of the PORAM terms. Entitled "Extension of Shipment", it provides for penalty charges calculated at varying rates to be paid by a buyer who asks the shipper for an extension of the shipment date. On 5 January 2004 Pamin informed the plaintiff that it would be charging it a penalty of 1.5% of the contract price should the vessel call after 8 January 2004. Pamin also stated that if the vessel was delayed beyond 8 January 2004, it would charge the plaintiff an additional penalty of 1.5% over and above the first penalty. Subsequently on 27 January 2004, Pamin informed the plaintiff that because the shipment was slipping into another month, it was going to charge the plaintiff an additional penalty of 1.5% and if loading was not completed by 7 February 2004, there would be another additional penalty of 1.5%. On 11 February 2004, Pamin stated that as the *Chembulk Barcelona* had completed loading on 9 February 2004, the penalty would be compounded to 1.5% + 1.5% for January 2004 and 1.5% + 1.5% for February 2004 plus interest for one month at 18% per annum. This communication was followed by Pamin's debit notes which reflected penalty of US$39,562.50 for the first eight days in January 2004, penalty of US$40,155.95 for a further eight days in January 2004, penalty of US$40,758.92 for the first eight days of February 2004 and penalty of US$41,369.65 for the further delay after 8 February 2004. The plaintiff contended that it had paid Pamin all the amounts charged against it as penalty and should be allowed to recover the same from the defendant.

96 The defendant argued that the plaintiff was not entitled to recover the penalty paid for two reasons. The first was that this alleged loss arose only from the delay of the *Asia Star* and not the

breach for which the defendant was found liable ie its failure to provide a seaworthy vessel with suitable cargo tanks. The plaintiff had agreed to extend the laycan to 15 January 2004 at the defendant's request and therefore the delay of the *Asia Star* was not treated as a breach. The plaintiff agreed to the extension of the laycan knowing the shipment period of the Pamin contract and therefore any additional charges imposed by Pamin in respect of the period up to 15 January 2004 was not caused by the defendant and such loss cannot be visited on it. I accept this argument in respect of loss incurred before 15 January 2004. I do not accept it in respect of loss incurred when the vessel turned out to be unseaworthy. The defendant is responsible for loss sustained after 19 January 2004.

97 The second argument was that Clause 5 of the PORAM terms does not prescribe the penalty charges beyond eight days. The defendant said that in the present case, the first eight days would have been from 22 January to 31 January 2004. The computation started unjustifiably from 1 January 2004 and there was also no basis for adding another 1.5% to the contract price after the first eight days. Further, the parties did not appear to have agreed on the amount of penalty charges beyond January 2004. It was only Pamin who imposed such charges unilaterally without contractual basis.

98 Clause 5 of the PORAM terms reads as follows:

> At the request of Buyer, the period of shipment shall be extended by an additional period not exceeding eight(8) calendar days provided notice is given to Seller of his intention to claim such extension on or before the last shipment day of the contract period. Buyer shall provide satisfactory evidence that such delayed vessel was originally booked with layday/cancelling within the original contract period.
>
> For such late shipment, Buyer shall pay a penalty to Seller for late presentation of vessel as follows:
>
> > 1½% for 1,2, 3, or 4 days
> >
> > 1% for 5 or 6 days
> >
> > 1½% for 7 or 8 days
>
> Should Buyer claim the Extension of Shipment Clause and the vessel fails to complete loading within such eight (8) calendar days, the original contract period shall be deemed to have been extended by eight (8) calendar days and the contract price increased by 1½%. On the determination of penalty, the extended day shall be on the basis of completion of loading.
>
> … Upon the expiry of extended period without vessel being alongside the berth, Buyer is deemed to be in default of the contract.

99 Construing that clause as best as I can, it appears to me that, assuming the period of shipment was to start on 15 January 2004 as contemplated by the extended laycan requested by the defendant, under its contract with Pamin the plaintiff was liable to pay up to 1½% of the purchase price as penalty if the plaintiff did not present the vessel for loading within seven to eight days of the extended shipment period. Additionally even if the ship was presented within those seven to eight days, if loading was not completed within the eight day period the contract price would be increased by a further 1½%. In this case the vessel was not presented by 23 January 2004 (ie within eight days of 15 January 2004) and loading was not completed by that date. Accordingly under its contract with Pamin, I consider that the plaintiff would have been liable to pay Pamin a total penalty of 3% of

the contract price. That is all, however, as the clause does not provide for additional penalties when the shipment period slips from one month into another and there was no agreement between Pamin and the plaintiff as to the extra charges prior to completion of loading on *Chembulk Barcelona* . It was only after all the cargo was on that vessel that Pamin sent its debit notes for penalty interest to the plaintiff. The plaintiff could then have taken issue with the fact that it was charged four sets of penalty interest when, at the most, the contract appeared to contemplate not more than two sets of such charges being incurred. The fact that the plaintiff did not argue with Pamin but paid all the charges does not entitle it to full recovery of the same from the defendant. The plaintiff is only entitled to recover 3% of its contract price with Pamin as an expense incurred by reason of the delayed shipment occasioned by the unsuitability of the *Asia Star* since that was the amount it was contractually obliged to pay.

100 The next component of the payment to Pamin was the interest charged. It is not clear on what basis Pamin claimed interest on the contract price. By clause 3(iii) of the PORAM terms, if the originally nominated vessel is delayed (within the contracted period) beyond the originally expected time of readiness to load by more than 72 hours, the buyer has to bear all additional costs incurred including interest. This clause cannot have been the basis of Pamin's claim since the delay fell outside the contracted period. Then the other possible clause is clause 13 which reads:

> "If payment is not made by due date, interest shall be payable at the rate of 1½ % per month."

In its debit note dated 12 February 2004 Pamin charged the plaintiff a total sum of USD$19,733.61 being "interest charges @ 18% for one month". This debit note was followed by a letter of 16 February 2004 in which Pamin explained the total charges and the rebates that it had given to the plaintiff at the plaintiff's request. In respect of interest, the total interest payable for the period of 32 days as calculated by Pamin was USD$42,200 before the application of the rebate and the rebate given was about 50%. Going by the rate of 18% used, it would appear that Pamin was relying on clause 13.

101 The payment term of the sales contract between Pamin and the plaintiff was that the full price of the cargo was to be paid in cash against the original shipping documents. Therefore payment was only due upon shipment and presentation of documents. The term "due date" in clause 13 can only refer to the date on which the documents were presented. In this case, the presentation of documents would only have taken place after shipment on the *Chembulk Barcelona* and interest under clause 13 would not accrue before then. Therefore, there was no basis on which before that date Pamin could charge the plaintiff interest for the delay in shipment. Its remedy for the delay was to charge the penalty payable under clause 5. It did this and thus the interest charged was a double claim. The plaintiff should not have paid it and cannot recover it from the defendant.

102 The next component of the amount paid to Pamin was the storage charge. Initially Pamin charged USD$9.00 per metric tonne of cargo for the entire period of the delay in shipment. The defendant had contended that since Pamin bought its oil from other suppliers there should be storage charge claims from those suppliers. The evidence of Mr Ali Sulaiman of Pamin was, however, that Pamin had its own storage tanks and that he had checked the company's records and ascertained that the cargo for the plaintiff had been stored in those tanks. Pamin had given the plaintiff a rebate on the storage claim of USD$24,534.95 which reduced these charges from USD$51,750 to USD$27,215.05. The latter sum translated to a rate of USD$4.73 per metric tonne which the plaintiff submitted was not high compared with the storage charges of Pacoil and the evidence of what those charges generally would be according to the defendant's expert Mr Shah. I accept the plaintiff's contentions and agree that it is entitled to recover the full sum of USD$27,215.05 paid to Pamin in respect of the storage cost. This amount cannot be apportioned as the charge levied was in respect

of the quantity of the cargo and not in respect of how long it remained in the tanks after 15 January 2004.

103 Next is the claim for reimbursement of the amounts paid to Pacoil. Pacoil sent the plaintiff four debit notes on 13 February 2004. The first debit note was for the sum of MYR$213,750 and was in respect of storage charges for palm oil and palm kernel oil. The second debit note was for the sum of MYR$189,736.90 and comprised MYR$91,200 as reprocessing charges, MYR$79,800 for transportation for reprocessing charges and MYR$18,736.90 for shortage of cargo during transportation. The third debit note was for heating charges in the sum of MYR$45,600 and the final debit note was issued in respect of interest charges and was for the total sum of MYR$109,548. On 22 November 2005 the plaintiff sent Pacoil the sum of MYR$558,634.90 in total settlement of all the debit notes.

104 Syed Mohammed Shoaib Sabri from Pacoil testified that the contracts between the plaintiff and Pacoil for the sale of 3000mt of palm oil and 750mt of palm kernel oil were subject to the PORAM terms. The contracts provided for the goods to be shipped from Pasir Gudang between 15 December 2003 and 10 January 2004. The plaintiff had nominated *Asia Star* for shipment of the goods between 1 and 7 January 2004 but when the vessel did not arrive by 9 January 2004, Syed Mohammed put the plaintiff on notice that Pacoil would not be responsible for any deterioration in the quality of the cargo. On 14 January 2004, he further told the plaintiff that Pacoil reserved its rights to charge the plaintiff for the heating and storage charges as well as interest and other costs consequences arising from the delay of the vessel. Pacoil was later informed that the cargo would be shipped by the *Chembulk Barcelona* between 5 and 12 February 2004. Consequently in early February 2004, the plaintiff arranged for the sample testing of the palm oil cargo to determine whether it conformed to PORAM specifications. The test results showed that due to the long period of storage it was no longer in compliance with PORAM specifications. As a result the cargo had to be transported back to Pacoil's factory for reprocessing and heating to bring it back to specification. Syed Mohammed exhibited various documents indicating the tests done, the transportation of the cargo and the re-analysis after processing. Syed Mohammed also informed the plaintiff that all expenses relating to the reprocessing and storage of the cargo together with interest for late payment would be charged. Whilst the plaintiff had requested Pacoil to charge only the minimum charges, Pacoil maintained its claims and kept chasing the plaintiff for settlement until the money was received in November 2005.

105 First, I must hold that Pacoil was not entitled to charge the plaintiff interest at 18% per annum as asserted by Syed Mohammed. That charge was not justified for the reasons I have explained above in relation to a similar charge levied by Pamin. The plaintiff should not have paid it and cannot recover it from the defendant. Pacoil could, however, have charged the plaintiff a penalty of 1½% on the basis that the shipment was delayed by more than eight days. It did not do so, perhaps because the plaintiff had requested it on 12 January 2004 to waive the penalty charges due to the delay. If Pacoil had incurred interest costs as a result of the delay under clause 3 of the PORAM terms, it could have recovered those but there was no proof that it did and its claim was not related to any interest paid to any other party by reason of the delay.

106 As regards the charges for heating, transporting and reprocessing the cargo, as these resulted from the deterioration of the cargo due to long storage, I find that the plaintiff is entitled to recover the same.

107 The final item of Pacoil's claim was the storage charges. The evidence of Syed Mohammed and RKN was that at the relevant time, Pacoil's storage facility was used by the plaintiff to store cargo that it had purchased from Pacoil and that Pacoil charged the plaintiff a fee for the use of its storage facility. The fee would be included in the price of the cargo up to the time that the cargo was supposed to be shipped out but if the cargo remained in the facility beyond the contractual shipment

date then additional storage charges would be levied. RKN confirmed that the plaintiff paid such storage charges because it was aware that Pacoil had incurred costs in setting up a storage terminal and was entitled to recover those costs by charging for the use of the facilities. Further, Pacoil was a separate entity from the plaintiff, although there were connections between the two companies, and the plaintiff had to deal with Pacoil as a third party. He confirmed that what the plaintiff paid for was what it had used and it did not pay the cost of the entire terminal regardless of usage. Pacoil bore the cost of maintaining the terminal and of storing its own cargo there. I accept the evidence and hold that the plaintiff is entitled to recover the storage charges.

108 The defendant had submitted that because Pacoil had not produced stock reports to cover the complete period by which shipment had been delayed, the plaintiff had not proved that its cargo had been in Pacoil's storage terminal throughout that period. I reject that submission. The evidence was that at the material time Pacoil was selling cargo exclusively to the plaintiff and therefore any cargo that it was holding in its terminal for a purchaser was being held for the plaintiff. The stock reports showed when the cargo came into the tanks and when it was moved out of the tanks for reprocessing and then put back into the tanks to await shipment. Pacoil's evidence was that this cargo was held for the plaintiff throughout. There was some gap in the documentation but it was only for a few days and I do not consider the gap to be significant.

Conclusion

109 For the reasons I have given above, the plaintiff's appeal must be allowed and the defendant's appeal must be dismissed. I set aside the order made by the Assistant Registrar as the damages payable by the defendant to the plaintiff are not to be calculated according to the difference in freight costs between the *Asia Star* and the *Chembulk Barcelona* but according to the ordinary measure of damages applicable in a non-shipment case. My findings above have stated the bases of the computation in this case and I will hear the parties on the exact computation since the plaintiff did not include any calculations on this basis in its submissions. As for costs, the plaintiff is entitled to the costs of the assessment and of the appeals up to this point. As the necessity for the next hearing is dictated mainly by the plaintiff's omission, I will consider at that hearing who the costs of the same are to be paid by. A word of caution to the parties, in particular the defendant: only brief submissions on the figures are required in order to assist me to work out the quantum of the final award to be made in favour of the plaintiff.