IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 64

Civil Appeal No 131 of 2016

Between

TOPTIP HOLDING PTE LTD

… *Appellant*

And

MERCURIA ENERGY
TRADING PTE LTD

… *Respondent*

Civil Appeal No 132 of 2016

Between

MERCURIA ENERGY
TRADING PTE LTD

… *Appellant*

And

TOPTIP HOLDING PTE LTD

… *Respondent*

JUDGMENT

[Admiralty and Shipping] — [Carriage of goods by sea] — [Voyage charterparties]

[Contract] — [Formation]

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v
Mercuria Energy Trading Pte Ltd and another appeal

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Court of Appeal — Civil Appeals No 131 and 132 of 2016
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
26 July 2017

23 November 2017 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 The present appeals are cross-appeals by Toptip Holding Pte Ltd ("Toptip") and Mercuria Energy Trading Pte Ltd ("Mercuria"). They arise out of the decision of the trial judge (the "Judge") that negotiations carried on between these parties in October 2014 for the charter of the vessel *m.v. Pan Gold* (the "Vessel") never achieved completion and thus no charterparty was concluded. This was a decision in favour of Mercuria which had acted as disponent owner of the Vessel in the negotiations while Toptip had intended to charter the Vessel from Mercuria to carry a cargo of iron ore pellets. Shortly after Mercuria's denial of the existence of the charter, Toptip entered into another charterparty with a different disponent owner, albeit this was again in respect of the Vessel. The new charter was at a higher rate than that used during the discussions with Mercuria. The parties' dispute centres on the construction

of their e-mail correspondence and whether the presence of a "subject to review" clause had prevented the formation of a contract.

2 The Judge dismissed Toptip's claim against Mercuria for damages for breach of contract on the basis that no valid charterparty had been formed and Toptip's appeal (in Civil Appeal No 131 of 2016 ("CA 131")) is against this finding. Mercuria, despite having won the case at trial, appealed (in Civil Appeal No 132 of 2016 ("CA 132")) against aspects of the Judge's decision that were not in its favour. After disposing of the main issue, the Judge had considered whether the charterparty, if formed, would have been void for uncertainty and concluded that it would not have been. He also opined that if a valid charterparty existed, Mercuria had been in repudiatory breach of contract. The reasons for the Judge's decision are given in his judgment, *viz*, *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2016] SGHC 173 dated 1 September 2016 (the "Judgment").

The factual background

3 This account of the background facts is largely derived from the Judgment. Toptip is a Singapore company trading in bulk commodities, including iron ore. Mercuria is the Singapore subsidiary of a global energy and commodity group engaged, *inter alia*, in the chartering out of vessels to carry dry cargo. Mercuria does not own any vessels itself and negotiated with Toptip on the basis that it would be the disponent owner of the Vessel if the charterparty was concluded.

4 On 10 October 2014, Toptip entered into a contract with Samarco Mineracao SA ("Samarco") (the "Sale Contract") to buy approximately 170,000

metric tonnes of iron ore pellets (the "cargo") from Samarco to be shipped from the port of Ponta Ubu in Brazil to ports in China. Under the Sale Contract, the "laycan" for the shipment was stipulated as being between 21 and 30 November 2014. Further, Toptip had to arrange for a vessel to transport the cargo but Samarco had the right to reject Toptip's nominated vessel if it was not suitable. Toptip therefore contacted Mr Shu Changhong ("Mr Shu"), a ship chartering broker, and asked him to find a vessel for it. Throughout the communications that followed, Mr Shu acted on Toptip's behalf and Toptip never corresponded directly with Mercuria.

5 Toptip set out its requirements for a carrying vessel and the charter contract in its e-mail of 13 October 2014 (the "Enquiry") to Mr Shu. Among these were clauses relating to details of the cargo, the expected laycan, the ports for loading and discharge, the age and other features of the carrying vessel, and the governing law and forum for dispute resolution. The clauses pertaining to freight and demurrage rates were left blank to be filled in by the prospective ship-owner. Some of the terms of the Sale Contract (the "Samarco terms") were also attached to the Enquiry pursuant to a term reading: "OWNRS SHALL COMPLY ALL SHIPPING/LOADING TERMS AS ATTACHED". One of these terms was a stipulation that vessel nominations had to be made at least ten days prior to the commencement of the shipping laydays and would be subject to Samarco's acceptance. The last clause of the Enquiry read: "OTHERWISE AS PER VALE CP AS ATTACHED WITH LOGICAL AMENDMENT". This clause was a proposal by Toptip that the detailed terms of the charterparty be based on the *pro forma* charterparty of Vale SA, a large iron ore producer (the "Vale CP").

6 Mr Shu forwarded the Enquiry to Mr Sanjeev Gupta ("Mr Gupta"), chartering manager of Mercuria, on the same day, stating at the end of his e-mail: "Invite owners best freight for fixing" and asking for a response by 5pm on 14 October 2014. It was understood that Mercuria would, if interested, offer a freight rate for the carriage on a vessel that it would charter.

7 Shortly before 6pm on 14 October 2014, Mr Sanghwa Lee ("Mr Lee"), Mercuria's Capesize chartering manager, responded to Mr Shu. His e-mail (the "Bid") began with these words: "Mercuria would like to offer firm bss following terms". In chartering language, the short form "firm bss" meant "firm basis". The Bid substantially repeated the terms set out in the Enquiry. Both the freight rate and the demurrage rate were specified with the freight rate being stipulated at US$18.40 per metric tonne. The only other difference between the Bid and the Enquiry was in the last clause; Mercuria amended the clause to state the following: "OTHERWISE SUB REVIEW OF CHTRS PFMA CP WITH LOGICAL AMENDMENT" (the "Subject Review clause"). Written out in full the Subject Review clause would read: "Otherwise subject review of charterers' *pro forma* charterparty with logical amendment". The Bid did not nominate any specific vessel for consideration as the conveying vessel.

8 Mr Shu immediately forwarded the Bid to Mr Liu Bin ("Mr Liu") of Toptip from whom he received, shortly afterwards, the response: "We confirm to accept your bid". Mr Shu then contacted Mr Lee and Mr Gupta stating, "We confirm the acceptance of your offer. Thanks for your business!"

9 On 16 October 2014, Mr Shu asked Mr Lee for "the working CP in word format". On the same day, Mr Lee replied that they "[did not] have working CP in word format" and that they were "waiting for chtrs PFMA CP for [their]

review". Soon after, Mr Gupta, who was copied in the entire exchange, sent an e-mail to his colleague Mr Lee as well as to Mr Shu, asking two questions: "Do we have their Australian cargo CP? Can we use that as base?" Mr Lee then e-mailed Mr Shu a form of charterparty stating simply: "Please find attached CP in word format". The attached document, which we shall term the "Australian CP", was the form of a charterparty which had been used by Mercuria and Toptip a few months earlier for the carriage of similar cargo on a ship which Mercuria had chartered out to Toptip.

10 Thereafter, Mr Shu and his employee prepared a draft charterparty using the Australian CP format as a base and amending it to reflect the main terms in the Bid (the "Draft CP"). They dated the Draft CP 14 October 2014 and, on 24 October 2014, sent it to Toptip and Mercuria for comments.

11 In the meantime, the parties corresponded regarding the nomination of the carrying vessel. On 23 October 2014, Mercuria nominated the Vessel and asked for the cancelling date (the last day of the laycan) to be pushed back from 30 November 2014 to 1 December 2014 as it was "targeting [the] back end of [the] laycan". This nomination was conveyed to Samarco as required. As it turned out, Samarco rejected the Vessel due to concerns over the financial health of Pan Ocean Co Ltd ("Pan Ocean"), the Vessel's registered owner, based on a report by Rightship, a ship-vetting company. This rejection was communicated to Mercuria via Mr Shu on the morning of 24 October 2014.

12 Later that day, at 7.56pm, Mercuria replied to Mr Shu, passing on Pan Ocean's request to "persuade" Samarco to accept the Vessel and to inform the latter that the Vessel had been given five stars by Rightship. Mr Shu responded that Samarco would maintain its rejection unless Rightship's reservation was

removed. The next day, 25 October 2014, Mercuria asked Mr Shu for Samarco's contact details. These were provided by Mr Shu on the morning of 27 October 2014. That afternoon, Mr Shu e-mailed Mercuria on an amendment that needed to be made to the Draft CP with respect to the dispute resolution clause.

13 On 29 October 2014, Mr Shu forwarded an e-mail to Mercuria. The e-mail contained a message from Samarco stating that even though Samarco did not receive any call from Mercuria, it was of the view that the Vessel was "OK". This was after Samarco had obtained a new vetting analysis from Rightship. Later that day, however, Mercuria replied to Mr Shu stating: "Owrs cannot accept chtrs cp after review, so subject failed on cp review. Owrs cannot accept chtrs cp for this trade." The meaning of this e-mail was that Mercuria was rejecting the business on the basis that the Draft CP was unacceptable but without assigning any reason for its unacceptability. Toptip accepted this rejection on 5 November 2014 and sent out a message stating it was terminating the charterparty.

14 Toptip therefore had to secure a substitute charter contract (the "Substitute Charter") for the carriage of the cargo. On or about 8 November 2014, it chartered the Vessel (*ie*, *m.v. Pan Gold*) from another company, RGL Shipping Pte Ltd ("RGL"), but at the higher freight rate of US$25.25 per metric tonne for approximately 160,000 metric tonnes of cargo. Toptip claimed that the terms of the Substitute Charter were contained in a "recap" e-mail dated 7 November 2014 (the "Recap E-mail") which was sent to both Toptip's Mr Liu and to RGL. It then commenced proceedings against Mercuria to recover the difference between the freight it would have paid Mercuria and the freight that it actually had to pay RGL.

The decision below

15 The Judge held that the question of whether a contract for the charter of the Vessel was concluded depended on the nature of the Subject Review clause. The key question was whether the Subject Review clause indicated that the parties intended to defer legal relations until full details were agreed or whether they had agreed to be immediately bound to perform on the main terms as set out in the Bid despite the details being subject to review of the *pro forma* charterparty to be furnished.

16 In this regard, the Judge found that the Subject Review clause, construed in its full context, indicated that on 14 October 2014 Mercuria did *not* have the unequivocal intention to be immediately bound by the terms of the Bid. The Judge was persuaded by Mr Gupta's evidence that the freight rate which Mercuria offered was conditional on the acceptability of the subsidiary terms in the *pro forma* charterparty that Toptip was to provide. According to Mr Gupta, the subsidiary terms under the Vale CP were too onerous; Mercuria was only willing to enter into a binding charterparty if the terms in the charterer's *pro forma* were favourable and allowed it to perform the contract at the lower freight rate of US$18.40 per metric tonne as offered in the Bid. This showed that not any *pro forma* charterparty would suffice.

17 Next, the Judge considered whether Mercuria had lifted or waived the Subject Review clause by providing the Australian CP. The concept of "lifting" applied if the Subject Review clause was considered to be a condition subsequent which needed to be fulfilled to prevent the contract from coming to an end. The concept of "waiver" applied if the clause was a condition precedent to the conclusion of a binding contract. The Judge held that this distinction did

not matter because Toptip's case was that Mercuria, by providing the Australian CP, had accepted that there was no longer any need for: (a) Toptip to provide Mercuria with its *pro forma* charterparty with logical amendments; or (b) Mercuria to then review this document. If so, the parties would be bound by the terms of the Bid regardless of whether the Subject Review clause was a condition subsequent or a condition precedent to contract formation. If not, Toptip's claim failed because it accepted that Mercuria had the right to withdraw from the contract if the condition subsequent had not been fulfilled.

18 The Judge held that Mercuria's provision of the Australian CP to Mr Shu did not release Toptip from its obligation to prepare a draft charterparty, nor did it waive Mercuria's right to review the draft. The Subject Review clause could only be lifted or waived by clear and unequivocal words or conduct. However, there was insufficient evidence to make such a finding in this case.

19 The Judge held that Mercuria's conduct after 14 October 2014 did not impact his finding that no charterparty was concluded between the parties. He held that Mercuria's nomination of the Vessel on 23 October 2014 and its contemporaneous request for an extension of the cancelling date did not lead to a clear inference that the parties were performing a contract which had already been concluded prior to that date. That was because the Vessel was nominated in advance of the Draft CP which was still being prepared by Toptip for Mercuria's review. At that time, the laycan which the parties were working towards was fast approaching. The extension request was consequential on the nomination of the Vessel.

20 Further, at that time, Mercuria had not yet chartered the Vessel from its owners and was therefore not in a position to charter it *out* to Toptip. This

supported Mercuria's submission that the nomination of the Vessel was made *in anticipation* of a concluded charterparty. The Judge also found it significant that after Toptip rejected the Vessel, Mercuria decided to drop the back-to-back charterparty with the owner which was also on a "subject" basis then. These facts showed that Mercuria had all along proceeded on the basis that no charterparty was concluded with Toptip on 14 October 2014.

21 Having found that there was no concluded charterparty, the Judge was of the view that he need not consider Mercuria's alternative submission that the charterparty, even if it was concluded, was void for uncertainty. Nonetheless, he made three brief observations on the issue. First, the defence of uncertainty was not available as it had not been pleaded by Mercuria. Second, Mr Gupta's failure to attach the Samarco terms to the Bid carried no real significance. The Judge stated that if necessary, he would have found that these terms, which contained conditions relating to, *inter alia*, the nomination of the vessel, the notices of arrival and readiness, loading and laytime calculation, demurrage and dispatch, were incorporated into the Bid. Finally, the Judge rejected Mercuria's submission that the phrase "with logical amendment" gave rise to substantial uncertainty. That was because case law had shown that that phrase, on its own, would not preclude a contract from being formed and that the "logical" amendments could be determined objectively.

22 The Judge also proceeded to consider whether Mercuria's rejection of the Draft CP on 29 October 2014 was a repudiatory breach of contract. Toptip argued that Mercuria's right of review under the Subject Review clause had to be exercised reasonably and in good faith. It therefore argued that Mercuria was in repudiatory breach when it rejected the Draft CP on 29 October 2014 without

giving any reason or basis for the rejection. The Judge disagreed. Toptip's case was that there was an *implied term* that Mercuria was obliged to identify the terms it found unacceptable and that the parties would co-operate in carrying out the review. However, the implied term, which was a term implied "in fact", was not pleaded by Mercuria. Further, the submission presupposed that there was a concluded charterparty. Because there was none and parties were still in negotiation, Mercuria had the unqualified right to either reject or accept any draft charterparty proposed by Toptip on 29 October 2014.

23 Turning to the issue of damages, the Judge was of the view, albeit *obiter*, that Toptip had proved its case as to the amount of damages it had sustained. While there were some evidential gaps on the quantum of damages, these were not insurmountable.

24 The first evidential issue arose because Mr Liu disavowed the Recap E-mail dated 7 November 2014 which contained the terms of the Substitute Charter with RGL. He insisted there was another document dated 8 November 2014 that was not tendered as evidence. Although this caused some difficulty, the Judge was convinced by all the other available evidence that Toptip had proved its case as to the terms and freight rate of the Substitute Charter.

25 Next, while Toptip's expert evidence on the market freight rate at the time when the Substitute Charter was entered into was incomplete, this was not fatal to its claim. Its expert witness, Karina Albers ("Ms Albers"), gave evidence that the freight rate of US$25.25 was reasonable based on data from the Baltic Exchange on Baltic Capsize Index routes and the Baltic Exchange fixtures lists on comparable charterparties concluded between 5 and 10 November 2014. However, this underlying data was not annexed to her expert report or tendered

as evidence by Toptip. The Judge was, nevertheless, of the view that her evidence was reliable in view of her expertise and the lack of contrary evidence from Mercuria.

26 The Judge ordered costs to be fixed at $175,000 plus reasonable disbursements to be taxed if not agreed to be paid by Toptip to Mercuria.

27 We now turn to the parties' cases in the cross-appeals.

The parties' cases in CA 131

Toptip's case

28 CA 131 is Toptip's appeal. It makes two broad submissions. First, that a valid charterparty was concluded between itself and Mercuria. Second, that Mercuria is in repudiatory breach of the charterparty.

29 Toptip argues that a valid contract was formed as there was a clear offer and a clear acceptance of the main terms of the charterparty on 14 October 2014. Further, Mercuria's subsequent conduct was consistent with the performance of its obligations under a concluded charterparty. Toptip also submits that on 14 October 2014, the parties intended to be bound to perform the charterparty regardless of the Subject Review clause. Further, according to Toptip, Mercuria had lifted or waived any requirement for Toptip to submit a *pro forma* charterparty.

30 Toptip argues that it would suffer injustice if the Judge's decision were upheld because Mercuria should not be entitled to benefit from rejecting the Bid in order to enter into a more profitable charter. Toptip claims that Mercuria had

time chartered the Vessel from Pan Ocean and in turn voyage chartered it to Sinom International Shipping Limited ("Sinom"). Subsequently, Sinom did a vessel swap with RGL, which then chartered the Vessel back to Toptip. This shows that Mercuria was in fact involved, albeit indirectly, in the performance of the Substitute Charter. Toptip argues that Mercuria should not be allowed to profit in this manner. We pause at this juncture to state that we have little hesitation in rejecting this argument. The parties, who were both experienced commercial entities, were negotiating at arm's length and on an equal basis. There is no allegation of deceptive conduct on Mercuria's part. That being the case, if no contract was formed by Toptip's acceptance of the Bid, Mercuria was free to disavow the intended relationship and pursue its own economic interests without regard to Toptip's position. There would be nothing unjust to Toptip when it did so.

31 Toptip further submits that Mercuria was in repudiatory breach of the charterparty when it rejected the same on 29 October 2014. Toptip therefore submits that it is entitled to damages in the sum of US$1,151,546.65, being the difference between the freight rate proposed by Mercuria and that which applied to the Substitute Charter.

Mercuria's case

32 In response, Mercuria's case in CA 131 is that by reason of the Subject Review clause, the parties did not enter into a contract on 14 October 2014. Mercuria's willingness to enter into the contract depended on a review of Toptip's *pro forma* charterparty. Mercuria ultimately rejected this *pro forma* on 29 October 2014. Therefore, Mercuria was deciding not to contract with Toptip rather than repudiating an existing contract.

The parties' cases in CA 132

Mercuria's case

33 Mercuria's case in CA 132 is, to a large extent, a defensive appeal lodged in case Toptip succeeds in persuading us that a binding charterparty was entered into on 14 October 2014. It makes two broad submissions as to why, even in that event, Toptip's claim should not be allowed. First, it says that any charterparty based on the Bid would be void for uncertainty and that this defence has been sufficiently pleaded. In this regard, it argues that the phrase "logical amendment" in the Subject Review clause is itself uncertain because reasonable parties may not agree on what is logical and there is no objective or reasonable method for ascertaining what is a logical amendment.

34 Secondly, it says that Toptip has not proven the alleged damages claimed. In particular, Mercuria argues that the Judge should not have found that the Substitute Charter had a freight rate of US$25.25 per metric tonne. Further, Ms Albers' evidence was lacking in that it did not contain the underlying data which she used to determine the prevailing market rate at the time the Substitute Charter was entered into.

35 There is another aspect of Mercuria's appeal in CA 132. That is premised on the decision of the Judge being upheld. In that event, Mercuria argues that the Judge should have ordered costs of the trial to be taxed instead of fixing costs. Mercuria submits that this was not the kind of simple case with minimal evidence and written submissions that would make fixing costs appropriate.

Toptip's case

36 In response to Mercuria's submissions in CA 132, Toptip submits that the defence of uncertainty should have been pleaded by Mercuria and that even if it was not necessary, the defence should fail because the contract was not void for uncertainty. It argues that the phrase "logical amendment" is not uncertain and would simply mean that the *pro forma* charterparty had to be amended so that its terms followed logically and inevitably from the essential terms already contained in the Bid.

37 Toptip further argues that it has proven its damages. As the Judge held, RGL's representative, Mr Jin Yan ("Mr Jin"), who was personally involved in negotiating the Substitute Charter, had corroborated Toptip's case that the freight rate for the Substitute Charter was US$25.25 per metric tonne. Mr Jin also testified that there was no other document containing the terms of the Substitute Charter. On the issue of Ms Albers' evidence, Toptip submits, among other things, that her evidence is the best evidence before the court of the freight market rates during the relevant period.

38 Finally, Toptip argues there is no reason to disturb the Judge's decision to fix costs at $175,000. Fixing costs is entirely appropriate because the issues in the present case were not complex and were largely factual in nature.

The issues

39 The following issues arise from the appeals taken together:

(a) Was there a contract between the parties?

(b) If a contract was concluded, did it contain uncertain terms so as to render it unenforceable?

(c) If the contract was enforceable, had Mercuria repudiated the same?

(d) If so, has Toptip proved its losses so as to be entitled to an award of damages?

(e) If Toptip fails in its appeal, was the order for costs made in Mercuria's favour correct?

Our decision

Did the parties here intend to be immediately bound?

A contract can be formed though not all the terms have been settled

40 The applicable legal principles are not in dispute. It is established law that a contract may be formed despite the fact that some terms have not yet been finalised. This occurs when an objective appraisal of the conduct and language of the negotiating parties leads to the conclusion that, having agreed on the essential terms, though not all the terms, they nevertheless intended to be bound immediately. Mercuria accepts that to determine if this is so the court must look at all the circumstances of the case, not just the correspondence that passed between the parties but also their conduct.

41 As every law student knows, when considering whether a contract has been formed the first thing to look at is whether one party has made an offer which is capable of an unconditional acceptance and, if so, whether the other party has accepted it, also unconditionally. If so, a binding contract would have

come into existence. This, however, is not the end of the matter because a contract can still be formed if the circumstances show that the main terms of the offer have been accepted and the parties agreed to be bound forthwith although some minor terms remain to be worked out later. To complicate things, there is also the situation that results when parties are agreed on everything but one party puts in a reservation like "subject to contract" and intends by this to mean that he will not be contractually bound unless a formal contract is signed by both. But even in that case the factual matrix may be such that the court is able to find that as a matter of substance the parties had intended to be immediately bound without the necessity of signing the formal contract document.

Objective examination of the Bid

42 The present case is not a "subject to contract" case. Mercuria's position was that it did not anticipate or require a formally signed contract. It accepted that the contract could be formed by the correspondence alone though it contended that this had not happened in the circumstances. The essential reason Mercuria says that no charter contract was formed is that the Bid was, it contends, never an offer capable of acceptance. It was only an invitation to treat and therefore, from 14 October 2014 right up to 29 October 2014, parties were only in a process of negotiation which had not resulted in a binding consensus. Until Mercuria accepted the *pro forma* charterparty with logical amendments provided by Toptip there could be no binding contract.

43 Toptip on the other hand contends that there was a clear offer capable of acceptance so as to constitute an immediately binding contract. The terms of the Bid provided sufficient certainty and completeness for a valid and binding charterparty to be concluded and they were accepted as such. As this court stated

in *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440 (at [30]), "[a]n offer … is an expression of willingness to contract made with the intention (actual or apparent) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed". Toptip says that the Bid satisfied this definition.

44 The problem involves an objective consideration of what Mercuria offered and what an objective understanding of the Bid would be. We therefore have to examine the Bid.

45 First, it must be noted that the Bid was sent out in response to Mr Shu's e-mail in which he asked Mercuria to check Toptip's "firm enquiry and reply" by 5pm the next day. The terms of the Enquiry itself indicated that the laycan for the shipment was between 20 and 30 November 2014, about six weeks hence, and that any ship nominated for the carriage would have to be confirmed by both the charterer and the shipper. It would have been clear to Mercuria therefore that Toptip was urgently looking for an offer to carry this cargo and, as usual in cases like this, the sooner something was in place the better.

46 As requested, the next day, albeit shortly after Mr Shu's time limit had expired, Mercuria sent its reply. This started: "Mercuria would like *to offer firm bss* following terms" [emphasis added]. Objectively considered, such language was apparently introducing an offer. The terms then followed. These were practically all the same as those set out in the Enquiry and dealt with the following matters: identity of charterers, nomination of vessel, suitability of vessel for loading in Brazil and discharging in China, responsibility for dead freight at loading port, class and age of vessel, cargo and manner of its loading, stowage and discharge, the loading and discharge ports, the laycan, other

shipping particulars such as the notice of readiness and the laytime, the freight and demurrage rates and how freight was to be paid, discharge of cargo if bills of lading were not available, taxes, agency fees, brokers' commission, and the governing law and dispute resolution terms. As has been previously stated, the freight and demurrage rates which had been left blank in the Enquiry were completed by Mercuria in the Bid. The very last term after the dispute resolution clause was the Subject Review clause. It should be noted that in court Mr Gupta agreed that the terms in the Bid were main terms to which he had no objections which in context meant that those were terms on which Mercuria was prepared to carry the cargo. Mr Gupta was, however, quick to add that he could stand by these main terms provided the detailed charterparty was to his satisfaction.

47 Within an hour of the Bid being sent out, Mr Shu replied on behalf of Toptip: "We confirm acceptance of your *offer*. Thanks for your business!" [emphasis added]. At that stage Mr Shu, an experienced chartering broker, obviously had no difficulty in reading the Bid as an offer and accepting it as such on Toptip's instructions. At that time, Mercuria did not respond to say the Bid was not an offer and should instead be regarded as an invitation to negotiate further. It kept quiet. When Mr Gupta was asked in court what Mr Shu meant by "[w]e confirm acceptance of your offer", he was evasive saying that it was something only Mr Shu could explain. When it was put to him that the sentence meant that Toptip through Mr Shu was accepting Mercuria's offer on 14 October 2014, he first said he did not understand the question but when pressed said it meant Mr Shu knew Mr Gupta would stand by the freight rate in the Bid provided he agreed with the terms and conditions that were to be put out subsequently.

48 Thus far, the terms contained in the Bid were clear and certain and referred to all the essential matters that were needed for a workable charter contract. If the Bid had ended there, objectively there could be no doubt that it was intended as an offer. Mercuria says not only that one cannot stop there (which we accept) but that the final term in the Bid was one which destroyed its apparent character as an offer.

49 In the nature of ship-chartering transactions, parties generally do not agree on only the essential terms (usually of the character of the terms of the Bid) but also include various other provisions to allocate responsibility with regard to situations that might arise in the course of carrying out the charter contract. A number of standard charter contracts containing these nitty-gritty or boiler-plate provisions have been developed over the years and these are usually resorted to for convenience of negotiation. In this case, the Enquiry proposed that the Vale CP be used for the boiler-plate terms. Mercuria deliberately did not repeat that term in the Bid. Mr Gupta's explanation was that the terms of the Vale CP were onerous and would not have allowed Mercuria to maintain the offered freight rate of US$18.40 per metric tonne. In place of the Vale CP, it proposed the details be as contained in the charterers' *pro forma* charterparty with logical amendments. This proposal allegedly changed the whole character of the Bid and made it an invitation to treat because the clause started with the words "OTHERWISE SUB REVIEW", meaning "otherwise subject review". These words meant that until the review had taken place and been satisfactory no contract was formed or in Mr Gupta's rather more colourful language: "When I say charterer's *pro forma*, I'm telling them, 'This one, I give you 18.4. But you make a charterparty which I like.'"

50 Various authorities in the specific context of charterparties indicate that when negotiations include clauses like "subject to details", it is usually the case that a binding contract will not be formed until there is full agreement on the details (see, for example, *Star Steamship Society v Beogradska Plovidba (The "Junior K")* [1988] 2 Lloyd's Rep 583). The same may be true for a "subject review" clause – a clause which specifies that either or both parties' review of the final terms is a pre-condition to contract formation. It was, however, recognised in the case of *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd (The "Pacific Champ")* [2013] 2 Lloyd's Rep 320 ("*The Pacific Champ*") that a binding contract can be formed notwithstanding the presence of such a clause. It is all a question of the context and whether the parties intended to defer legal relations until full details were agreed.

51 What factors in the present context would indicate that the Subject Review clause was not intended to be an obstacle to a binding contract? First, the Bid expressly stated that it was an offer and not only that but that it was an offer on a firm basis. Secondly, when Mr Shu, who was an experienced shipbroker and well versed in charterparty negotiations and language, replied to confirm acceptance of what he expressly described as an "offer", Mercuria did not respond to clarify that this was not an offer and no contract could be concluded by accepting it. Mr Gupta's explanation that what Mr Shu meant only Mr Shu would understand was a feeble attempt to escape the objective implication of Mr Shu's language. Indeed, Mr Gupta was highly evasive during this part of his cross-examination and, as an experienced manager in the chartering business himself, his prevarication indicates quite the opposite of what he was intending to convey: Mercuria must have fully comprehended what Mr Shu meant and the attitude that he took. Yet it remained silent. As pointed

out in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 (at [51]), it is always a question of fact whether silent inactivity after an offer is made is tantamount to an acceptance. The same must apply to silence after an apparent offer is accepted. In view of the fact that Mr Shu's acceptance was not ambiguous, Mercuria's silence was an indicator that the Bid had not been misunderstood. This indication was bolstered by Mercuria's subsequent conduct, a matter we consider below.

52 Returning to the factors indicating the Bid to be an offer, thirdly, there was Mr Gupta's admission, as pointed out earlier, that he had no objection to the main terms. Fourthly, a relevant consideration in assessing the Bid as being capable of immediate acceptance is that the background facts did not indicate any reason for a reservation to be made by Mercuria. Mr Gupta asserted in court that he had offered Toptip a rate that was below the market rate and therefore the detailed terms were important to him. He said that if he had done the business on the Vale CP terms, the rate of US$18.40 would not have been possible and this showed that the subsidiary terms had to be acceptable to him. The Judge considered that this evidence provided a sensible commercial explanation for the introduction of the Subject Review clause in the Bid. With respect, we do not agree. Mr Gupta did not introduce any evidence, other than his own assertions, of the freight rate on 14 October 2014 and how it could have been affected by the detailed terms of the charterparty. The objective documentary evidence of the market rate on 14 October 2014 was adduced by Toptip's expert witness, Ms Albers. The Baltic Capesize Index route C3 diagram which appears in her report shows that the market rate as of 14 October 2014 was in fact closer to US$18 than over US$20 as Mr Gupta asserted in court. Further, it made no commercial sense for Mr Gupta to have offered Toptip

a freight rate that was below the market rate applicable at the relevant time, especially since Mercuria would itself have to charter in a vessel to charter out to Toptip. Mercuria is a commercial enterprise focussed on making profits, not a charitable organisation. Most likely, the rate in the Bid was at or above market levels. In any case, had there been any particular term that could have been expected to have an impact on Mercuria's profitability, such price-affecting term surely would have been included in the Bid itself and not been left to be sorted out in the charterparty details, particularly when Mercuria was happy to accept Toptip's format with logical amendments without previous sight of the same or even knowing whether there was such a *pro forma* document. There is, also, significance in the fact that Mercuria did not see the need itself to specify any particular format which it could easily have done, being an active chartering business, if the details were that important to it.

53 In view of the foregoing, in our judgment, the Bid was a complete and certain offer capable on acceptance of constituting an immediately binding contract notwithstanding the presence of the Subject Review clause.

Conduct of the parties post 14 October 2014

54 Before we turn to consider the meaning and role of the Subject Review clause, we will consider the conduct of Mercuria after 14 October 2014. In our view, such conduct clearly indicates that Mercuria considered a binding contract to exist.

55 The most significant action taken by Mercuria after 14 October 2014 was its nomination of the Vessel as the carrying vessel to perform the charter contract and its concurrent request that the cancelling date be pushed back by

one day from 30 November 2014 to 1 December 2014. The Judge considered that this conduct was equivocal because, while it was consistent with parties performing a charterparty which had already been concluded by that date, it was equally consistent with the parties taking steps in anticipation of a contract to be concluded. However, Mercuria did not simply nominate the Vessel, it also asked Toptip what documents in relation to the Vessel were required by Samarco and sent over the specified documents (all the certifcates relating to the Vessel) so that Samarco could approve it. Then, when Samarco initially rejected the Vessel because it apparently did not have Rightship's approval, Mercuria sent Mr Shu a file that showed that the Vessel had a five-star rating from Rightship and that the "owner risk" was at the lowest level of rating. Mercuria said that the criticism of the Vessel by Rightship which Samarco had relied on was an old one. The day after sending that information, Mercuria followed up by asking for the name of the shipper and their contact details.

56 To us, the aforesaid actions on the part of Mercuria display an urgency in obtaining approval of the Vessel which would likely not have existed had Mercuria thought that the charterparty had yet to be concluded. First, there would be no reason for Mr Gupta to write to Mr Shu asking Toptip to move the laycan back by a single day if Mercuria did not think it had a concluded charterparty to perform and wanted to make sure it could perform it. Second, the forwarding of the new rating of the Vessel and the request for the name of the shipper and their contact details show that Mercuria was anxious that the shipper accept the Vessel. This anxiety only existed because under the charter contract rejection of the Vessel by shipper/charterer meant that Mercuria would have to look around for another suitable vessel to carry the cargo and this might have been difficult and/or more expensive. Indeed, the evidence of Ms Albers

was that from 17 October 2014 to 3 November 2014 the freight market was rising continuously. There was no evidence of an alternative vessel being available to Mercuria at that time. If there was no concluded contract, Mercuria could have walked away at that point without bothering to send further information in an attempt to persuade Samarco to accept the Vessel or asking for Samarco's details in order to contact it directly. Further, between 23 October 2014 when it nominated the Vessel and 29 October 2014 when it rejected the charterparty, Mercuria did not mention that it was simply nominating the Vessel in anticipation of a charterparty to be concluded.

57 Mercuria's anxiety about the acceptability of the Vessel stands in contrast to its lack of anxiety about finalisation of the CP details. Having, on 16 October 2014, sent the Australian CP to Mr Shu to use as a base for the parties' detailed contract, Mercuria was rather relaxed about the terms thereafter. It did not press Mr Shu for the Draft CP between then and 24 October 2014 when the draft was sent out. It made no comments on receipt of the Draft CP, not even to remark that Mr Shu should not have dated it 14 October 2014 since no contract had been concluded on that date. It maintained its silence on 27 October 2014 when Mr Shu sent it a further e-mail indicating that he had made a mistake in the dispute resolution clause and that the same had to be amended. Right up to its rejection of contractual relations on 29 October 2014, Mercuria had nothing to say about the detailed terms or the way in which Mr Shu had amended the Australian CP. The lack of any request to amend any clause of the Draft CP in any particular way, or to put forward any requirement for a new clause on the basis that this had underpinned the offer and matters could not proceed without incorporation of such new clause, is telling of Mercuria's nonchalant attitude to the Draft CP and its contents. Indeed,

Mr Gupta admitted in court that he only started to review the Draft CP on 27 October 2014, some three days after its receipt. This delay must be contrasted with the fact that having secured a back-to-back charter of the Vessel, albeit on a "subject basis" in order to perform the voyage for Toptip, when Mercuria learnt on 24 October 2014 that Samarco had rejected the Vessel, Mr Gupta said he immediately decided to drop this charter with the head-owner. A likely reason for the latter action is that Mercuria wanted the freedom to look for another vessel to perform the Toptip charter. It is noteworthy that Mr Gupta testified that it might take him up to 40 days to find another vessel (this could have added stress since the laycan ended on 30 November 2014 which was less than 40 days away). If Mercuria considered it was not bound by the contract, the easiest thing to do on 24 October 2014 would have been to drop the Vessel and Toptip itself at the same time and walk away free and clear immediately. Instead it waited another five days to untangle itself from Toptip.

Meaning of the Subject Review clause

58 Having reached the conclusion that both the parties' correspondence and their conduct are consistent with them having been contractually bound on 14 October 2014, we turn to the Subject Review clause. We have already said that the Bid as a whole indicated that this clause was not intended to act as an impediment to the immediate formation of a contract contrary to Mercuria's stand and the Judge's holding.

59 In theory a clause like the Subject Review clause can be construed in one of two ways: either as a condition precedent to the formation of the contract or as a condition subsequent which has to be met in the course of the contract and if not satisfied the contract will end. How one classifies such a clause

depends on the circumstances. The fact that it contains the word "subject" is not determinative of the issue.

60 In the case of *The Pacific Champ* the court had to consider the effect of cl 12 in an e-mail described as "the second recap" that read: "SUB REVIEW OWNRS HEAD CP BTB" which wording can be expanded as "subject to review of owners' head charterparty back-to-back". The owners contended that no contract existed until the review had taken place, but the charterers argued that on the facts, the term "OWNRS HEAD CP" referred to a document identified as the "Pro forma Charterparty" and that the intention was for those terms to be part of the contract. Eder J accepted the charterers' contention and held (at [67]) that cl 12, on its proper construction, had the effect of incorporating the Pro forma Charterparty into the fixture between the parties subject only to review by the charterers by the time specified in the second recap. It is plain from his judgment that Eder J regarded cl 12 as a condition subsequent, rather than a condition precedent, and that therefore its existence did not prevent a binding contract coming into existence. Thus, in that case, the owners could not back out until the time for reconfirmation had passed. The factual background in that case clearly influenced the decision.

61 In the present case, the matters set out at [45] to [57] above also lead us to the conclusion that the Subject Review clause was a condition subsequent which did not prevent the formation of a binding contract. Apart from what we have already stated, when Toptip suggested in the Enquiry that the Vale CP be the source of the boiler-plate clauses, the clear intention was that that document, with logical amendments, would be incorporated into the contract. When Mercuria rejected that proposal and suggested the source of the boiler-plate

terms should be the "charterers' *pro forma* charterparty with logical amendment" instead, equally the intention was for this charterparty as amended to be incorporated. Mercuria was indicating that whatever format Toptip came up with as its *pro forma* charterparty should be amended in a fashion that was "logical", *ie*, found to be consistent with the terms of the Bid on an objective review. This is also a proper interpretation of the Subject Review clause because there was nothing in it or the Bid to indicate that negotiations were intended to be prolonged until the review. No specific additional provisions were suggested nor was anything else said to indicate that this clause was intended to negate the "firm basis" of the offer. Further, no time limit was given for review. This is another indication that the clause was not a condition precedent. Given the approaching laycan, had the parties not already reached binding agreement, a deadline for acceptance of the "charterer's *pro forma* charterparty with logical amendment" would have made commercial sense because it would have enabled both parties to protect their interests in a timely fashion. In the event that parties were still negotiating, Toptip, in particular, would have been pressing for quick confirmation of the terms so that Mercuria would be bound to supply a vessel.

62 We have interpreted the scope of the review under the Subject Review clause as being limited to the document which the charterers would present as being their *pro forma* charterparty incorporating the logical amendments required to reflect the Bid. An alternative interpretation is that Mercuria would be entitled to review both the *pro forma* charterparty itself and the logical amendments made to it. Whilst considering that the less likely interpretation in the circumstances, we need not choose between the alternatives because what

actually occurred made such review of the *pro forma* charterparty alone unnecessary.

63 The starting point is Mr Shu's e-mail of 16 October 2014. In it he asked Mr Lee for "the working CP in word format". Mr Lee replied the same day stating that Mercuria did not have such a document and that it was waiting for the charterer's format for its review. Mr Gupta who was copied in this correspondence then voluntarily sent an e-mail to both Mr Shu and Mr Lee asking whether Mercuria had the Australian CP and if it could be used "as base". That resulted in a quick forwarding (within 20 minutes) of the Australian CP by Mr Lee to Mr Shu. Reading these e-mails together, the most plausible inference to draw is that Mr Gupta meant for the Australian CP, a document previously used by both parties, to take the place of the charterer's *pro forma* document. On that basis, Mr Shu did not seek to replace any of the terms contained in the Australian CP. All he did in producing the Draft CP was to insert into the Australian CP the terms of the Bid agreed on 14 October 2014 and make logical amendments to the document to make it consistent with those terms. Consequently, there was no reason to believe that Mercuria would find any of the terms of the Draft CP objectionable upon review. And indeed, Mercuria did not point out any objections to any specific clause whether original or amended as a "logical amendment" during the five days between receipt of the Draft CP on 24 October 2014 and its rejection on 29 October 2014. During these five days, there is nothing to suggest that it did not otherwise regard itself as bound to Toptip to perform the charterparty – its conduct at the time, in particular in pursuing the acceptance of its nominated vessel, is wholly consistent with an attitude of contractual obligation.

64 The Judge did not take the same view of Mr Gupta's e-mail of 16 October 2014. He considered that e-mail to be equivocal and to contain a question to Mr Lee about the suitability of the Australian CP rather than an unqualified direction that this charterparty should be used as a base without any further review. We differ from the Judge on this because the Australian CP was sent out very shortly thereafter by Mercuria without any qualification or indication that it doubted the suitability of this document as a base and needed to review the same further. The document was simply provided for Mr Shu's amendment without reservations. Objectively, the provision of the document in such manner would have appeared as an endorsement of the same as a base on which the amendments should be made. In our view, Mercuria's conduct in sending over the Australian CP to be used as the base of a working charterparty clearly satisfied the "review" part of the Subject Review clause, at least in relation to the boiler-plate clauses.

65 Thereafter, Mercuria's entitlement was to review the Draft CP based on the format it had supplied to ascertain whether the amendments made to the format were "logical" when regarded in the light of the Bid. It follows that Mercuria could not reject the Draft CP unless its review disclosed, from an objective perspective, that the "logical" amendments made to the Australian CP were no such thing.

Were the terms of the contract uncertain?

66 Having concluded that a contract came into existence, we move on to consider an argument made by Mercuria in its appeal which was that the Subject Review clause introduced such uncertainty into the contract that, although validly concluded, it was void for uncertainty and therefore unenforceable.

67 The Judge considered this argument. He rejected it on the basis that Mercuria should have pleaded a defence of uncertainty but did not do so. On the appeal, Mercuria's contention is that it needed to plead the material facts alone and not their legal effect. In the Defence it had pleaded the Subject Review clause itself and since that clause was uncertain, that pleading was sufficient to introduce the defence.

68 Mercuria gives three reasons why the Subject Review clause should be regarded as uncertain. First, the phrase "logical amendment" in the clause was itself uncertain because the parties did not define what logical amendments would be and there was no machinery in the charterparty to ascertain how that logic was to be determined. Second, the clause did not provide a timeframe in which the contract would: (a) be provided by Toptip for review; and (b) have to be reviewed by Mercuria. Third, no chartering terms were identified to be the subject of the "logical amendment" after Mercuria rejected the Vale CP. Mercuria argues that this rejection included the Samarco terms which Mr Gupta did not attach to the Bid because he did not agree to them. According to Mercuria, Mr Gupta was waiting to see the Draft CP before he would decide whether Mercuria would accept the other terms. Therefore, there were no agreed chartering terms whether by way of the Subject Review clause or the Bid.

69 There are three responses to Mercuria's arguments. The first is that we agree with the Judge that the defence of uncertainty cannot be considered because it was not sufficiently pleaded. Whilst it is correct that the legal conclusions drawn from facts need not be pleaded, material facts must still be pleaded (see *MK (Project Management) Ltd v Baker Marine Energy Pte Ltd* [1994] 3 SLR(R) 823 at [26]). Although Mercuria pleaded the existence of the

Subject Review clause as well as what it called the "effect of [the] words" in that clause, it did not plead what was in fact lacking in the Subject Review clause so as to render it uncertain. Mercuria's Defence focussed on the alleged need for Mr Shu to supply Mercuria with an actual physical draft of the proposed charterparty and the further need for review of this draft by Mercuria before a valid contract would be formed. The three matters raised in Mercuria's submissions were not pleaded. They should have been pleaded so as to properly demarcate the parameters of Mercuria's case and to prevent Toptip from being caught by surprise at the trial (see *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [76]). Since Mercuria did not plead the facts pertaining to the defence of uncertainty, there was no way Toptip could have responded to this defence in its Reply or prepared witnesses to show how the chartering industry regarded or used the phrase "logical amendment".

70 The second response to the issue raised is that the phrase "logical amendment" is capable of an objective interpretation indicating that the amendments to be made must be such that the *pro forma* charterparty would be consistent with the terms contained in the Bid. In Julian Cooke *et al*, *Voyage Charters* (Informa Law, 4th Ed, 2014), it is stated (at para 1.20) that the expressions "subject to logical amendments" or "alterations" mean that "the only amendments permissible are those which follow logically and inevitably from the terms agreed, and thus can be determined objectively". While the authors recognise (at para 1.20) that there is "no decisive authority on the meaning of such expressions standing alone", this definition finds support from the case of *CPC Consolidated Pool Carriers GmbH v CTM CIA Transmediterranea SA (The "CPC Gallia")* [1994] 1 Lloyd's Rep 68. In the case, the English Commercial Court agreed with counsel (at 73) that "logical

amendments" meant amendments that "were in any event required to give effect to the main terms thus far negotiated and agreed". In this case, at [35] of the Judgment, the Judge noted that the term "with logical amendment" standing alone would not prevent a binding contract from being concluded. We agree.

71 The third response is in respect of the Samarco terms. Mercuria uses the fact that Mr Gupta did not attach the Samarco terms to the Bid to demonstrate that the main terms of the Bid were inadequate because they did not include the shipping and loading terms. This argument, however, seeks to give undue weight to the non-attachment of the Samarco terms. These terms had been attached to the Enquiry and referred to in the clause reading: "OWNRS SHALL COMPLY ALL SHIPPING/LOADING TERMS AS ATTACHED". Mercuria repeated this clause *verbatim* in the Bid but omitted to attach the Samarco terms again. The omission is not significant. First, Mercuria was aware that Toptip already had a copy of the Samarco terms having received this document with the Enquiry. Second, as already stated, the clause incorporating the Samarco terms was repeated *verbatim* in the Bid and it obviously meant to refer to the Samarco terms. Third, if Mercuria truly did not wish to be bound by those terms, it would have stated so in the Bid. When it came to the Subject Review clause, Mercuria had no difficulty in removing the reference to the Vale CP, a format it objected to, and proposing an alternative. The same treatment would have been given to the Samarco terms were they truly rejected. We agree with the Judge's holding that the fact that the Samarco terms were not attached to the Bid does not lead to the inference that Mercuria had rejected them.

72 In the result, we hold that the contract between the parties concluded on acceptance of the Bid was certain and capable of enforcement.

Was the contract repudiated by Mercuria?

73 As we have interpreted the Subject Review clause, Mercuria had the right after reviewing the Draft CP to object to it on the basis that the amendments made to the Australian CP could not be regarded as "logical" amendments in the way that phrase has to be construed. On 29 October 2014 when it wrote, allegedly "after review" of the document, Mercuria made no effort to challenge any of the clauses of the Draft CP whether as they appeared in the original Australian CP or as they were amended by Mr Shu. All it said was "Owrs cannot accept chtrs cp after review, so subject failed on cp review. Owrs cannot accept chtrs cp for this trade." The lack of any reasoned objection indicated that Mercuria was taking the view that it was free to reject the document for no reason at all 15 days after the Bid was accepted on 14 October 2014. That would only be the case if the parties were not already contractually bound. That, however, was not the legal position as we have explained. By its rejection of the Draft CP Mercuria was stating that it had no intention of performing the charterparty with Toptip. The contract was thereby repudiated and Toptip was entitled to accept this repudiation and look around for another charter contract.

Has Toptip proved its damages?

74 Mercuria argues that there is insufficient proof of Toptip's losses. Although it does not dispute the fact that Toptip entered into the Substitute Charter with RGL, it argues that Toptip has not shown that it had paid a freight rate of US$25.25 per metric tonne under the Substitute Charter. It also argues that Ms Albers' expert evidence of the market freight rate cannot be relied upon.

75 Turning first to the freight rate of the Substitute Charter, the evidence before the court is as follows:

(a) Mr Liu stated in his affidavit of evidence-in-chief ("AEIC") that the Recap E-mail dated 7 November 2014 sent by Deng Song (a broker) to him and Mr Jin of RGL which began with the words "PLEASED TO RECAP WE FIXED ON SUBS ASF" indicated a freight rate of US$25.25 per metric tonne.

(b) Mr Liu disavowed the Recap E-mail while being cross-examined, insisting that there was another contractual document dated 8 November 2014 which was not tendered as evidence. No mention was made of this other document in Mr Liu's AEIC. No credible explanation has been provided as to why Mr Liu would give oral evidence that was completely different from that shown in his AEIC.

(c) Evidence of payment to RGL has been exhibited in Mr Liu's AEIC:

(i) freight invoice dated 4 December 2014 for payment of a total of US$3,820,277.03 at freight rate of US$25.25 for 168,109 metric tonnes of iron ore;

(ii) debit confirmation of outward remittance dated 23 December 2014 in the same amount of US$3,820,277.03;

(iii) freight invoice dated 13 March 2015 for payment of the remaining freight (US$436,041.54) due at the freight rate of US$25.25; and

(iv) debit advice dated 21 April 2015 for the same amount of US$436,041.54.

(d) The chartering of the Vessel by Toptip at the freight rate of US$25.25 per metric tonne was also confirmed by Mr Jin in his AEIC.

76 Although the invoices and debit documents do not make reference to the Substitute Charter, the evidence as a whole indicated that on a balance of probabilities, US$25.25 per metric tonne was the freight rate under the Substitute Charter. The Recap E-mail makes reference to 160,000 metric tonnes of iron ore, which is an approximation of the 168,109 metric tonnes that were actually transported. The Recap E-mail also refers to the discharging ports of Zhoushan and Nantong, and the loading port of Ponta Ubu, all of which are referred to in the freight invoice dated 13 March 2015. Further, all the freight invoices refer to the Vessel. Documentary evidence showing that the Vessel indeed travelled to those ports at the relevant time can also be found in Mr Liu's AEIC. Indeed, the Vessel managed to arrive at Ponta Ubu on 30 November 2014, the last day of the original laycan specified in the charter between Toptip and Mercuria.

77 Taken in its totality, the evidence shows that the freight rate for the substitute charterparty was US$25.25 per metric tonne. Mr Liu's disavowal of the Recap E-mail must be disregarded.

78 Turning now to Ms Albers' testimony, we are of the view that the Judge was correct to accept her evidence that the freight rate of US$25.25 per metric

tonne was reasonable in view of the prevailing market rate of an average of US$24.50.

79 Mercuria argues that Ms Albers' expert evidence is unreliable because she did not provide the supporting documents on which she based her assessment. These include the Simpson Spence & Young market reports, the Baltic Exchange data for Baltic Capsize Index routes, and the Baltic Exchange fixture lists. Her failure to attach these documents was unsatisfactory but this alone is insufficient to show that her conclusions were unreliable. As the Judge noted at [63] of the Judgment, her evidence was the best evidence before the court and was credible given her "substantial expertise and qualifications in this area".

80 Mercuria did not produce any evidence, expert or otherwise, to show that Ms Albers' conclusions were wrong. Mercuria does not deny Ms Albers' evidence that the data was publicly available. It has not shown that she misquoted the data or that her conclusions are contradicted by the available data. Mercuria submits that the vessel swap that Sinom did with RGL to enable RGL to charter the Vessel to Toptip resulted in the increased freight rate of US$25.25 and that Ms Albers had no knowledge of the effect of a swap on the weight rate. As Toptip noted, however, Ms Albers was not cross-examined on the effect of a vessel swap on the market rate. Mercuria's attempt to discredit Ms Albers' expert evidence is highly speculative.

81 In view of the above discussion, Toptip is entitled to damages in the sum of US$1,151,546.65, being the difference in the freight rate proposed by Mercuria (US$18.40) and that which applied to the Substitute Charter (US$25.25) for 168,109 metric tonnes of iron ore.

Conclusion

82 For the reasons given above, we allow Toptip's appeal (CA 131) and set aside the decision below including the costs order made by the Judge. In view of this result, we need not deal with Mercuria's arguments on the costs below.

83 Judgment shall be entered in favour of Toptip for the sum of US$1,151,546.65 and interest thereon at the judgment rate from the date of the writ. We dismiss Mercuria's appeal (CA 132). Mercuria shall bear Toptip's costs of the trial and of both appeals as taxed or agreed.

Sundaresh Menon	Andrew Phang Boon Leong	Judith Prakash
Chief Justice	Judge of Appeal	Judge of Appeal

Tan Boon Yong Thomas and Amirul Hairi (Haridass Ho & Partners) for the appellant in Civil Appeal No 131 of 2016 and the respondent in Civil Appeal No 132 of 2016;
Tay Twan Lip Philip and Yip Li Ming (Rajah & Tann Singapore LLP) for the respondent in Civil Appeal No 131 of 2016 and the appellant in Civil Appeal No 132 of 2016.