Yip Holdings Pte Ltd *v* Asia Link Marine Industries Pte Ltd
[2011] SGHC 227

Case Number	: Suit No 399 of 2008 (Registrar's Appeal Nos 389 of 2010 and 391 of 2010)
Decision Date	: 13 October 2011
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: Glenn Knight and Susan Jacobs (Messrs Glenn Knight) for the plaintiff; Walter Ferix Justine (Joseph Tan Jude Benny LLP) for the defendant.
Parties	: Yip Holdings Pte Ltd — Asia Link Marine Industries Pte Ltd

Damages – Assessment

Damages – Rules in awarding – Ascertainment difficult or impossible

Damages – Mitigation

13 October 2011

Belinda Ang Saw Ean J:

Introduction

1 The Assessment of Damages against the Defendant, Asia Link Marine Industries Pte Ltd, was pursuant to Lai Siu Chiu J's decision on liability given on 5 June 2009. Interlocutory Judgment was duly entered in favour of the plaintiff, Yip Holdings Pte Ltd, on its claim with costs, and damages were directed to be assessed by the Registrar with costs of the assessment reserved to the Registrar (see *Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2009] SGHC 136 ("*Yip Holdings v Asia Link*").

2 The facts giving rise to these proceedings may be briefly stated as follows. The plaintiff in Suit No 399 of 2008 claimed damages for breach of contract in relation to, *inter alia*, damage caused to the plaintiff's American Hoist 9280 crane ("the Crane") that was kept at the defendant's premises pursuant to an oral agreement made in 1999 (see *Yip Holdings v Asia Link* at [107] for the terms). The defendant admitted that on 17 February 2007, the plaintiff had requested access to the Crane in order to facilitate its removal, and that the defendant had instructed the Crane to be moved to another yard belonging to Haruki Machinery Pte Ltd ("Haruki"). Lai J found that the Crane was unilaterally moved from the defendant's premises to another location on 18 April 2007, that the plaintiff had no prior knowledge of the defendant's instructions to Haruki, and that the defendant did not inform the plaintiff that the Crane had been moved to another location until 7 May 2007.

3 Haruki had demobilised and dismantled the Crane purportedly to carry out repairs to the Crane at No 48 Tuas Avenue 9, Singapore ("Haruki's yard"). From what had been stated, the dismantling of the Crane involved taking out various parts of the Crane. However, repairs were never carried out. Instead, the defendant left the Crane in the open in its dismantled state at Haruki's yard.

4 The plaintiff's managing director and major shareholder who testified at the trial was Yip Fook Chong also known as Ronald Yip ("Yip"). The defendant's director and shareholder who testified on

behalf of the defendant was Lim Seong Ong also known as Kenny Lim ("Lim").

Decision of Lai Siu Chiu J

5 I refer to the trial judge's finding of facts and legal conclusions on the liability issue in *Yip Holdings v Asia Link*. The paragraphs that are relevant to the assessment of recoverable damages are set out hereunder:

> 102 I found Lim's explanation as to why he refused Yip permission for [Triple Gem International Pte Ltd ("Triple Gem")] to move the [Crane] out from the yard utterly incredible. As it was the plaintiff and not the defendant which owned the [Crane], it was of no concern to the defendant whether the removal from the yard was done by a qualified or unqualified crane contractor. It would be the plaintiff and not the defendant who would bear the consequences should it be found that the moving needed to be done by an approved contractor on MOM's list.
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> ...
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> 104 As the plaintiff rightly pointed out in its closing submissions [at para 11(b)], Yip responded as expeditiously as possible when Lim demanded that the [Crane] be removed by 2 January 2007. On 17 February 2007, the plaintiff was ready to move the [Crane] to the premises of Triple Gem but was denied access to the yard by Lim. Lim failed to respond to Yip's letter dated 17 February 2007 in [30]. After his unilateral move of the [Crane] on 18 April 2007, Lim still did not inform Yip/the plaintiff of the move until 7 May 2007. It is my view that the only reason Lim was prompted to respond was due to his receipt of the letter dated 3 May 2007 from the plaintiff's solicitors in [33] which was carbon-copied to Jurong Police station, after Yip had lodged a police report on Lim's attempt to move the [Crane] out of Haruki's yard.
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> 105 What made the defendant's/Lim's conduct even more reprehensible was the fact that Lim had engaged Haruki who were not a qualified contractor for the make of the [Crane], to dismantle and disassemble [Crane]. Judging by subsequent events, Haruki not only damaged the [Crane] in the process but seemed incapable of assembling and/or restoring the [Crane] to its original state.
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> 106 Lim acted to all intents and purposes as if he was the owner of the [Crane] to the extent that he denied Yip access to the [Crane] while it was in the yard. ...
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> ...
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> 109 ...I accepted the plaintiff's submission that the defendant breached the oral agreement when it unilaterally moved the [Crane] out of the yard without the prior knowledge or consent of the plaintiff and against the plaintiff's express request to have the move carried out by its appointed contractor, Triple Gem.
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> 110 It would not even be necessary to consider the plaintiff's submissions on the necessary terms to be implied into the oral agreement as Lim himself had admitted (at N/E 169-170) that he needed to inform the owner should any equipment stored in the yard be relocated to another area and, when questioned by the court, he agreed that he would be liable should any damage result from such a move (see [93] above).
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> 111 Consequently, the [Crane] having been damaged when it was moved and/or after it was moved, from the yard to Haruki's yard on the instructions of Lim, the defendant was liable for the damage caused thereby.

...

113 There can be little doubt that the present deplorable condition of the [Crane] was entirely attributable to Haruki's dismantling and disassembling of the [Crane]. In the words of Spencer (at N/E 98) the condition of the [Crane] was near scrap value. Spencer's view was confirmed by none other than the defendant's own witness Razak (at para 8.03 of his report) when he said:

> The [Crane] had deteriorated to such a state it might not be economical to repair to bring it back to original working condition.

...

6 The undisputed facts as narrated by Lai J in *Yip Holdings v Asia Link* are as follows:

35 The plaintiff's solicitors wrote to the defendant on 28 May 2007 to say the latter had breached its obligations to safeguard the [Crane]. Despite the plaintiff's various efforts to recover the [Crane], the defendant refused to respond to the plaintiff's request to repair and reassemble the crane into working condition.

36 At the same time as the plaintiff/its solicitors were corresponding with the defendant, the plaintiff requested Haruki to give a list of replacements to put the [Crane] into fully operational condition. The plaintiff was anxious to rebuild the [Crane] as soon as possible so that it could rent it out or sell it off as at that time, the construction industry was booming in both Asia and the Middle East with a corresponding high demand for big heavy cranes.

37 Haruki did give the plaintiff an estimate but it failed to take any steps to rebuild the [Crane] leaving the [Crane's] components exposed to the elements. Notwithstanding Haruki's inaction, Yip let the market know that the plaintiff had a 150 ton lifting capacity crane which was available for rent or sale.

38 Between 7 May 2007 and 7 December 2007, the plaintiff received inquiries from three interested parties either to buy or to rent the crane. One offer was from an Indian party (at US$400,000), another from Malaysia (also at US$400,000) and the third offer was from Haruki itself whose offer was $300,000 on an "as is where is" basis. The first two interested parties required the [Crane] to be rebuilt to its fully operational condition. Unfortunately, the plaintiff was unable to accept either the first or second offers (Yip rejected Haruki's offer) because of Haruki's inaction on the repair works.

39 Subsequently, Haruki renewed its offer to the plaintiff after the Malaysian buyer withdrew its offer. On 7 December 2008, the plaintiff's solicitors received an offer from Haruki's solicitors of $300,000 for the [Crane]. The offer required the plaintiff as well as Yip to given an indemnity. Yip rejected the offer.

The Assistant Registrar's Order of 15 September 2010

7 The plaintiff's Notice of Assessment of Damages, namely, NA 18 of 2008/W ("NA 18") was listed for hearing before an Assistant Registrar ("AR") over several tranches. The AR's decision on the quantum of damages recoverable was given on 15 September 2010 ("the Order of 15 September 2010"). In particular, the AR awarded:

(a) Damage to the Crane at US$285,000;

(b) Loss of chance of rental at US$48,000;

(c) Cost of torque converter at US$6,000; and

(d) Outstanding amount on the Manitowoc crane at S$65,715.

8 The AR also awarded interest at 5.33% per annum from the date of the Writ of Summons to the date of assessment with costs of the assessment fixed at S$53,000 excluding disbursements.

9 Both parties were dissatisfied with the quantum of damages assessed by the AR and Notices of Appeal to Judge in Chambers were filed. RA No 389 of 2010/J ("RA 389") was filed by the Defendant and the scope of the appeal related to items (a) and (b) of the AR's Order of 15 September 2010 (see [7] above). RA No 391 of 2010/E ("RA 391") was filed by the plaintiff, and the appeal also related to items (a) and (b). In short, both parties did not appeal against items (c) and (d) of the Order of 15 September 2010. At the conclusion of the hearing, I made the following orders:

(a) The defendant to pay the plaintiff the sum of US$395,000 (equivalent to S$516,265) being the value of the Crane after deducting the sum of US$5,000. The defendant is to take over the plaintiff's proprietary interest in the Crane "as is, where is";

(b) No damages for loss of rental;

(c) No damages for loss of chance to rent out the Crane; and

(d) Each party to bear its own costs of appeal.

10 I informed counsel at the hearing on 20 April 2011 that I would use the AR's exchange rate of US$1 = S$1.307. [note: 1] For the plaintiff's loss of the Crane being the value of the Crane, the amount of damages awarded in US Dollars was US$395,000 after deducting US$5,000. I was informed by Ms Jacob that in Singapore dollars, the quantum of damages would be S$516,265 (US$395,000 x S$1.307).

11 Given the scope of the defendant's appeal, I will only be publishing the reasons for my decision to award the sum of US$395,000 as damages to the plaintiff for the destruction of its Crane.

The legal principles for assessment in this case

12 To recap, the breaches were that the defendant had refused to allow the plaintiff to take away the Crane between 17 February and 30 March 2007, and thereafter the defendant failed to, *inter alia*, safeguard the Crane in Haruki's yard. In April 2007, without the consent and authorisation of the plaintiff, the defendant unilaterally gave instructions to Haruki (acting on behalf of the defendant) to dismantle and move the crane to the latter's yard which instructions were acted upon by Haruki. In the process of the move, the Crane, in its dismantled state, was damaged on 18 April 2007. The Crane was not reassembled and its condition deteriorated over time as it was left in the open at Haruki's yard with its components exposed to the elements. Under these circumstances, the plaintiff is entitled to *restitution* in *integrum*. As Andrew Burrows in *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd Ed, 2004) ("*Remedies for Torts and Breach of Contract*") observed (at 232):

> Whether for torts or breach of contract, the general compensatory aims dictate that the claimant should be put into as good a position as if its property had not been damaged.

13 In the context of the present case, how this general compensatory principle is to be applied will depend on whether the chattel was damaged or destroyed. In the case of damage to property, the amount by which the value of the chattel is diminished is usually equated with the cost of repair. Alternatively, if the damaged chattel is owned for use, the measure of damages would be the cost of replacement of a similar chattel and loss of use. However, where the chattel has been destroyed or is a constructive total loss in the sense that it would be uneconomic to repair, the *prima facie* measure of damages is the value of the chattel at the time and place of destruction, plus any other consequential losses (see *The Liesbosch* [1933] AC 449 at 464, per Lord Wright and *Butterworth's Common Law Series, The Law of Damages*, (LexisNexis, 2010, 2nd Ed) ("*Butterworth's Law of Damages*") Chapter 14, paras 14.01 and 14.02).

14 The burden of proof is on the plaintiff as the party seeking to establish its entitlement to damages. As for the degree of proof required in respect of the loss claimed, I refer to and adopt the apt words of Andrew Grubb in *The Law of Torts* (LexisNexis, 2nd Ed at para 6.5) where the author, rightly, observed:

> ... it is not possible to say more than that the claimant must prove his damage with as much degree of particularity as is required in the circumstances.

15 The impossibility of laying down any definitive rule as to what may constitute adequate proof of damage means that a court has to adopt a flexible approach with regard to the proof of damage. This approach was fully explained by Andrew Phang JA in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 ("*Robertson Quay*"). The decision at [27] – [28] and [30] – [31] is particularly instructive:

> 27 ... [I]t is fundamental and trite that a plaintiff claiming damages must prove his damage. ... The process of proving damage is an intensely factual one ... . In the circumstances, it is impossible to lay down any *general* rules or principles as to what constitutes adequate proof of damages since the *particular* factual circumstances can take, literally, a myriad of forms.
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> 28 The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. Thus, the learned author of *McGregor on Damages* continues as follows (at para 8-002):
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> > [W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in Chaplin v Hicks [[1911] 2 KB 786], the leading case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss. [emphasis added]
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> ...
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> 30 Accordingly, a court has to adopt a flexible approach with regard to the proof of damage. Different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. ... The correct approach that a court should adopt is perhaps best summarised by Devlin J in the English High Court

decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 ("*Biggin*"), where he held (at 438) that:

> [W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.
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> ...
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> 31 To summarise, a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss *and* the evidence is cogent, the court should allow it to recover the damages claimed.
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> ...
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> [emphasis in original]

Overview of the parties' submissions

16 The plaintiff had in its Statement of Claim claimed damages comprising of:

(a) The cost of repairs/replacement;

(b) The loss of rental income; and

(c) The costs of recovery and reassembly.

Before the AR, the plaintiff's former lawyers argued that the defendant should pay US$500,000 as it was the cost of cure, *ie*, the cost of repairs or the replacement cost. Before me, counsel for the plaintiff, Ms Susan Jacob ("Ms Jacob"), who was assisted by Mr Glenn Knight, explained that the plaintiff accepted the AR's assessment of the value of the Crane at US$400,000, but she argued that, in awarding damages to the plaintiff, the AR was wrong to have deducted the scrap value of the Crane (*ie*, US$100,000) from its pre-accident value of US$400,000. Put another way, the plaintiff's case at the appeal before me is that the defendant is liable to pay for the full pre-accident value of the Crane, and it is for the defendant to take over the Crane "as is, where is".

17 The defendant's arguments toggled between two different positions. This was because the defendant did not take a firm position as to whether its case was that the Crane was damaged or that it was destroyed. The first contention was that the cost of repair should be US$15,000, and in the alternative, the plaintiff was entitled to only the replacement cost of a similar crane. The second contention was that if the Crane was beyond repair, counsel for the defendant, Mr Walter Ferix ("Mr Ferix") accepted that the *prima facie* measure of damages was the value of the chattel at the time and place of destruction. However, he argued that as there was no available market for the Crane, the plaintiff was only entitled to its current scrap value and no more. Finally and in the alternative, the value of the Crane in 2007 was S$150,000 based on the fair market value of comparable cranes with similar characteristics as the Crane. Therefore, the AR was wrong to have assessed the value of the Crane in 2007 at US$400,000.

18 For expediency, I propose to discuss some of the defendant's arguments here since they are

short points and hence easily dealt with. First, the contention that there was no available market for this Crane and, as such, the value of the Crane undamaged was the same as the value of the Crane damaged, *ie*, its scrap value. Mr Ferix argued that it would be impossible to find a 40-year old 150 ton crawler crane in Singapore because the age of obsolescence of cranes in Singapore was 30 years. [note: 2] By reason of that norm, the Crane was obsolete and consequently, there would be no available market for such cranes in Singapore. Therefore, the value of the Crane would be its scrap value. Not only was the legal basis for his contention suspect (see [36]-[41] below), Mr Ferix appeared to have disregarded the evidence of the defendant's own expert's valuation of the Crane which was supposedly based on the comparable values of cranes with similar characteristics as the Crane (see [49]-[50] below).

19 Second, Mr Ferix argued that the plaintiff had neither used the Crane for many years nor attempted to sell or rent the Crane. Developing his argument, Mr Ferix submitted that it would be akin to the plaintiff receiving a windfall if the latter was awarded as damages the value of the used Crane. Mr Ferix's point was a nonstarter. The law in this area is quite clear and it is set out succinctly in "*Butterworth's Law of Damages*" at para 14.03:

> ... Damages are awarded to a goods owner for loss or damage to the goods themselves, rather than for pecuniary loss as such. Put another way, an owner can generally be awarded the above measure of damages for destruction or injury, whether or not he is actually impoverished as a result. For example, if a car is destroyed, it is nothing to the point that the owner did not in fact drive it, or that he might have given it away in the future.

See also *The Mediana* [1900] AC 113 at 117.

Mitigation of Damages

20 Earlier before the AR, the defendant argued that no damages should be awarded for the damage to the Crane because the plaintiff had failed to mitigate its losses. The AR summarised the defendant's arguments on mitigation and her decision was as follows: [note: 3]

> **Damage to crane**
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> When he was represented by his previous solicitors, the Defendant's position was that the crane was already damaged prior to its being moved from the Defendant's yard to Haruki's yard. His present counsel now informs the court that having perused Lai J's judgment, the Defendant now accepts that a finding had been made that the crane was not damaged prior to its removal. However, the Defendant now submits that the damage occurred after it was moved to Haruki's yard and hence, because the Plaintiff had failed to mitigate his losses thereafter, no damages should be awarded on this head.
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> PW2 [Yip] has testified that DW1 [Lim] and Haruki Lim had prevented him from accessing the crane during the material time (*ie* around the time of breach, and after). As I prefer PW2's testimony over DW1's, I accept PW2's evidence on this. Accordingly, D/C's submission on this point is not sustained. Even if the damage to the crane was not caused by the act of dismantling the crane improperly, if DW1 prevented PW2 from accessing the crane, PW2 obviously will not be in any position to mitigate his losses. However, on this point, I accept PW2's evidence that the damage to the crane was caused by the act of dismantling the crane improperly, and this was done by Haruki on the Defendant's instructions.

21 Before me, Mr Ferix repeated the same arguments that were canvassed at the hearing of NA

18. I found difficulty with Mr Ferix's submissions that the plaintiff chose to "go after the defendant for damages instead of reassembling the crane and selling/renting out the Crane". It was alleged that (a) the Crane and been removed to Haruki's yard on or about 18 April 2007, (b) the plaintiff was aware of that fact on the same day or shortly thereafter, (c) the plaintiff, initially, could have reassembled the Crane at a cost of US$15,000 but wilfully chose not to do so, and (d) the plaintiff could have sold the Crane to Haruki soon after 18 April 2007, but chose not to do so. In relation to the cost of cure at US$15,000 [note: 4], the submission was that Yip could have taken action soon after 18 April 2007, and the subsequent deterioration in the condition of the Crane was not recoverable from the defendant. I also found difficulty with Mr Ferix's statement that the "damage to the [Crane] was done only after it was allowed to waste away at Haruki's yard by the [plaintiff]". It was alleged that the plaintiff did not attempt to reassemble the Crane but chose to allow the Crane's component parts to lay exposed to the elements thereby causing the Crane to waste away.

22 Two points may be made. First, it seemed to me that the defendant was re-arguing the liability issue when the trial judge had expressly ruled against the defendant in *Yip Holdings v Asia Link* at [111] (see [5] above). Those findings should be read with [61], [113] and especially Lai J's further observations at [93]-[94] of *Yip Holdings v Asia Link*:

> 93 Although he had initially prevaricated when first questioned by counsel for the plaintiff, Lim eventually agreed when pressed by the court (at N/E 172) that if the [Crane] was damaged while it was being moved within the yard, he was liable.
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> 94 In relation to moving the [Crane] to Haruki's yard without the plaintiff's consent, Lim further admitted that as a result of his instructions, Haruki practically took out all the parts of the [Crane] which were then left in the open at Haruki's yard. He accepted that he was responsible for the present state of disrepair of the crane.

23 Second and more importantly, mitigation of damages as a defence must be properly pleaded and proved. Mr Ferix's contention that the plaintiff's loss was due to its failure to mitigate was raised at the hearing of NA 18. The AR should not have permitted and entertained the arguments because there was no plea of mitigation of damages in its Defence. The state of the defendant's pleadings contravened the established procedural rule that an assertion that the plaintiff had failed to mitigate its loss must be pleaded and proved by the defendant relying on it (see *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 at [71] following *Geest plc v Lansiquot* [2002] 1 WLR 3111 at [16]; and recently *The "Rainbow Star"* [2011] 3 SLR 1 at [56]).

24 There is no gainsaying the importance of a specific plea of mitigation of damages as a defence following the restatement of the principles of mitigation by the Court of Appeal in *The Asia Star* [2010] 2 SLR 1154. For present purposes, V K Rajah JA (delivering the judgment of the court), *inter alia*, observed at [24]: (a) mitigation of damages involves an inquiry as to the reasonableness of the innocent party's action or inaction after the breach, and (b) ordinarily it is the defendant's burden of proving that the innocent party had failed to take reasonable steps to mitigate its loss, and that the burden is not one that is easily discharged. In his overview of the law relating to mitigation of damages, Rajah JA pointed out at [31] that whilst the standard of reasonableness is said to be an objective one, it also takes into account subjective circumstances such as the aggrieved party's financial position. Accordingly, the reasonableness inquiry falls short of being purely an objective one. Furthermore, since the question of mitigation is a question of fact, and the circumstances in which the plaintiff was placed by the breach dictated its action or inaction, they would be matters of materiality that must be pleaded with as much particularity as would be required in the circumstance.

25 Significantly, two applications were taken out by the defendant late, long after RA 389 and RA

399 were filed. The defendant's first application was related to mitigation of damages. Summons No 86 of 2011 ("SUM 86") filed on 10 January 2011 was for leave to adduce further evidence by filing the Affidavits of Evidence-in-Chief of two persons from Haruki, namely, Lim Choon Bock and Samy Nathan, the defendant's director and manager respectively. Interestingly, the defendant wanted to show through the two witnesses from Haruki that once the Crane was moved to Haruki's yard, the defendant had nothing to do with the Crane, that it was a matter between Haruki and the plaintiff, that Haruki did not stop the plaintiff from accessing the Crane, and finally, that the condition of the Crane was not as bad as it was made out to be by the plaintiff. The application was dismissed by me on 31 January 2011. The defendant had not appealed against the dismissal of SUM 86. I was of the view that SUM 86 was made too late in the day, and above all, it was a veiled attempt to re-visit and re-litigate the liability issue which it could no longer do so. Neither could the defendant adduce evidence on failure to mitigate when mitigation was not pleaded in its Defence. Previously, Lai J had (a) commented on the glaring absence of Haruki's representative as a witness in the liability trial despite the pivotal role of Haruki's director, Lim Choon Bock, who dealt with the defendant's Lim, and (b) recorded in the judgment the defendant's acknowledgement that it was responsible for the state of disrepair of the Crane whilst it remained at Haruki's yard (see *Yip Holdings v Asia Link* at [72] and [94]).

26 The defendant must have realised that its pleadings were deficient for the latter on 28 January 2011 applied *vide* Summons No 431 of 2011("SUM 431") for leave to amend the Defence to plead that the plaintiff had failed to mitigate its loss. No particulars of the failure of the plaintiff to mitigate were provided. It was telling that Mr Ferix withdrew SUM 431 on 14 February 2011. [note: 5]

27 In the premises, those parts of the defendant's submissions that traversed the issues of liability and mitigation of damages were not considered by me.

Discussions and decision

28 I now turn to the Assessment of Damages with the relevant legal principles in mind (see [12]–[15] above). In this particular case, the defendant refused to allow the plaintiff to move the Crane in February and March 2007 and the Crane was later dismantled. Due to the damage sustained by the Crane on 18 April 2007, the delay associated with the non-repair of the Crane, the neglect and abuse of the Crane, the plaintiff was permanently deprived of the Crane. Put another way, this damage to property is analogous to the pecuniary loss consequent on a breach of contract where the damaged property is said to correspond to a deprivation of the contractual benefit which, in this case was to, *inter alia*, safeguard the Crane (see *Remedies for Torts and Breach of Contract* at p 232).

29 By way of background and clarification, the defendant at the hearing of NA 18 had initially adopted the position that the Crane was not in a working condition when it was kept at the defendant's premises. However, midway through the hearing, the defendant changed its position, and Mr Ferix accepted that Lai J had made a finding of fact that the Crane was in a working condition. [note: 6] Consequently, an application was made for leave to file an affidavit from an expert witness, Mr Leng Kwang Chiang ("Mr Leng") to testify on the value of the Crane in 2007 based on the value of a working crane of the type of crane in question. [note: 7] Mr Leng filed his Affidavit of Evidence-in-Chief on 16 June 2010. A supplementary affidavit was filed on 21 July 2010 to correct typographical errors in Mr Leng's earlier affidavit.

30 The evidence adduced at the hearing of NA 18 pertained to the following:

(a) repair of the Crane would be completely uneconomical as it would cost about US$500,000;

and

(b) the value of the Crane as determined by the respective experts called by the parties.

I will consider the evidence in turn.

Crane was a constructive total loss

31 Ms Jacob submitted that the cost of repair would be US$500,000, and that what was left of the damaged Crane was its scrap metal value of US$100,000. I was reminded that, at the trial on liability, Lai J at [113] of Yip Holdings v Asia Link had found the Crane to be in a deplorable condition and that it was near scrap value. The trial judge accepted the evidence of the plaintiff's expert witness, Mr Spencer Kenneth Harold Spencer ("Mr Spencer") that the Crane had been neglected and abused. Lai J at [61] noted:

> ... Spencer opined that the [Crane] had been neglected and abused. He surmised that the parts had been taken off by hacking and that they were not professionally removed by experienced engineers. Many of the major parts had been dismantled and dumped on the ground with some parts beyond repair while others had rusted and would need to be replaced. There was little evidence of maintenance work and the condition of the [Crane] was such that it was near scrap value.

32 The trial judge also noted the evidence of the defendant's own witness, Mr Abdul Razak, a marine engineer, who agreed with Mr Spencer's view on the state of deterioration of the Crane and opined that it might be uneconomic to repair to reinstate it to previous working condition (see [5] above). Mr Spencer had estimated the total cost of repair to be about US$500,000 excluding the other costs of lifting equipment such as a forklift, a small crane and an 85 ton crawler crane for the rebuilding and reassembly of the Crane (see *Yip Holdings v Asia Link* at [62]).

33 Before me, Mr Ferix confirmed that the condition of the Crane was not an issue at the hearing of NA 18 as it was already decided by Lai J. Before the AR, the defendant did not adduce evidence of the cost of repair of the Crane in its damaged state.

34 On the other hand, the plaintiff called Mr Ian Drysdale Banks ("Mr Banks") as its expert witness. Mr Banks testified on 9 April 2010. He had inspected the Crane on-site and seen its condition before writing his report. Mr Banks opined that it was commercially not viable to repair the Crane for it would cost the sum of US$500,000. [note: 8] The cost of repairs in the sum of US$500,000 did not take into consideration the cost of replacing the main boom which was found to be in an unusable condition. The condition of the various component parts of the Crane was described in detail and the report contained his recommendations on whether they were serviceable or had to be replaced. Mr Banks assessed the Crane's scrap value to be US$100,000.

35 The AR accepted that it was uneconomical to repair the Crane. She proceeded to assess damages based on the value of the Crane at the time and place of destruction. I agreed with the AR that the Crane was a constructive total loss.

Value of the Crane: pre-breach

36 The Crane was manufactured in 1967. It was an old and second-hand crane that was no longer in production as its manufacturers were no longer in business. The market was unable to supply any close replica or suitable replacement of what had been lost. Damages were awarded for the loss of

the Crane. In other words, the loss was *prima facie* the value of the Crane. A question for consideration is how is the value of the Crane to be assessed?

37 One way of putting a monetary figure on the value of the chattel is to use "market value". Market value is looked upon as the fairest way to objectively assess the value of a chattel destroyed at the place and the time of the wrong. The function of an available market as the basis upon which to determine compensation in damages in a case involving negligent damage to goods was explained by Coleman J in *Derby Resources AG and another v Blue Corinth Marine Co Ltd* [1998] 2 Lloyd's Rep 410 ("*Derby Resources*"). Colman J's explanation (which is of general application) states (at 416):

> The relevance of an available market in this exercise is thus simply to provide evidence of the monetary value of the goods, both in their sound condition and in their damaged condition.

Thus, in cases where the chattel can be replaced in the market, evidence to assess compensation to the owner for the destroyed or lost chattel is easily available. It is not disputed that expert evidence may be given of the market value of the chattel as it was at the time and place of destruction (see *The Harmonides* [1903] P 1 at p 5-6).

38 However, if the market value cannot be determined or will be inadequate because of the special or unique nature of the chattel, the value of the chattel must still be ascertained, and the court has to do the best it can on the available evidence. This is because the exercise required to quantify the damages would involve the same objective and principle: the value of the chattel at the time and place of destruction.

39 I now come to what evidence the court can take into consideration if there is no meaningful market value. The commentary in para 14.11, *Butterworth's Law of Damages* is instructive:

> ... [W]here there is otherwise no meaningful market value, the court must attempt as best it can to value what was lost, or rather to determine what it was worth to the claimant. For these purposes the admissible evidence ranges widely. Courts have taken into account original cost less depreciation, evidence of earnings (in the case of a chattel such as a ship), insurance appraisals, bona fide offers, sales of similar chattels or agreed resale prices.

40 Another suggestion that is instructive is gathered from Coleman J's observations in *Derby Resources* (at 416 – 417):

> There may be cases where the probative value of market prices at different place or at different dates is weak but where the monetary value of the goods indicated by that evidence can be corroborated by other evidence from the place of delivery at the time of delivery with the result that on the whole of the evidence the court can reach a conclusion. It is, however, important to keep in mind that the purpose of the exercise is to ascertain the objective monetary value of the goods, not their utility to the receiver in the circumstances peculiar to him.

41 Finally as stated, the value of the Crane is assessed at the place and time of the wrong. This is the general rule that damages for tort or breach of contract are assessed as at the date of the breach. It is recognised in the cases that such an inquiry may be factually difficult, and should not be applied mechanistically in circumstances where assessment at another date may more accurately reflect the compensatory principle (see *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433). Thus, events occurring between the date of damage and the date of trial may fall to be taken into account (see Scrutton LJ in *The Kingsway* [1918] P 344 at 362).

42 In the present case, the AR held that it was "fair to assess the value of damage to the crane by taking ... the value of the crane as at the date of breach (February/March 2007)". [note: 9] In my view, what the AR meant to say was that she would determine the Crane's pre-breach or pre-accident value, and she rightly identified the period to be in "February/March 2007".

43 I now come to the evidence of the expert witnesses.

44 The plaintiff's expert witness, Mr Banks, was the Managing Director and co-owner of Mobile Crane Asia Pte Ltd. The defendant's expert witness, Mr Leng Kwang Chiang ("Mr Leng"), was the Director of Valuations, Asia of GoIndustry DoveBid Pte Ltd.

45 Mr Banks stated at paragraph 4 of his Affidavit that he has had extensive experience working in the crane business industry having worked over 30 years, holding various roles in engineering, sales and senior management, in three of the largest companies in the industry, namely Grove Crane, Krupp and Demag Cranes, which was acquired by Terex Cranes in 2002. [note: 10]

46 In preparing his report, Mr Banks read and considered Mr Spencer's affidavit evidence filed for the trial on liability. He also gathered the condition of the Crane from the evidence given by Yip and Mr Spencer at the trial. [note: 11] Mr Banks also spoke to Yip. On 15 February 2007, Yip inspected the Crane with one Chan Yeng Sum of Triple Gem with the view of estimating the labour and equipment cost of moving the Crane out of the defendant's premises. Photographs of the Crane were taken at the time. Mr Banks also inspected the Crane on-site before writing his report. He put forward a figure of US$400,000, in part based on his understanding that the Crane was refurbished in 1997, and that its value at that time was US$550,000 and it was financed to this amount. He had not seen evidence to cast doubt in his mind that the Crane was not refurbished in 1997. In re-examination, Mr Banks elaborated that these types of cranes were built to last, and the older ones were built to enable refurbishing to be done, unlike the modern ones. Maintenance, working conditions and climatic conditions would play a part in the working life span of the cranes. [note: 12]

47 Based on his knowledge of the market in 2007, the figure of US$400,000 was what the Crane could be sold to his client in 2007, and on the assumption that the Crane was in a working condition. [note: 13] Mr Banks also explained that second-hand cranes were in demand between 2007 and 2009 because of a world-wide shortage.

48 In cross-examination, Mr Banks was asked a second time how he had arrived at the figure of US$400,000: [note: 14]

> Q: And your final sentence is that you estimate the next value of the crane in February 2007 is in the region of US$400,000. Can you explain how you arrived at this figure?
>
> A: From my knowledge of the market at the time. This is how I make my living.
>
> Q: And this was based on the assumption that the crane was in good working condition.
>
> A: Yes

49 On the other hand, Mr Leng was of the view that the Fair Market Value of the Crane in 2007 would be S$150,000.00. [note: 15] Fair Market Value was defined in Mr Leng's appraisal report as: [note: 16]

> A professional opinion of the estimated most probable price expressed in terms of currency to be realised for property in an exchange between a willing buyer and a willing seller, with equity to both, neither being under compulsion to buy or sell, and both parties fully aware of all relevant facts, as of the effective date of this appraisal report. Both the buyer and the seller acknowledge that the assets must be dismantled and removed at the buyer's expense.

50 Mr Leng's valuation was on a "Desktop" basis (meaning that a physical inspection of the crane was not made). He considered that the closest guide to the Crane's value was to be found in certain comparables which he had put together in a table. The table was annexed to his appraisal report. As stated earlier, the defendant was no longer disputing Lai J's finding that the Crane was in a working condition when it was handed over to the defendant, [note: 17] and as such, Mr Leng's evidence was based on comparable cranes in a working condition.

51 Yip had testified that the Crane was meant for the offshore industry which was the plaintiff's main business. [note: 18] He explained that the Crane was not "a standard production". It had to be specially ordered for the offshore industry, and was thus unique. He said: [note: 19]

> ...
>
> The special features are: the boom is ordered specially with a "92 inch", high-lift boom. 92-inch refers to the diagonal measurement, the length of the boom. Whereas a standard boom for a 150-ton crawler crane is only 77 inches. The cords of the base unit has a 5 inch diameter, the outer section is reduced to 3.5 inches. In comparison to the standard boom, the outer cord is 3 and a-half inches, if I remember correctly. This 92-inch boom actually was designed as part of one model higher of the American hoist, the crane identified as 9310. This 9310 is rated at 225-tons, as opposed to 150. The tracks of the standard-sized crawler crane is 44-inches, whereas on my 9280, it is equipped with a 50-inch track. Again this track is taken from 9310. The chassis of the 9280 also have an option available, to extend the track by about 2 and a half feet wider. All these options are needed for offshore operation because the crane will be mounted on a barge in the open sea, where it is subjected to marine environment, waves action etc. I have perused the Notes of Evidence of in respect of PW1's testimony for the AD given on 9 April 2010- he testified that under ISO standards, the crane capacity is automatically reduced or downgraded by 40%, in the marine environment. With these features identified, then the crane is suitable for working in the environment. The wider track gives you stability... .

52 Yip's reference to Mr Banks' evidence on the downgrading of the Crane for off-shore operations was further explained in cross-examination: [note: 20]

> But for offshore operations, for a marine environment, we select features to compensate the downgrading of the ISO features of the lifting capacity by 40%. To overcome that, we select components from a bigger crane to compensate, and they came up with a new number only for this crane, 9280. So it's more like a special built model.

53 Yip also gave evidence before the AR that there had been approaches to buy the Crane in 2007. I was mindful that the same evidence was previously noted to be undisputed by Lai J in [38] of her decision (see [6] above). One interested party was Skyboom from India, and the other was See Yong & Sons from Malaysia. Yip referred to his Affidavit of Evidence-in-Chief filed for the liability trial where he had recounted that between May and December 2007, one Ashni Suchdev of Skyboom was prepared to buy the Crane at US$400,000 if it was in a fully operational condition. [note: 21] Yip's offer

to Mr See Fann of See Yong & Sons was to sell the Crane, rebuilt by Haruki, at US$400,000. [note: 22] There was Haruki's offer to buy the Crane "as is, where is" for S$330,000. [note: 23]

54 In my view, the expert's opinion of value in the present case had to operate on the basis of experience and judgment as opposed to having material on the basis of which to offer analytical approaches. I accepted the AR's reasons for preferring the opinion of Mr Banks. Mr Banks had extensive knowledge, expertise and experience in the heavy crane industry for over 30 years where he had held various roles in engineering, sales and senior management in three of the largest companies in the industry. The Crane in question was built by the American Hoist Company. The American Hoist Company was acquired by Terex Cranes, of which Mobile Crane Asia Pte Ltd was the official agent. In this sense, Mr Banks had particular knowledge and experience of cranes manufactured by American Hoist Company.

55 In contrast, Mr Leng's experience as a licensed appraiser and valuer was more broad-based and general. Mr Leng possesses a certificate in ship building and engineering from Ngee Ann Polytechnic. During his career as an appraiser and valuer, he had valued cranes of different makes. In his report under the heading "Use of the Appraisal", he wrote: [note: 24]

> ... to provide [the defendant] with the documentation necessary for determining the potential value of the asset and financial decision making.

56 The AR noted that Mr Leng had told the court that he made his assessment based on internet information and general sources from trade magazines. [note: 25] His answers at cross-examination assisted in evaluating his experience and expertise: [note: 26]

> Q: Please tell the court your qualifications.
>
> A: *I have a certificate in shipbuilding and engineering from Ngee Ann Polytechnic*.
>
> ...
>
> Q: Have you ever been involved in the sale, use, maintenance or inspections of American crawler cranes?
>
> A: *Ok, my career is an appraiser or valuer. So I'm only involved with inspection and appraisal of cranes*.
>
> ...
>
> Q: In the past, you physically go to see the crane but now, you are doing more *desktop appraisals*?
>
> A: Yes.
>
> ...
>
> Q: Am I right to say that your job scope as a desktop appraiser, you will just get the necessary information pertaining to that machine, and make an evaluation based on the documents?
>
> A: Yes.

Q: Does your company hold yourself out to be specialists in American crawler cranes?

A: No, because we are not so called dedicated dealers of maintenance company. We are an appraising and auctioneering company.

...

Q: The plaintiff's expert had opined that the price of cranes had gone up due to the construction boom from 2007 to 2009, and this was a factor he considered. What are your views?

A: Actually, the boom was from 2005. It is the truth, it is worldwide, China is the biggest consumer, this knowledge was given to me by people in the business.

[emphasis added]

57 From the answers above, it is evident that Mr Leng was lacking in terms of experience, expertise or knowledge of American crawler cranes. Furthermore, I noted from the table and the printouts attached to his report that the comparable cranes he had identified as having similar characteristics as the Crane were located in various states in America. Significantly, his valuation of S$150,000 was based on a sale "as is, where is" to be removed at the expense of the buyer [note: 27] and that valuation would not assist the court as the appropriate measure of damages would have to include the notional cost of transportation to Singapore. More importantly, the cranes listed in the table prepared by Mr Leng were for use on land rather than of the type used offshore in a marine environment with the special features identified by Yip in his testimony (see [51]-[52] above).

58 Mr Leng was informed by the defendant that the length of the boom was 100 feet and based on that advice, Mr Leng commented that this length was impractical in the sense of its proportion and utility. [note: 28] When told that the Crane's shorter boom was not for lifting but for offshore dredging purposes, he agreed with counsel's statement. However, he claimed without explanation that the Crane could be used offshore as well as onshore and that it was not a dedicated offshore crane. [note: 29] In the end, he conceded that the Crane would have to be converted to be used for onshore operations. [note: 30] Later, when pressed by counsel for the plaintiff, Mr Leng accepted that if the Crane had the special features Yip talked about, the features would be considered as enhancements, and that his valuation would be different in the sense that the value would be dependent on the level of enhancement. [note: 31]

59 From the overall evidence, Mr Leng's evidence lacked probative value. In contrast, Mr Banks provided more cogent and convincing evidence. Besides, the monetary value of the Crane could be corroborated by the offer Yip received from Ashni Suchdev of Skyboom who was prepared to buy the Crane at US$400,000 if it was in a fully operational condition. [note: 32]

60 The figure of US$400,000 represented a reasonably conservative figure for what its value would have been if the defendant had not acted in breach of contract. It was accepted that in February 2007, an engine of the Crane had to be repaired [note: 33] and that it would cost US$5,000 to do so. [note: 34] Against the figure of US$400,000, a sum of US$5,000 had to be deducted. Notably, the next sum of US$15,000 was the cost to reassemble the Crane. It was an expenditure that arose because the defendant had wrongly caused the Crane to be dismantled. I agreed with Ms Jacob that the AR was wrong to have deducted this sum from the value of the Crane. Finally, I concluded that the

defendant should take over the Crane "as is, where is" since the award of US$395,000 was for damages in full. Accordingly, there should be no deduction of the scrap value of US$100,000 from the figure of US$400,000.

61 Given that each side was partially successful in respect of its own appeal, I ordered that each side is to bear its own costs.

[note: 1] NOA dated 20 April 2011

[note: 2] Defendant's Further Skeletal Submissions dated 19 April 2011 at paras 13-14

[note: 3] AR's NOE dated 15 September 2010 at p 4

[note: 4] Defendant's skeletal submissions dated 16 February 2011 at para 152

[note: 5] AR Leong's Minute Sheet dated 14 February 2011

[note: 6] Affidavit of Walter Ferix filed 9 June 2010 at para 3

[note: 7] Summons No 2262/2010

[note: 8] Banks' affidavit filed 18 January 2010 at paras 5 & 6

[note: 9] AR's NOE dated 15 September 2010 at p 5

[note: 10] Banks' Affidavit filed 18 January 2010 at para 4

[note: 11] AR's NOE dated 9 April 2010 at p 7

[note: 12] AR's NOE dated 9 April 2010 at p 14

[note: 13] AR's NOE dated 9 April 2010 at pp 8 & 9

[note: 14] AR's NOE dated 9 April 2010 at p 9

[note: 15] Defendant's Bundle of Expert Reports and Affidavits for NA No 18 of 2010, p 26

[note: 16] Mr Leng's AEIC filed 16 June 2010 at p 20

[note: 17] AR's Minutes dated 9 June 2011 to Summons No 2262/2010

[note: 18] Yip's AEIC filed 18 January 2010 at paras 12 & 19

[note: 19] AR's NOE dated 18 June 2010 at pp 2 & 3

[note: 20] AR's NOE dated 18 June 2010 at p 11

[note: 21] AR's NOE dated 18 June 2010 at pp 16 & 21

[note: 22] AR's NOE dated 18 June 2010 at p 34

[note: 23] AR's NOE dated 18 June 2010 at p 27

[note: 24] Leng Kwang Chiang's AEIC filed 16 June 2010 at p 20

[note: 25] AR's NOE dated 15 September 2010 at p 3.

[note: 26] AR's NOE dated 9 July 2010, pp 2 to 7

[note: 27] Leng Kwang Chiang's report at 23 of Bundle of Expert Reports and Affidavits

[note: 28] AR's NOE dated 9 July 2010 at p 9

[note: 29] AR's NOE dated 9 July 2010 at p 11

[note: 30] AR's NOE dated 9 July 2010 at p 13

[note: 31] AR's NOE dated 9 July 2010 at p 14

[note: 32] AR's NOE dated 18 June 2010 at pp 16 & 21

[note: 33] AR's NOE dated 28 April 2010 at p 8

[note: 34] AR's NOE dated 9 April 2010 at p 11 & AR's NOE dated 18 June 2010 at p 36