The "Asia Star"
[2008] SGHC 92

Case Number : Adm in Rem 30/2004

Decision Date : 05 June 2008

Tribunal/Court : High Court

Coram : Chew Chin Yee AR

Counsel Name(s) : J Govintharasah s/o Ramanathan (Gurbani & Co) for the plaintiff; Thio Ying Ying and Alan Loh (Kelvin Chia Partnership) for the defendant

Parties : —

Admiralty and Shipping

Contract

5 June 2008

Chew Chin Yee, Assistant Registrar:

Background

1 The plaintiff, Pacific Inter-Link Sdn Bhd ("PIL"), a Malaysian company that trades in refined palm oil products, chartered a vessel, the Asia Star from the defendant ("OAS"), the owners of the vessel, to carry 21,500mt of refined palm oil from Belawan, Indonesia, and from Pasir Gudang, Malaysia, to Turkey.

2 The Asia Star was found to be unfit for loading the cargo, upon inspection by PIL's representatives on 19 January 2004. PIL then rejected the vessel. Mr Jason Wang Jian Jun ("Jason Wang"), the assistant business manager of CSC Oil Transportation (S) Pte Ltd, the managers and operators of the Asia Star, subsequently cancelled the charterparty, on 19 January 2004. OAS made a further attempt to deliver the vessel for boarding, after cleaning of her tanks, and invited PIL to re-inspect the tanks, on 20 January 2004. As there was no reply, OAS subsequently cancelled the charter party, on 21 January 2004. OAS were found liable for damages for breach of the charterparty, which assessment was heard before me.

PIL's claim

3 PIL claimed for the following items of loss:

Loss incurred on account of cancellation of sale contracts for the Cargo by PIL's suppliers PT Pacific Indomas ("Indomas"):	US$ 698,889.88
Claim by Plaintiff's buyers Agrima Ic Ve Dis Ticaret Pazarlama Ltd ("Agrima")due to failure of delivery:	US$ 823,800.00

Penalty charges imposed by suppliers PT Pacific Medan Industri ("Pamin") and Pacific Oil and Fats Industries Sdn Bhd ("Pacoil") for delay in loading/failure to present vessel for loading and for charges such as interest and storage, reprocessing, transportation and hearing charges:	US$ 357,000.00
Total	**US$ 1,879,689.88**

Plaintiff's case

4 PIL is, by its own declaration, one of the largest traders of palm oil products in Malaysia and Indonesia. PIL had entered into contracts for delivery of the following products to Agrima, who was their trading partner in Turkey. Agrima is itself a trader in palm oil products.

Products and Quantities to be delivered to Agrima

(a) 10100 MT ("Metric Tonnes") of Palm Oil

(b) 3500 MT Palm Stearin

(c) 5750 MT Palm Olein

(d) 1650 MT Palm Kernel Oil

(e) 500 MT CCNO

5 The total quantity to be delivered was 21,500 MT of products.

6 PIL purchased the products from three suppliers – Indomas, Pamin and Pacoil. 12000 MT was purchased from Indomas, while 57500 MT and 3750 MT were purchased from Pamin and Pacoil respectively.

7 The Plaintiff's case is that the products were all supposed to have been shipped on the *Asia Star* and delivered to Turkey in satisfaction of their contracts with Agrima. The cargoes to Agrima were intended to be shipped between 15 December 2003 to 15 January 2004.

8 The *Asia Star* was initially fixed for charter with a laycan between 27 December 2003 to 4 January 2004. PIL nominated the *Asia Star* as its vessel in its Shipping Instructions ("SI") to the three suppliers. However, the vessel was delayed and berthed only on 19 January 2004.

9 PIL contends that loading of the cargo from the three suppliers, based on the initial laycan of *Asia Star*, was supposed to have been from 5 January 2004 onwards. However, due to the delay, they had to obtain extensions from the suppliers.

10 After the charterparty was terminated by Jason Wang, Indomas repudiated its contract with PIL on 22 January 2004, on the basis of their breach of contract in failing to load the cargoes purchased. In addition, Agrima cancelled the majority of its purchase contracts with PIL on 23 and 26 January 2004, after they learnt of the cancellation of *Asia Star.* Agrima then claimed against PIL for the losses incurred, as well as the costs of replacement products.

11 PIL negotiated with Pamin and Pacoil for a substitute vessel, the *Chembulk Barcelona*, to load the goods purchased. The loading was done in February 2004. Pamin and Pacoil agreed, subject to penalty charges for the delay, which included storage, reprocessing and heating costs. Agrima also agreed to a delayed delivery of 5750 MT of the goods on the *Chembulk Barcelona.*

Defendant's case

12 OAS mounted three main arguments. First, they contended that PIL had failed to prove that the damage suffered was a result of their breach. Secondly, they argued that PIL had failed to mitigate its loss. Lastly, they took issue with the quantification of damages submitted by PIL, on the basis of the calculation, as well as the fact that some of the damages claimed were too remote.

Decision

13 I considered the matter in the same sequence as the arguments advanced by OAS.

Whether PIL had proven its loss

14 The logical first step would be to examine if the evidence presented by PIL sufficiently proved its loss, on a balance of probabilities. If not, the issues of mitigation and quantification of damages would be irrelevant.

15 The evidence in support presented by PIL were mainly the SIs and purchase orders with Agrima. These corresponded in time, quantities and types of goods ordered. In addition, the *Asia Star* was stated on the SIs as the nominated vessel for loading. The representative of PIL, Mr Ravi Kumar Nagar ("Ravi"), also testified at the hearing that the *Asia Star* was the only vessel in the relevant period (January 2004) which was chartered by PIL to carry goods to Turkey.

16 The thrust of the Defendants' attack was basically that PIL had not actually decided at the relevant point in time (19 January 2004) to ship the cargos from the three suppliers to Agrima on the *Asia Star*. They further contend that PIL had effectively colluded with Pamin, Pacoil, Indomas and Agrima to present a "sham" case to the court.

17 In support of their submissions, the OAS pointed to numerous cargo nomination instructions, which had been sent to the OAS via email. These emails, sent between 13 to 17 January 2004, showed that PIL requested various permutations in terms of the quantities of cargoes to be loaded on *Asia Star*, and was asking for stowage plans to be prepared for these permutations. The quantities stated in these requests did not match those in the SIs.

18 OAS also point to the close relationship between the parties. PIL, Pamin, Indomas and Pacoil all belonged to the same group of companies, with common directors. Agrima was also closely linked to PIL, having been appointed as PIL's sole agent in Turkey in 2004.

19 Based on the evidence before me, I found that PIL had proven its loss on the contracts, on a balance of probabilities. Ravi had testified that the various cargo nominations were requested as PIL was exploring possible alternative shipping destinations at that point in time. He explained that this was common practice in the industry. Ravi confirmed that the initial position was for the *Asia Star* to ship cargo for the satisfaction of the Agrima contracts. While PIL was exploring other possible alternatives, they had not made any firm decision on this. This evidence was supported by the testimony of Sheik Abdul Malik Mohamed Kassim ("Malik"), the Head of Chartering/Operations for PIL.

20 The first cargo nomination corresponded to the quantities ordered by Agrima from PIL. This showed that PIL had chartered *Asia Star* for delivery of Agrima's contracts. The evidence did not show that they had decided affirmatively to deviate from this position. PIL was at the relevant time ready, willing and able to ship the cargo from the three suppliers to Agrima in satisfaction of their obligations. The SIs and purchase orders from Agrima are contemporaneous proof of this. The *Asia Star*, being the only ship chartered by them in the relevant time period for shipment to Turkey, was an integral part of the arrangement. Any losses occasioned by PIL's failure to load the cargo and deliver it to Agrima within the material time flowed directly from the Defendant's breach of the charterparty. The fact that they may have eventually used the *Asia Star* for other purposes does not detract from this position.

21 Even if PIL was considering alternative arrangements, these had not concretised at the time of the breach. I do not think that PIL's actions in exploring ways of maximising their business should preclude them from claiming for loss of a pre-arranged transaction, which the Defendant's breach had unwound.

22 I also noted that OAS had alleged fraud on the part of PIL in presenting this claim. This was not specifically pleaded. Fraud has to be specifically pleaded, due to the very serious nature of the allegation. While OAS has sought to couch this submission in the form of attacks on the credibility of the evidence presented, it was in substance an allegation of collusion on the part of PIL and its associated companies to present a false case to this court. A substantial amount of the hearing was directed towards cross-examination of the various witnesses on their complicity in the "sham" presented by PIL.

23 I found these allegations to be entirely unmeritorious. The case of PIL is based largely on the contemporaneous SIs and purchase orders with Agrima, which were concluded well before PIL's travails with the *Asia Star.* The payments of money by PIL to the various parties are also documented. It was highly unlikely, to say the least, that PIL would pay out huge sums of money in settlement of the claims even before litigation had commenced, in the expectation that they would be able to claim back the same as damages. While parties are entitled to raise defences and/or causes of actions as they deem fit, where these are plainly unmeritorious, not properly pleaded and consumes a large part of the time taken in the proceedings, adverse consequences may well be attracted in terms of costs.

Whether PIL had failed to reasonably mitigate its loss

24 It is trite law that a plaintiff in suing for damages in breach of contract has the duty of taking all reasonable steps to mitigate the loss consequent on the breach. It may also be usefully understood as a break in the causative link – having failed to take reasonable steps to mitigate his loss, damage which is directly attributable to this failure could more properly be construed as a result of the conduct of the plaintiff, and not flowing from the breach of contract.

25 The standard of reasonableness is not a high one; the plaintiff is not expected to do anything other than in the ordinary course of business: *British Westinghouse Electric Co Ltd v Underground Electric Rhys* [1912] AC 673. What would constitute reasonable steps that ought to be taken is dependent on the particular circumstances of each case: *Payzu Ltd v Saunders* [1919] 2 KB 581, cited with approval in *PT Master Mandiri v Yamazaki Construction (S) Pte Ltd* [2001] 1 SLR 540.

26 In deciding on the consequences of the failure to take reasonable steps, the court must also have regard to events which transpired after the breach, in order to determine how much, if any of the damage suffered by the plaintiff was due to this failure. This is only done, however, once the

failure to take reasonable steps is established. In judging the reasonableness of a plaintiff's conduct, the circumstances to be considered should be limited only to those prevailing at the material time.

Were the steps taken by PIL reasonable in the circumstances?

27 The main contention here to which I addressed my attention was the availability of an alternative vessel, the *Puma*, which was made known to PIL on 20 January 2004.

28 The circumstances were thus: After OAS failed the ship inspection on 19 January 2004, Malik immediately requested one Mr Sivanathan Munusamy ("Siva"), a shipbroker, to look for another vessel. It should also be mentioned at this stage that Jason Wang had already informed PIL that OAS were not able to offer any substitute vessels. Two vessels were raised. One, the *Mt Mackinney*, was deemed unsuitable because of its size and its late laycan. The other vessel was the *Puma,* which was stated to be available on 27 January 2004.

29 Malik negotiated with the owners of the *Puma* on 20 January 2004. This led to the eventual offer by the owners for the *Puma* to be available for a laycan of 25-31 January 2004, and for delivery to Turkey. The offered rate by the owners was US$27.50 per MT, with demurrage at US$16,000 and a minimum loading tonnage of 36,000 MT. These were all confirmed on 20 January 2004.

30 Malik gave a firm counteroffer to the owners of the *Puma*, on the same day, requesting for a lower freight rate of US$25.50 per MT, as well as a lower demurrage. Malik confirmed in court that the freight rate was the only factor which prevented him from chartering the *Puma* as substitute for the *Asia Star*.

31 According to Malik, he wanted to reduce the freight rate by US$2 per MT in order to compensate for the fact that there was an excess space of 14500 MT on the *Puma*, which PIL would have to fill with extra cargo on short notice. These cargo would most probably be discharged at ports in the Red Sea, which warranted a lower freight rate.

32 The owners of the *Puma* did not give any reply to Malik's counteroffer. Malik then gave Siva instructions to find a new vessel, on 21 January 2004. It is of note that this new requirement was for a vessel to carry 20,000 MT to East Mediterranean and 20,000 MT to the Red Sea, on an urgent basis.

33 Based on the above facts, I found that the larger capacity of the *Puma*, as compared to *Asia Star*, was not a major consideration for PIL in deciding whether to charter it in substitution. This is supported by Malik's testimony that the only sticking point was the freight rate. It appeared clear to me that PIL was simply trying to maximise the revenue which could be generated from chartering the *Puma*, which was why they did not immediately charter the *Puma* as a substitute vessel.

34 Two other salient points to note at this juncture were: First, the fact that none of the suppliers, nor Agrima, were kept informed of the state of affairs at that critical time. Neither the fact that the *Asia Star* had been rejected, nor the fact that there was a substitute vessel available with an appropriate laycan, was told to them at the material time. PIL did not even ask for an extension of time from Agrima, who were informed of the cancellation of the *Asia Star*, through their agent, only on 23 January 2004. As for Indomas, they learnt of the cancellation only on 24 January 2004. This was after they had already sent a letter, dated 22 January 2004, to PIL, informing PIL that Indomas was cancelling all the contracts.

35 The second point to note was that as at 19 January 2004, PIL was already technically in

default of their obligations under the SIs and purchase contracts with Agrima. This was as they had nominated the *Asia Star*, with its laycan of 27 December 2003 to 4 January 2004, as the loading vessel. I found that based on the contract with the suppliers, loading had to be done by 4 January 2004. Based on the contemporaneous correspondence and the evidence of the suppliers, two extensions were granted to PIL to present the vessel for loading, without prejudice to the suppliers' rights to cancel the contracts and/or to hold PIL liable for penalty charges occasioned by the delay – to 15 January 2004 and 21 January 2004. As for Agrima, the goods were supposed to have been shipped on 15 January 2004 from the suppliers. They had given an extension to 21 January 2004 for the goods to be shipped. This exacerbated the urgency of the matter at the material time.

36 In light of the above facts, I found it inexplicable why PIL did not immediately inform the parties concerned of the rejection of the *Asia Star* on 19 January 2004, the cancellation of the charterparty on 21 January 2004, and the ongoing negotiations with the owners of the *Puma*, on 20 January 2004. This should have been done forthwith, along with a request for a further extension of time. This is especially so in light of PIL's precarious contractual position.

37 As for Agrima, I found that PIL knew, or should have known, that the cargo they were supposed to deliver to it was predominantly meant for on sale to Agrima's end buyers. Both were trading companies, not end users. Based on the contract between PIL and Agrima, PIL would be liable to Agrima for all consequential damages arising from any breach of the contracts. Having already delayed the shipment, it should have been incumbent on PIL to inform Agrima of the ongoing state of affairs at the time and negotiate in order to prevent repudiation of the contract by Agrima.

38 A further fact to note was that the market for palm oil products was a rising one at the relevant point in time, between January and February 2004. This was undisputed, and would have been a fact known to PIL, being traders in these products. This would have made it even more incumbent on PIL to avoid any cancellation of contracts for the supply of the products, since they would be exposed to potentially ruinous damages.

39 Ravi has testified that he informed Agrima's managing director, Ms Kestelli Isinsu ("Isinsu") of the fact that they were negotiating for a replacement vessel at the relevant time, although no details were mentioned. This was directly contradicted by Isinsu's testimony, where she confirmed that she was not told of any such negotiations at the time. I believed Ms Isninsu on this point, as she was adamant that she had, in fact, been told that there was no substitute vessel forthcoming on 23 January 2004.

40 Malik explained that the reason for not informing the parties about the *Puma* was simply that they had not confirmed its charter. This was as PIL, having already gotten numerous extensions, would look "stupid" if the charter of *Puma* didn't "come through". Malik also expressed the view that there was "flexibility" between the parties in negotiating for extensions. I would state that Malik appeared to take conflicting positions in this respect, as he also testified that there was "no flexibility" at that point in time between the parties.

41 Based on the evidence, I drew the inference that PIL had taken it for granted that it would get further extensions time granted to it by both Agrima and the suppliers. Plaintiff counsel's submissions were also to this effect – that PIL didn't expect any cancellation of the contracts at the time.

42 I found this position taken by PIL to be unreasonable, in the circumstances. Having already substantially delayed the shipment, it was unreasonable for PIL to have expected extensions as of right. This is especially since PIL had already received notifications from the suppliers and Agrima previously on the fact that they were potentially liable for penalty charges for their lateness.

Repudiation of the contracts by the parties was a clear and present danger in the circumstances prevailing at the time, and prompt action should have been taken by PIL to seek to reassure the parties. In fact, counsel for the plaintiff had himself, during cross-examination, put forth the proposition that PIL was, at the material time, "shitting bricks".

43 I further found that PIL should have chartered the *Puma* at the freight rate of US$27.50 per MT, once they had arrived at a satisfactory laycan of 25 January 2004. At the minimum, they should have reserved the ship, pending confirmation of extensions of time being granted by the suppliers and Agrima. When the owners of the *Puma* did not respond to the counteroffer, I was of the view that PIL should have chartered the *Puma* at the offered freight rate, rather than abandoning it altogether. A comparison of the monetary consequences fortified my view. Even assuming that PIL failed to find available cargo for shipping to fill up the excess 14,500 MT capacity of the *Puma,* it would have had to pay a "dead freight" of US$398,750. However, it would have made savings of US$96,750, based on the lower freight of the *Puma*, compared to the US$32 per MT they had chartered the *Asia Star* for. This meant a potential loss of around US$302,000 at most.

44 The potential loss from cancellation of any, if not all, of the contracts far outweighed this. The amounts on each individual head claimed by PIL in this suit exceeded this value. In particular, Agrima's claim for loss was initially in excess of US$900 thousand, which was later settled at US$823,800 by PIL. As I had found above, PIL would have been aware of the rising prices, and hence potentially ruinous damages, it would have had to pay in the event of repudiation of the contracts. The value of the contracts themselves far exceeded US$302,000.

45 I found that in the circumstances, a reasonable and prudent businessman in PIL's position would have chartered the *Puma*, subject to negotiations for extensions of time, and then negotiate for extensions on the basis of the availability of the *Puma.* If extensions of time had not been granted, PIL could have simply released their "option" to charter the *Puma*, at no cost to themselves. I also found that PIL should reasonably have chartered the *Puma* at a rate of US$27.50 per MT, instead of doggedly insisting on a lower rate. As will be explained further, the availability of an alternative vessel would have materially affected the development of events.

46 In this regard, I accepted the evidence of Mr Raj Kumar Shah ("Shah"), an expert witness for OAS, that PIL should have chartered the *Puma* even with the dead freight. Mr Shah also expressed the view that PIL should have been in continuous contact with the suppliers and Agrima, in order to keep them updated on the desperate situation at that time. Mr Shah himself was in the palm oil trading business, with extensive experience.

47 I also took the view that the Court is entitled, as a rule of thumb, to expect that parties would be more inclined to seek to fulfil their contractual obligations, rather than to blithely face the consequences of a breach. PIL was in imminent breach of its contractual obligations at that point in time. I would have expected them to act more positively to assuage this danger, rather than to gamble on continued goodwill from their contractual parties. Having taken the gamble and lost, I did not find that the consequences ought be visited on OAS.

48 I therefore found, on a balance of probabilities, that the OAS have shown that PIL failed to take reasonable steps to mitigate its losses, by failing to charter the *Puma* at a freight of US$27.50 per MT, and seeking to negotiate an extension of time on 20 or 21 January 2004 with their suppliers and Agrima.

Whether Agrima and Indomas would have cancelled their contracts in any event

49 Having found that PIL failed to take reasonable steps to mitigate its loss, I went on to consider whether any, or all, of the losses claimed could be attributable to this failure.

50 The damages claimed in respect of Pacoil and Pamin would obviously have been largely avoided by the charter of the *Puma*, since there is no question that they would have granted extensions to PIL.

51 PIL have strenuously contended that the charter of the *Puma* would have made no difference, and that Agrima and Indomas would have repudiated their contracts in any event. Based on the evidence, I did not accept this. I found that both Agrima and Indomas would, on a balance of probabilities, have accepted the substitution of the *Puma* to load and deliver the cargo.

52 With regard to Agrima, Ms Isinsu in her testimony confirmed that Agrima needed the cargo to be delivered by mid February 2004. Factoring a voyage time of around 20-22 days, the cargo would have needed to be loaded by around 23 January 2004. Ms Isinsu agreed that a substitute vessel with a laycan of 25 January 2004 to 31 January 2004 was acceptable to her:

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

A: If they could have, we could have delivered, yes, and there wouldn't be any problem. There was no ship [emphasis added]

53 It is clear that Agrima would not have repudiated their contracts with PIL had the *Puma* been chartered, and that fact made known to it.

54 In respect of Indomas, Ms Cherie Toh ("Toh"), Indomas' Branch Manager, had testified that she would have cancelled the contracts on 22 January 2004. I did not accept this evidence, and found that it was more likely that Indomas would have extended the contracts with PIL as well, had the availability of the *Puma* been made known to it.

55 I found Toh to be an unsatisfactory witness. Her evidence was mostly confusing, and she had a tendency to merely repeat her answers, without regard to what was actually being asked of her. She also shifted her position several times in cross examination:

(a) Toh had initially explained in her Affidavit of Evidence in Chief ("AEIC") that she had cancelled the contracts as PIL's cargo was taking up a lot of space in storage tanks belonging to another company, PT Pacific Palmindo Industry ("Palmindo"). However, it transpired under cross-examination that only about 3,000 MT of the PIL's cargo (total 12,000 MT) were being stored in Palmindo's tanks. The rest were stored in Indomas' own storage tanks. Toh did not have an explanation for why her testimony differed materially from the position she took in her AEIC.

(b) In addition, Toh admitted that of the products ordered by PIL, both Palm Oil and Palm Olein were sufficiently "liquid" and could be provided to other customers in the interim delay by PIL to pick up the cargo. This meant that the storage situation could not have been as drastic as she sought to portray in her AEIC.

(c) Toh also tried to justify her position by stating that the Crude Coconut Oil (CCNO), Palm Stearin and Palm Kernel Oil were difficult to dispose of, and so were blocking her storage tanks. I did not accept this, as based on her own evidence, Indomas managed to dispose of all 12,000 MT

of the ordered goods within one to two weeks of their cancellation, at a profit.

(d) Toh also sought to raise the fact that the products were degrading, due to the delay, as a reason why no further extensions could be granted. However, she later agreed that product degradation due to delay was a risk borne solely by PIL, who would still have to take delivery of the goods.

56 In view of the foregoing, I found that the reasons given by Toh for Indomas' steadfast insistence on repudiating the contracts on 22 January 2004 to be less than convincing. Toh also testified that she had "lost faith" in PIL after the numerous extensions and the lack of any vessel being available for loading, and that she would not have allowed any further extensions. Toh also said that she would not have believed PIL even if she had been told that the *Puma* had been available.

57 I found Toh to be a less than credible witness in this respect. Her reasons for needing to cancel the contracts appeared to have little validity. In addition, it seemed strange that she would suddenly choose not to believe PIL's representations about a substitute vessel, bearing in mind the two previous extensions granted. This was particularly since the delays were not PIL's fault, and PIL was, by her own acknowledgement, the biggest "FOB buyer from Indonesia".

58 Based on the long business relationship between PIL and Indomas, I found on a balance of probabilities that Indomas would have granted a final extension to PIL, had they been requested to do so by PIL before 22 January 2004, with the substitution of the *Puma*. There was really no reason for Indomas to have been insistent on cancellation, if an alternative vessel on short notice could have been procured.

59 I accordingly found that all of the damages claimed by PIL could have been avoided by them taking the reasonable and prudent steps of chartering the *Puma* on either 20 or 21 January 2004, and requesting for extensions of time on that basis from the suppliers and Agrima. PIL, having failed to reasonably mitigate their loss, would not be entitled to the damages they claimed for under their Writ of Summons.

Damages to be awarded to PIL

60 The proper measure of damages to be awarded to PIL would therefore be the total amount of freight they would have paid for the charter of the *Puma*, at US$27.50 per MT for 36,000 MT, less the amount of freight which they were originally to pay for the charter of *Asia Star*, at US$32 per MT for 21,500 MT. That figure works out to be US$302,000. I therefore award PIL US$302,000 as damages for the breach of the charterparty by OAS.

61 I would add that while OAS have alleged that PIL would easily have been able to secure additional goods for shipping on the *Puma*, there was no evidence produced in support of this. I found that PIL would have had to bear 14,500 MT of "dead freight" had they chartered the *Puma* as a substitute vessel to load the cargo meant for *Asia Star.*

62 I will hear parties on interest and costs.

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