Paragon Shipping Pte Ltd *v* Freight Connect (S) Pte Ltd
[2014] SGHC 165

Case Number : Suit No 855 of 2012

Decision Date : 26 August 2014

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : K Muralitherapany and Koh Seng Tee Edward (Joseph Tan Jude Benny LLP) for the plaintiff; Navinder Singh and Amirul Hairi (Navin & Co LLP) for the defendant.

Parties : PARAGON SHIPPING PTE LTD — FREIGHT CONNECT (S) PTE LTD

Admiralty and Shipping – Carriage of Goods by Sea – Voyage Charterparties

Contract – Discharge – Anticipatory Breach

Contract – Formation – Acceptance

26 August 2014 Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff and the defendant are Singapore companies in the business of providing transport services for the import and export of cargo by sea. Neither company is a ship owner or operator. Each of them deals with third party providers of vessels either directly or through another middleman.

2 This action arises out of arrangements made between the plaintiff and the defendant for the transport of machinery ("the cargo") from the port of Nanwei in China to Singapore. The exact contractual arrangements are a matter of dispute: the plaintiff's position is that there were two charter contracts (the "first fixture" and the "second fixture" respectively) between the plaintiff and the defendant by which the plaintiff agreed to supply a vessel to transport the cargo, the second fixture being concluded after the first fixture was cancelled by the defendant. The defendant's position is that the first fixture was the only contract between the parties and that because the plaintiff breached the terms of the first fixture, the defendant had to ship the cargo by a vessel supplied by a third party.

3 The plaintiff has sued the defendant for loss of freight and demurrage and the defendant has made a counterclaim for damages for breach of contract and also loss of business arising from a letter written by the plaintiff to the defendant's customer.

4 The following main issues arise from the pleadings, evidence and submissions:

(a) What happened to the first fixture: was the plaintiff in breach?

(b) Was the second fixture concluded between the plaintiff and the defendant?

(c) Was the Notice of Readiness ("NOR") tendered by the vessel under the second fixture

valid?

(d) What remedies are recoverable by either party in relation to the first or second fixtures?

(e) Is the plaintiff liable to the defendant for the tort of wrongful interference with trade?

Background

5 All events referred to in this summary of what occurred took place in 2012.

The first fixture

6 In July 2012, the defendant entered into a contract with a company called Herrenknecht Asia Headquarters Pte Ltd ("Herrenknecht") to transport the cargo from China to Singapore and deliver it to Herrenknecht. At about the same time, the defendant's general manager and director, Marcus Stephen Tan ("Mr Tan") and its operations manager, Yesica Winata ("Ms Winata"), had discussions with the plaintiff's director, Madeline Ong Kah Liang ("Ms Ong"), regarding the provision of a vessel to carry the cargo from the port of Nanwei, China, to Singapore.

7 On 26 July, the plaintiff and the defendant entered into the first fixture by which the plaintiff agreed to provide the vessel "MV Dahua" (the "*Dahua*") to carry the cargo to Singapore for a lump sum freight of US$161,000. The plaintiff had in its turn chartered the *Dahua* for this purpose from FLS (Thailand) Co., Ltd ("FLS") on the basis that it would pay FLS a lump sum freight of US$155,000 for the carriage of the cargo.

8 The charter contract between the plaintiff and the defendant was a voyage charter and a written document entitled "Fixture Note" was signed by both parties. It contained the following important terms:

02) Loading port: 1SBP Owners Berth Nanwei Port, Guangdong, PR China;

03) Discharging port: 1SBP Owners Berth Singapore;

04) Laycan: 10th – 20th Aug, 2012;

19) Others as per Gencon C/P 1994.

Clause 4 above is crucial. It provided that the "laycan", meaning the period during which the *Dahua* had to arrive in Nanwei and be ready to load the cargo, was between 10 and 20 August. If the *Dahua* did not meet this laycan, then the defendant would be entitled to cancel the fixture. The term "laycan" or "lay/can" is commonly used in charter contracts as a short form to indicate the dates when the vessel is to be ready to load and the cancelling date.

9 Clause 19 of the Fixture Note incorporated, as part of the first fixture, the terms of the standard form contract devised by The Baltic and International Maritime Council and codenamed "Gencon". The plaintiff relied on cl 9 of Gencon ("cl 9") to support its stand. Clause 9 provides:

9. Cancelling Clause

(a) Should the Vessel not be ready to load (whether in berth or not) on the cancelling date indicated in Box 21, the Charterers shall have the option of cancelling this Charter Party.

b) Should the Owners anticipate that, despite the exercise of due diligence, the Vessel will not be ready to load by the cancelling date, they shall notify the Charterers thereof without delay stating the expected date of the Vessel's readiness to load and asking whether the Charterers will exercise their option of cancelling the Charter Party, or agree to a new cancelling date.

Such option must be declared by the Charterers within 48 running hours after the receipt of the Owners' notice. If the Charterers do not excise their option of cancelling, then this Charter Party shall be deemed to be amended such that the seventh day after the new readiness date stated in the Owners' notification to the Charterers shall be the new cancelling date.

The provisions of sub-clause (b) of this Clause shall operate only once, and in case of the Vessel's further delay, the Charterers shall have the option of cancelling the Charter Party as per sub-clause (a) of this Clause.

10 On 30 July, FLS informed the plaintiff that the ship's agent for the *Dahua* at Nanwei would be Bruce Gong ("Mr Gong"), of ASB Group Co., Ltd of Guangdong ("ASB"). This information was passed on to the defendant. Subsequently there was contact directly between Mr Gong and the defendant regarding the loading of the cargo and the cargo documents were duly passed to ASB.

11 The defendant was anxious to ship the cargo as early as possible. On 7 August, and again the next day, the defendant wrote to the plaintiff asking for the status of the *Dahua*. On 8 August, the plaintiff replied that the vessel was at Yingkou anchorage due to bad weather and, according to its schedule, the *Dahua* would be at Shanghai between 10 and 12 August; at Nanwei between 15 and 17 August; and in Singapore between 22 and 25 August. A second e-mail was sent out by the plaintiff later the same day which stated that the vessel would be in Nanwei on 15 August and since there was a very big typhoon in China all plans had been delayed.

12 The defendant did some investigation of its own and, allegedly, Mr Tan was advised that the *Dahua* was in the vicinity of North Korea on 10 August and nowhere near the vicinity of the bad weather. On 13 August, the defendant informed the plaintiff that the vessel was near North Korean waters. The e-mail alleged that the vessel was already in default of the fixture note as it would need 15 to 18 days to reach Guangzhou. The e-mail ended with the following demand:

Kindly get the replacement vessel asap by today before noon hrs.

13 The plaintiff denied that the vessel was anywhere near North Korea. On the afternoon of 13 August, it informed the defendant that the vessel had berthed in Tianjin. On 14 August, FLS informed the plaintiff that due to continuing poor weather conditions and delays at the various ports in the region, the *Dahua* would only be able to arrive at Nanwei between 20 and 25 August. Accordingly, on 15 August, Ms Ong informed Mr Tan that she had been pushing for a confirmed schedule but so far the best estimate the plaintiff had received regarding the *Dahua's* arrival was "ETA 20 – 25th August". Ms Ong asked whether the laycan could be extended to 30 August. Her evidence was that Mr Tan rejected this suggestion.

Events leading to the disputed second fixture

14 By 16 August, the plaintiff was able to put forward some "options" (as Ms Ong called them) to the defendant regarding the shipment. In her e-mail sent at 1.35pm that day, Ms Ong told the defendant that the *Dahua* was expected to arrive at Nanwei around 30 August and if the defendant was willing to wait, the ship owner wanted it to sign an extension of the fixture note. If the defendant was not interested, then the *Dahua* would not call at Nanwei. She then advised that: (i)

an alternative vessel under consideration, the "*Limco Asia*", was not suitable because not all the cargo could be stowed under-deck; and (ii) another possible alternative vessel could load on 24 August at Gaolan port which apparently was close to Nanwei. Ms Ong asked the defendant to check with the shipper of the cargo whether loading at Gaolan would be acceptable. Ms Ong concluded by saying that the plaintiff was still looking for alternatives but these were the three "options" presently available. She wanted Mr Tan's urgent response on them. However, the defendant did not reply to this e-mail. At 6.37pm on 16 August, Mg Ong informed the defendant that if it did not agree to an extension of the *Dahua's* laycan, the fixture note would be void on 20 August as the vessel would not be going to Nanwei to pick up the cargo.

15 Mr Tan was upset by that e-mail. In his response, he indicated that if the *Dahua* could not meet the terms of the first fixture, the defendant might take legal action. Ms Ong replied on 17 August that the plaintiff had given the defendant three options and the defendant should indicate its choice as otherwise the plaintiff could not proceed. She also complained that Mr Tan had refused to answer her calls. A few hours later at 1.12pm, she sent the defendant an e-mail announcing that the plaintiff had found a "passing by vessel" to load the cargo in Nanwei on 20 August. She asked the defendant to confirm its acceptance of this new vessel and that the cargo was ready for loading as otherwise the vessel's detention charge would be US$25,000 per day. Ms Ong stressed that she needed an immediate acceptance in order to secure this vessel. The vessel that this e-mail referred to was the "MV AAL Dampier" ("*AAL Dampier*").

16 It is from this point onwards that the parties' accounts of what occurred diverge.

17 According to Ms Ong, the defendant accepted the *AAL Dampier* and the plaintiff proceeded to secure the vessel by entering into a charter with FLS as the disponent owners of this vessel. According to the charter between the plaintiff and FLS, the ports of loading and discharge were Nanwei and Singapore respectively and the time of shipment was between 19 and 20 August. The freight was US$155,000 lump sum and the detention charge was US$20,000 per day.

18 There was no signed fixture note between the plaintiff and the defendant in respect of the *AAL Dampier*. The earliest written response to the plaintiff's email was sent by Ms Winata at about 1.51pm on 17 August. She asked the plaintiff to advise the defendant speedily of the specifications of the vessel. The e-mail stated that the cargo was ready for loading and it needed to be loaded not later than 20 August. Further, the plaintiff should make sure that there was no further delay and that the ETA Singapore of the *AAL Dampier* was to be no later than 25 August.

19 At 2.06pm on 17 August, Ms Ong sent the defendant an e-mail addressed to Ms Winata. The first line of this e-mail read: "Thank you for your confirmation. As discussed, we have confirmed fixing the shipment…". This first line was followed by the terms of the engagement which identified the vessel as being "AAL tonnage or [substitute] (intention *AAL Dampier*)", and specified the following: the port of loading as Nanwei port, the port of discharge as Singapore, the time of shipment as "19 – 20.8.2012", the freight as US$161,000 lump sum and the detention charge as "US$25,000 per day pro rata". Ms Ong's testimony was that she had had a conversation with Ms Winata during which the latter had confirmed the charter of the *AAL Dampier* by the defendant.

20 As far as the plaintiff is concerned, the defendant had agreed orally to charter the *AAL Dampier* to carry the cargo from Nanwei to Singapore and the e-mail summarised above confirmed that. The defendant's position is that it did not confirm the charter of this vessel. It was only exploring the possibility of loading the cargo on to the same. The defendant says that the *AAL Dampier* was offered by the plaintiff in an attempt to rectify its breach under the first fixture. The defendant's interactions with the plaintiff thereafter were an attempt to co-operate in order to mitigate its own loss.

Events after 2.06pm on 17 August

21 After the exchange of e-mails detailed above, the parties continued to correspond. On the same day, the plaintiff sent an e-mail giving the defendant the stowage plan of the *AAL Dampier* and also details of its agent. In this e-mail, the plaintiff stated that the vessel's ETA in Nanwei was 19 August and its ETA in Singapore was 24 August. By a further e-mail sent later that evening, the plaintiff asked the defendant to confirm that the shipper had no problem with customs clearance at Nanwei. Further, the shipper should contact the new agent in respect of loading and ASB was no longer involved with the shipment. The defendant replied that the shipper had been informed of this.

22 The *AAL Dampier* arrived at Nanwei on 20 August. It tendered its NOR at 1915 hours that evening. The plaintiff was informed by FLS on 22 August that a berth had been booked for the vessel but that there was delay due to congestion at Nanwei port.

23 The *AAL Dampier* was scheduled to berth on 23 August. In order to confirm the berth, certain shipping/customs documents in relation to the cargo were required by the Nanwei port authorities. It was the defendant's responsibility, as the shipper, to procure these. The defendant did not supply these shipping/customs documents and as a result the vessel lost the 23 August berth booking. It was then given a tentative berth booking for 27/28 August subject to the shipping/customs documents being made available.

24 On 23 August, the defendant informed the plaintiff that the defendant would be loading the cargo on board a different vessel, the "*MV Sea Castle*" (the "*Sea Castle*"). Mr Tan said that the defendant was unable to load on the *AAL Dampier* as the previous agent, ASB, had retained the shipping documents. The plaintiff's reply was that it would charge the defendant dead freight of US$161,000 as well as detention charges. The defendant nevertheless proceeded to load the cargo on the *Sea Castle* which thereafter transported it to Singapore.

The claim and counterclaim

25 The plaintiff brought this action to recover its loss arising out of the failure of the defendant to load the cargo onto the *AAL Dampier*. The plaintiff claimed freight of US$161,000 or, in the alternative, damages for breach of contract. It also claimed detention charges of US$25,000 per day pro-rated for three days. Further, the plaintiff asked for an order that the defendant do indemnify and pay the plaintiff any sum that the plaintiff may be liable to pay the head charterer and/or the owner of the *AAL Dampier* arising out of the failure of the defendant to perform the charter of the vessel.

26 The defendant resisted the plaintiff's claim on the basis that the plaintiff had been in breach of the fixture in respect of the *Dahua* and that there had never been a confirmed fixture for the *AAL Dampier*. Thus, the defendant was entitled to ship the cargo by the *Sea Castle* and to recover the extra costs it had incurred by reason of having to engage this vessel. The defendant also had a counterclaim against the plaintiff for wrongful interference with the defendant's business relationship with Herrenknecht.

The issues

What is the legal position in respect of the first fixture?

27 The parties have taken opposing positions in relation to the legal effect of the events that occurred between 13 and 17 August 2012. The plaintiff's position is that what occurred fell within cl 9(b) and, as a result, the defendant cancelled the fixture of the *Dahua* on or about 16 August

2012. The defendant denies that this was the legal effect of those events. It contends, in effect, that cl 9(b) did not come into play because the plaintiff was in breach of the first fixture in that the inability of the *Dahua* to meet the contracted laycan of between 10 and 20 August 2012 arose from the deliberate decision to send the vessel to Tianjin and Qingdao.

28 I repeat below the portions of cl 9 which are relevant to the issues discussed in this part of the judgment:

> b) Should the Owners anticipate that, despite the exercise of due diligence, the Vessel will not be ready to load by the cancelling date, they shall notify the Charterers thereof without delay stating the expected date of the Vessel's readiness to load and asking whether the Charterers will exercise their option of cancelling the Charter Party, or agree to a new cancelling date.
>
> Such option must be declared by the Charterers within 48 running hours after the receipt of the Owners' notice. If the Charterers do not excise their option of cancelling, then this Charter Party shall be deemed to be amended such that the seventh day after the new readiness date stated in the Owners' notification to the Charterers shall be the new cancelling date.

(1) Was there a lack of due diligence on the part of the plaintiff?

29 In order to invoke cl 9(b), the plaintiff had to show that the inability of the *Dahua* to meet the laycan was not due to lack of due diligence on its part. The defendant's position is based on the plaintiff's own evidence as shown by its documents and the testimony of Ms Ong. This evidence was that the vessel had not originally been scheduled to call at Tianjin and it was only on 13 August 2012 that the plaintiff was informed of the change in the schedule decided on by the owners of the *Dahua*. On 14 August 2012, FLS informed the plaintiff that the laycan could not be met and asked for an extension of laycan to 25 August 2012. Ms Ong's response to FLS was that the plaintiff was not able to extend the laycan and FLS should find a substitute vessel. The defendant submitted that this evidence showed that the plaintiff knew that it was going to be in breach of the first fixture, yet the plaintiff did not inform the defendant at that time about the request by FLS or that it was trying to find a substitute vessel. Instead, on 15 August 2012 the plaintiff informed the defendant that the ETA of the *Dahua* was between 20 and 25 August 2012 and asked whether the defendant would agree to extend the laycan to 30 August 2012. Obviously, the defendant submitted, the plaintiff wanted an extension of the laycan so as to avoid a breach of the first fixture on its part. Further, on 16 August 2012, the defendant was told that the *Dahua* had departed Tianjin and diverted to Qingdao to load another lot of cargo and would arrive in Nanwei on 30 August 2012.

30 Although the defendant did not say so in terms, the implication of this recital of events was that the plaintiff had not exercised due diligence to make the *Dahua* ready to load at Nanwei by the cancelling date.

31 In my judgment, the evidence does reflect a lack of due diligence on the part of the plaintiff. The plaintiff, as the disponent owner of the *Dahua* under the second fixture, had a duty to cause the vessel to proceed to the loading port with reasonable despatch or, as cl 9(b) put it, to exercise due diligence to meet the contracted laycan. Whilst there was some evidence of bad weather affecting the vessel's progress during the period between 8 and 10 August, the vessel was sent to Tianjin instead of directly to Shanghai as originally scheduled. Even then, the vessel could perhaps have arrived in Nanwei within the laycan even with a stop-over in Shanghai. However, instead of proceeding to Shanghai and then Nanwei, after Tianjin, the owner sent the vessel to Qingdao. This decision was in breach of the obligation to proceed to Nanwei with reasonable despatch.

32 It is clear from the correspondence that passed between the plaintiff and FLS that although from 8 August 2012, the plaintiff was actively checking on the position of the *Dahua* and trying to obtain the firm estimate of when it would arrive in Nanwei, the plaintiff did nothing to try and compel the vessel to meet the laycan. Whilst on 13 August the plaintiff remonstrated with FLS about the change in the itinerary of the vessel, it went no further than asking for an urgent solution to solve the problem of the laycan. It seems thereafter to have concentrated on trying to find a substitute vessel for the defendant. This may have been a practical approach, given that the plaintiff was not in a position to force the *Dahua* to sail to Nanwei, but it did not establish due diligence in attempting to meet the laycan set by the first fixture. As early as 15 August, the owner indicated that the estimated arrival date at Nanwei was between 20 and 25 August and asked for the laycan to be extended to 30 August. Shortly thereafter, the owner's decision to divert the vessel to Qingdao made it impossible for the vessel to arrive at Nanwei within the laycan and thus equally impossible for the plaintiff to claim that it had exercised due diligence to meet the laycan.

(2) Was a proper notice given under cl 9?

33 As the plaintiff did not exercise due diligence to bring the *Dahua* to Nanwei within the laycan, it was not able to invoke cl 9(b). However, the submissions of the parties discuss at some length the issue of whether, if the plaintiff had been entitled to do so, it met the notice requirements of the clause. Thus, although the issue is not pertinent to my ultimate decision, I will consider whether the plaintiff gave a notice in the terms required by cl 9(b).

34 The defendant argues that the notice given by the plaintiff was inadequate and did not meet the requirements of cl 9(b). In particular, the plaintiff failed to: (a) notify it of the revised expected date of the *Dahua's* readiness to load; and (b) ask the defendant whether it would be exercising its option of either cancelling the charter or agreeing to a new cancelling date.

35 The plaintiff relies on three e-mails to show that the requisite notice was given. These are as follows:

(a) The e-mail of 15 August 2012 when the plaintiff informed the defendant that so far the best date given by the owner was "ETA 20 – 25 August" and that the owner had asked for an extension of laycan to 30 August, and if not granted, the owner would look for another vessel.

(b) The e-mail of 16 August 2012, at 1.35pm, when the plaintiff informed the defendant that the *Dahua* had diverted to Qingdao and it was expected to arrive at Nanwei on 30 August; and if the defendant was willing to wait for that vessel it had to sign an extension of the first fixture, otherwise the vessel would not call at Nanwei. Further, the plaintiff advised the defendant of a possible vessel that could load at Gaolan port on 24 August. The plaintiff asked the defendant to "advise your choice of acceptance urgently".

(c) The e-mail of 16 August 2012, at 6.37pm, when the plaintiff told the defendant that if it did not agree to an extension of the laycan, the first fixture would "be void on 20 August" and the *Dahua* would not be going to pick up the cargo and asked the defendant to advise it of the defendant's decision regarding the extension and the other "options" mentioned in the earlier e-mail of the same day.

36 The legal position regarding unilateral notices served pursuant to contractual rights is that such notices should be interpreted objectively and purposively: See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749. The House of Lords in that case stated that the question to be decided was how a reasonable recipient of such a notice, circumstanced as the actual recipient was,

would understand the notice. The court also stated that the purpose for which a notice is given must be taken into account when determining the validity of the notice (per Lord Steyn at 767–769).

37 The defendant argued that *The "Madeleine"* [1967] 2 Lloyd's Rep 224 ("*Madeleine*") and *The "Helvetia-S"* [1960] 1 Lloyd's Rep 540 ("*Helvetia-S*") stipulate that a notice of delay given by an owner under a cancellation clause in the charter party is only valid if there is strict adherence to the requirements of the clause. The cases do not stand for this proposition. In fact, both cases do not even discuss when a notice of delay given by an owner to a charterer will be valid. Rather, they concern the issue of whether the charterer is entitled to cancel a charter party pursuant to a cancellation clause before the stipulated cancelling date when it is clear that the owner will be unable to tender the ship in time. They decided that the charterers had no such right under the cancellation clauses in question (*Madeleine* at 244; *Helvetia-S* at 552). Those clauses gave the charterer an option to cancel should the vessel not be delivered on a specified date. They were quite unlike cl 9(b) which provides for a notice to be given by the owner in anticipation of an inability to deliver on a specified date and for the notice to be given in advance of that delivery date.

38 In the present case, the plaintiff's e-mail at 1.35 pm on 16 August advised the defendant that the estimated time of arrival of the *Dahua* at Nanwei was 30 August 2012. The plaintiff also asked whether the defendant was prepared to wait and extend the laycan. This e-mail clearly meets the requirements of cl 9(b) because it states the revised expected date of the *Dahua's* readiness to load and poses the question to the defendant as to whether the latter was willing to agree to the new date. Implied in this question was the further question of whether, instead of agreeing to the new date, the defendant would prefer to exercise its option in cancelling the first fixture.

39 The defendant argues that this e-mail only stated the date of the *Dahua's* expected arrival in Nanwei as opposed to the expected date of the vessel's readiness to load as required by cl 9(b). The defendant's interpretation of the e-mail is overly pedantic and technical. The e-mail stated that the *Dahua's* revised expected date of arrival was 30 August 2012. A reasonable recipient in the defendant's position would have understood this to mean that the earliest date of the vessel's expected readiness to load was also 30 August 2012. In fact, the plaintiff was telling the defendant that if it was willing to accept the change of date, it would have to sign an extension of the fixture to this date.

40 The defendant also argues that the e-mail should not be considered a notice concerning the cancellation of the first fixture because the plaintiff was simply forwarding the message it received from the owner of the *Dahua*. This argument must be rejected. The e-mail cannot be construed simply as a forwarded message sent for the defendant's information only since the plaintiff explicitly requested the defendant to decide whether it was willing to extend the laycan and to advise its choice urgently.

41 For the reasons given above, it is my view that had the plaintiff exercised due diligence to meet the laycan, the notices it gave the defendant on 16 August 2012, in particular the email of 1.35 pm, would have served as valid notice under cl 9(b).

(3) What was the legal position on 16 and 17 August 2013?

42 The fact that the plaintiff was not entitled to invoke cl 9(b) is not the end of the matter. The position on 16 August 2012 was that the plaintiff had clearly notified the defendant that it was unable to meet the contractual laycan. It asked the defendant to agree to an extension of the laycan. It was entitled to do this as a method of avoiding a breach of contract by an agreed variation of terms. There was nothing sinister in such a request as the defendant implied. The defendant remained free

to reject the request. The legal consequence of the events that occurred was that on 16 August 2012 there existed a situation of anticipatory breach of contract on the part of the plaintiff. The defendant then had the choice to affirm the contract or to accept the breach and terminate the contract. The defendant's position is that it took the first course. In my judgment, it actually took the latter one.

43 The defendant did not accept the new laycan suggested by the owner of the *Dahua*. Nor did it state explicitly in any correspondence that it wanted to cancel the first fixture. Ms Ong's evidence was that after she had made the request that the laycan be extended to 30 August, Mr Tan called her and said it was too late and asked her to look for a substitute vessel. Such a response was arguably a termination of the first fixture. The defendant denied that this had happened. However, I am satisfied that the defendant's conduct and the evidence support the conclusion that it terminated the first fixture, if not on 16 August then on 17 August. I should state here that although from time to time below I may use the terms "cancel" and "cancellation" I do not mean to imply that cl 9(b) was in operation during this period. I use the terms as synonyms for "terminate" and "termination" and because the parties used them in the course of the case.

44 First, I note that when Mr Tan was asked in court whether he had insisted that the *Dahua* perform the first fixture, although he was somewhat evasive, he finally agreed that he had not insisted that the *Dahua* go to Nanwei in any case. The following is taken from the Notes of Evidence:

> Q The emails on the 15th and 16th, we've just gone through all that, remember?
>
> …
>
> Q And those emails said she asked you for an extension of the laycan and you rejected this request, correct? Now, did you ask Madeline to---at the---to continue and perform the fix---first fixture in any case?
>
> A After the 16th, no.
>
> …
>
> Q Yes, okay. So you did not insist that the first vessel had to come to Nanwei in any case, right?
>
> A I did not continue on that one, disagree with that.
>
> Q Sorry, disagree with my question or disagree---
>
> A Your questions. Because actually I did not stop her or---or to tell her that not to come back to Nanwei at any point of time for the first fixtures note. Because we … did not talk about the first fixture note on whether to come in or not.
>
> …
>
> Q Did you tell her? It's either a yes or a no, did you tell her "I want the first vessel to come to Nanwei anyway even---whatever case, I want the first vessel to come to Nanwei"?
>
> A No, I did not tell her.
>
> Q Now, Mr Tan, I'm going to put a que---my case to you, you can just agree or disagree. I put

it to you, Mr Tan, that you did cancel the first fixture on about 16th August 2012. Do you agree or disagree?

A Disagree.

45 Second, the defendant did not at any time after 1.12pm on 17 August insist that the *Dahua* call at Nanwei on or before 20 August 2012. While at 11.32pm on 16 August, Mr Tan had threatened to take legal action under the first fixture, this threat was not repeated thereafter. Instead, the defendant leapt at the opportunity on the 17 August to get another vessel to carry the cargo. The significance of 1.12pm on 17 August was that was the time when the plaintiff first notified the defendant of the availability of the *AAL Dampier*.

46 As early as 13 August, the defendant had asked the plaintiff to look for a new vessel to replace the *Dahua*. Under the first fixture, it had no right to do this—it was stuck with the *Dahua* until and unless the vessel was not ready to load in Nanwei at the end of the laycan, that is 20 August 2012. It was only when the plaintiff's emails on the morning of 16 August arrived that the defendant was given the opportunity to get out of the first fixture without incurring any potential legal liability to the plaintiff. Even if Mr Tan did not call Ms Ong soon thereafter and say he was not willing to wait, the defendant's response to the plaintiff's offer of the *AAL Dampier* the next day shows that it had terminated the first fixture. The defendant has denied concluding the second fixture but there is no doubt that it was actively exploring the suitability of the *AAL Dampier* to carry the cargo and went as far as instructing its shipper to load on that vessel. Whether the second fixture was concluded or not, this conduct on the part of the defendant coupled with its lack of interest in the *Dahua* thereafter shows that it had cancelled the first fixture. Of course, if the second fixture was concluded that would mean that the first fixture was at an end as the defendant had clearly indicated its intention to transport the cargo on the *AAL Dampier* instead of the *Dahua* and could not have been legally bound to do both.

47 The defendant submits that it is entitled to damages by reason of the plaintiff's breach of the first fixture. I accept that a theoretical right to damages arose since the termination of the first fixture was due to the plaintiff's breach. However to establish a legal right to recover the same, the defendant must show that the damages it says it incurred were the result of the breach. I discuss this further below.

Was there a concluded second fixture?

48 The plaintiff submits that the second fixture was made on or about 17 August 2012 and that it was partly oral and partly in writing. As I have said, the defendant denies that the second fixture was ever concluded.

49 In cases such as the present one, where parties carry on negotiations with a view to conclude a contract, "the courts look at the whole course of the negotiations between both parties in order to ascertain if an agreement is reached at any given point in time": *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [53].

50 As I have mentioned, from 13 August 2012 onwards, the defendant was concerned about the progress of the *Dahua* and whether it would arrive at Nanwei within the laycan. From that date, the defendant had asked the plaintiff to look for a substitute vessel. The plaintiff itself told FLS on 14 August 2012 that it did not want to extend the laycan of the *Dahua* to 25 August and that it wanted a substitute vessel. By 16 August, both the plaintiff and FLS had been actively pursuing other options. This was shown in the 1.35pm e-mail on 16 August when the plaintiff informed the defendant

of two other ships it had investigated: the "*Limco Asia*" which was not suitable due to insufficient cargo space and another vessel which would be able to load at Gaolan port on 24 August. On 17 August 2012, therefore, the context in which the parties were operating was that they were carrying on an active and anxious search for a vessel to replace the *Dahua*.

51 On that day, FLS informed the plaintiff that the *AAL Dampier* was available to transport the defendant's cargo and asked the plaintiff if FLS could "fix her". FLS had to respond to the owner of the *AAL Dampier* by 2pm that day. The plaintiff passed the message on to the defendant in an e-mail sent at 1.12pm on 17 August. The pertinent parts of this e-mail read:

> We have found a passing vessel to load your cargoes in Nanwei Port on 20th August (am), please confirm your acceptance. As you mentioned all the cargoes are in the Port, please confirm that the cargoes are ready for loading otherwise the vessel's detention charge is US$25,000.00 per day.
>
> …
>
> Please reply me your acceptance by email with the vessel detention is US$25,000.00 per day.
>
> IF I DID NOT RECEIVE YOUR REPLY WITHIN 15 MINS, WE WILL MISS THIS VESSEL.

52 When Mr Tan was cross-examined, he gave evidence that there was a telephone conversation between him and Ms Ong after the plaintiff's e-mail cited above was sent. The relevant parts of the cross-examination are reproduced below:

> Q … But really, so the point is when she asked you to confirm this vessel on 17th August at 1.12pm, you confirmed it?
>
> A Conditional terms, ah.
>
> Q On---
>
> A Conditional terms that my cargo is able to load---
>
> Q I see.
>
> A ---and the documentation got no problems.
>
> Q Okay.
>
> A Yah.
>
> Q Did you put this in the email to her?
>
> A Er, we were on the phone, that's where---
>
> Q Yes.
>
> A ---Jesica is the one who send her the email---

53 Ms Winata sent out several e-mails to the plaintiff that afternoon and evening. The first was dated at 1.51pm and it reads:

> Kindly advise us your vessel specification Fast and Kindly take note cargo is ready to load on vessel & its inside port near the ship side only.
>
> And Kindly make sure no further delay, cargo need to load not later than 20 Aug and Pls make sure ETA SINGAPORE NOT LATER THAN 25 AUG 2012 due to LC requirement.

54 In its submissions, the plaintiff characterises the conversation between Mr Tan and Ms Ong as showing the defendant's acceptance of the *AAL Dampier* albeit based on conditional terms that that vessel would be able to load the cargo at Nanwei. It argues that the terms of the concluded second fixture were contained in an e-mail (which it calls the "fixture recap") the plaintiff sent to the defendant at 2.06pm. The e-mail stipulates some terms and general conditions of the fixture that the parties were negotiating. However, the defendant had not at this point given a final and unqualified expression of assent to the terms of the plaintiff's offer. The plaintiff had not yet reassured the defendant about the *AAL Dampier's* ability to transport the cargo. The evidence suggests that the vessel had to have an attached crane to lift the cargo. Indeed, in two e-mails dated 17 August 2012 sent to the plaintiff thereafter, at 2.20pm and 4.17pm, the defendant continued to ask for additional information (*eg*, the vessel's "stowage plan" and some other details).

55 The plaintiff gave the defendant the vessel's stowage plan, its estimated time of arrival in Nanwei and Singapore and some other details at 4.34pm the same day. Thereafter, at 6.07pm, the plaintiff posed a number of queries to the defendant by e-mail. The defendant responded at 6.19pm with its answer entered in uppercase letters next to the questions. The plaintiff's original e-mail together with the defendant's responses read as follows:

> (AA) Please confirm that the shipper has no problem with the customs clearance at port of Loading to have the cargoes load onboard MV "All Dampier", If so, we will proceed to bring the vessel to Nanwei Port as per schedule. Kindly advise urgently. – SHIPPER CONFIRM ON THIS ISSUE.
>
> (BB) Please inform the shipper only contact our new agent, AAL, for the loading the cargoes onboard Mv "AAL Dampier". Please inform them that Bruce is no longer involved with the shipment. – ALREADY INFORMED.
>
> (CC) Please ensure that the shipper will only be loading the cargoes onboard MV "AAL Dampier" instead any other vessel. – NOTED, ALREADY INFORMED.

In the light of the confirmation given by the defendant in this e-mail, I am of the view that there can be no doubt that the second fixture was concluded by this time. The conditional acceptance given by Mr Tan over the telephone in the afternoon had, at the latest by 6.19 pm, become an unconditional acceptance.

56 In fact, the defendant itself acknowledged the existence of the concluded second fixture in an e-mail it sent to ASB on 22 August 2012. ASB was the local shipping agent the plaintiff had appointed for the *Dahua* (but not the *AAL Dampier*). As mentioned above, the parties encountered problems in obtaining the shipping/customs documents for the cargo after the *AAL Dampier* arrived at Nanwei port. These documents were needed for the *AAL Dampier* to berth. In the circumstances, Mr Tan wrote to Mr Gong of ASB stating the defendant did not have a contract for the *Sea Castle* in the following terms:

> There is no way we can load our goods with the said vessel which does not have Crane. …

> Please do take note that I have a contract with AAL Dampier. I DO NOT have any contract with your said vessel.

57 During cross-examination, Mr Tan maintained that this was not an acknowledgment that the defendant had entered into the second fixture. He explained that he wrote this e-mail under the instructions of Ms Ong in a desperate bid to obtain the shipping/customs documents. However, as the plaintiff points out, "this explanation appears nowhere in his AEIC" and therefore does indeed appear to be an afterthought. Even if Ms Ong had advised him to write this e-mail, it must reflect what he regarded as the true state of affairs then (*ie*, the parties had concluded a fixture for the *AAL Dampier*).

58 The defendant's second argument is that even if the second fixture was concluded, the same was void because a fundamental term, the laycan, had not been agreed. The plaintiff's response is that the laycan was agreed and that it was 19 to 20 August 2012.

59 The plaintiff referred to the "fixture recap" that it sent to the defendant on 17 August 2012 at 2.06pm. This document states that the "time of shipment" is 19 to 20 August 2012. The plaintiff argues that the parties were aware that "time of shipment" meant the laycan for the *AAL Dampier*. The defendant's argument is that this phrase referred to the date that the cargo was meant to reach Singapore and that the laycan was left undecided.

60 The defendant's argument is disingenuous. The defendant's most urgent concern on 17 August was to ship the cargo by 20 August. In Ms Winata's e-mail to the plaintiff at 1.51pm, sent out just before the defendant received the "fixture recap", the defendant said that the cargo had to be loaded by 20 August and that it had to reach Singapore latest by 25 August. It was not asking for a commitment that the cargo would reach Singapore by 20 August. When it received the "fixture recap" e-mail, the defendant must have understood that "time of shipment" meant the period in which the vessel had to be available for loading at the load port and did not mean the discharge of cargo at the discharge port. Thus, when the plaintiff informed the defendant at 4.34pm that the *AAL Dampier* would "ETA Nanwei 19.8 PM, ETA Singapore (Jurong) 24.8 PM", the defendant did not protest. Instead, at 6.19pm, the defendant confirmed that its shipper had no problem with customs clearance at Nanwei and the cargo could be loaded on board *AAL Dampier*. The factual matrix makes it plain that both parties intended the phrase "time of shipment" to refer to the laycan under the second fixture.

61 In the circumstances, I am satisfied that the laycan term was agreed by the parties and that the second fixture was not void by reason of uncertainty of terms.

Did the AAL Dampier tender a valid NOR on 20 August 2012?

62 A valid NOR can only be given when the vessel concerned (a) has arrived at its specified destination; (b) is in a state of readiness to load or discharge; and (c) has fulfilled any additional requirements contained in the charter: John Schofield, *Laytime and Demurrage* (Informa Law & Finance, 6th Ed, 2011) at para 3.267.

63 The defendant contends that the NOR tendered by the *AAL Dampier* on 20 August 2012 was invalid because the vessel was not in a state of readiness to load since it had not berthed at Nanwei on that date. Therefore, the defendant is saying that the second fixture required the vessel to berth at Nanwei before giving its NOR. The plaintiff argues that the NOR was valid because the second fixture was a port charter. It contends that the *AAL Dampier* was an "arrived vessel" as of 20 August 2012 when it arrived at Nanwei port and was entitled to tender its NOR then, notwithstanding the

fact that it had not berthed. It also argues that the *AAL Dampier* could not berth on time because the defendant had failed to secure the shipping/customs documents related to the cargo.

64 A berth charter is one that requires a vessel to proceed to a named berth or one that contains an express right for the charterers to nominate a berth. A port charter is one that "requires the vessel to proceed for loading to a named port, but not to some particular berth either specified in the charter or by the express terms of the charter to be specified by the charterer": *North River Freighters, Ltd v President of India* [1955] 2 Lloyd's Rep 668 at 679. In a port charter, a ship is said to have "arrived" even when it is not berthed if (a) it is within the port; and (b) it is at the immediate and effective disposition of the charterer. The vessel will be in such a position if it is at a place where waiting ships usually lie except in "extraordinary circumstances" which must be proven by the charterers: *The Johanna Oldendorff* [1974] AC 479 at 535H.

65 In the present case, the second fixture was a port charter. This can be deduced from the correspondence. The "fixture recap" lists the *ports* of loading and discharge as Nanwei and Singapore respectively. Furthermore, the defendant unqualifiedly acceded to the plaintiff's query if they could "proceed to bring the vessel to Nanwei port as per schedule" in an e-mail sent at 6.19pm on 17 August 2012. These pieces of evidence suggest that the contractual destination was Nanwei port and not a named berth thereat. This is in contrast to the first fixture which provided the loading port to be "Owners Berth Nanwei Port". Therefore, under the second fixture, the *AAL Dampier* was an "arrived vessel" as of 20 August 2012 when it arrived at Nanwei port. It was entitled to tender its NOR on that date.

Consequence of a valid NOR having been tendered on 20 August 2012

66 The purpose of an NOR is to inform the charterer that loading may commence. A valid NOR also causes the laytime to commence. Laytime is the period of time during which the loading operation must be completed. Upon expiry of the laytime, liability for further delay in completing loading of the vessel shifts to the charterers: see generally Stephen Girvin, *Carriage of Goods by Sea* (Oxford University Press, 2nd Ed, 2011) at paras 32.22 and 32.37–32.38.

67 The second fixture does not contain a laytime clause which sets out a specific loading time. Instead, the following provisions of the "fixture recap" served to indicate how detention would be charged:

> Cargo to be delivered/received as fast as vessel can load/discharge otherwise detention to apply.
>
> Time lost due to swell and/or weather and/or waiting for loading and/or discharging berth on ships [*sic*] arrival at or off port…will be charged as time for which detention is due.

68 The tendering of the NOR on 20 August 2012 had the effect of notifying the defendant that the *AAL Dampier* was ready to load. From then the liability for any delay in loading the vessel shifted to the defendant and the time that the vessel spent waiting to berth was on the defendant. The *AAL Dampier* was not loaded in the period between NOR and 23 August 2012 and did not even berth then. On the basis of the clauses set out above, the time that the vessel spent waiting to berth, up to the time when the defendant repudiated the second fixture on 23 August would count as detention for which the defendant had to pay.

What would be the position if the second fixture was a berth charter?

69 Even if the second fixture was a berth charter, the defendant's failure of its obligation to

secure the shipping/customs documents for the cargo which would have enabled the *AAL Dampier* to obtain a berth and thereby become an "arrived" vessel, makes it responsible for detention charges. In *The Atlantic Sunbeam* [1973] 1 Lloyd's Rep 482 in 488, the court held that it was an implied term of charter parties that charterers will act with "reasonable despatch and in accordance with the ordinary practice of the port" of loading/discharge in carrying out acts which had to be done by them to enable the vessel to become an "arrived vessel". *The World Navigator* [1991] 2 Lloyd's Rep 23 at 29 suggests that in the event of breach of this implied term, the commencement of laytime may be antedated to the date it would have begun but for the breach (*ie*, the liability for delay shifts to the charterers as of the date when the ship would have become an "arrived vessel" but for the charterers' breach). The term in the "fixture recap" that time spent waiting for berth would count as detention time is also relevant in this connection as similar clauses have been interpreted as applying only to cases where a berth is not available.

70 The evidence here suggests that certain shipping/customs documents relating to the cargo were required by the Nanwei port authorities for the *AAL Dampier* to obtain a berth. These shipping/customs documents were prepared by the Chinese shipper of the cargo and were submitted to ASB at the time when the first fixture was still afoot. When it became apparent that the *Dahua* would not arrive by the cancelling date, the defendant approached Mr Gong and requested him to look for another vessel to ship its cargo. Mr Gong in turn approached one Mr Louis of Uptrans/Jade Shipping who secured the *Sea Castle*. It appears that Mr Gong gave Mr Louis the shipping/customs documents. Subsequently, Mr Louis refused to release these documents and insisted that the cargo be loaded onto the *Sea Castle*. As a result, the *AAL Dampier* was unable to berth and become an arrived ship.

71 The plaintiff had informed the defendant that Austral Asia Line ("AAL") and not ASB was its agent for the *AAL Dampier* as early as 17 August 2012. The defendant had confirmed that customs clearance was in order for the *AAL Dampier* in an e-mail dated the same day. Yet, it seems that the defendant did not or could not ensure that the shipping/customs documents were handed over to AAL before the arrival of the *AAL Dampier* at Nanwei.

72 The defendant's contention is that the delay was caused by the plaintiff's lateness in applying for a berth. To this end, it adduced the following e-mail from Mr Tan to Ms Ong:

> Below is what they found out from the berthing officer.
>
> Just double-confirm with Harbor supervisor, the vessel for loading S-608 parts just only can berth the wharf from the afternoon of 22-Aug-2012 due to the delay of application for berthing, which wharf was berth at another vessel.

Ms Ong was cross-examined on this issue and her responses were as follows:

> Q … Do you agree that the vessel had booked this berth late?
>
> A No.
>
> …
>
> A ---er, from the email, you see from Marcus. It may---it look like it's not confirm. One, two---er, we couldn't---we did not put the berth late because in this port, for big vessel, only one berth available for berthing. Secondly, er, the custom document for the cargo is not available for the berth.

Q Have you adduced any evidence to show that---

A Yes.

Q ---the berth was applied for within good time to ensure that the vessel could berth by the 20th?

A Document to prove, no. But when we able to berth on the 23rd, the custom refused us to berth. Because no cargo document---

73 It is in evidence that the plaintiff had not applied for a berth before the *AAL Dampier's* arrival on 20 August 2012. However, it cannot be said that it was *late* in applying for the berth because the plaintiff needed the shipping/customs documents to do so. It did not have these documents as a result of the defendant's failure to ensure beforehand that these documents were handed to the plaintiff's newly appointed agents. That is the implication of Ms Ong's evidence: that even if the plaintiff was late, an earlier application would have had no success because of the defendant's breach of its obligation to take steps that would have enabled the *AAL Dampier* to become an arrived vessel. The position is made even clearer by the fact that the allotment of a berth on 23 August was cancelled due to the absence of the shipping/customs clearance documents.

Repudiation of the second fixture

74 On 22 August 2012, with the issue of the shipping/customs documents still unresolved, Ms Ong wrote to the defendant informing it that the *AAL Dampier* was only expected to berth on 27 or 28 August 2012. The defendant wrote to the plaintiff on 23 August 2012 to advise that it would be loading the cargo onto the *Sea Castle*. By doing so, the defendant was in repudiatory breach of the second fixture.

What remedies are the respective parties entitled to in relation to the contractual claims?

The defendant

75 According to Mr Tan's evidence, the defendant sustained loss and damage in the sums of US$9,208.67 and $3,009.51 as a result of the plaintiff's breach of the first fixture. In his affidavit, these sums were derived as follows:

Ocean freight original quote for shipment by plaintiff	US$161,000.00
Alternative Cost of Shipment	
Ocean freight from ASB Co Ltd	US$148,000.00
"*Sea Castle*" detention charges	US$28,000.00
Bank remittance charges	US$208.67
Travelling expenses (8 – 12 August 2012) to Guangzhou, China	S$1,671.91
Travelling expenses (28 – 30 August 2012) to Guangzhou, China	S$1,337.60
Total loss:	**US$9,208.67** and **S$3,009.51**

However, there is an arithmetical error in the defendant's calculation. On the basis of the figures above, the total US dollar amount expended by it in respect of the *Sea Castle* was US$176,208.67. This means that the defendant spent US$15,208.67 (not US$9,208.67) more than if it had shipped on the *Dahua*.

76 It is not clear to me why the defendant incurred travel expenses between 8 and 12 August 2012, and again between 28 and 30 August 2012, and how such expenses (as well as the bank charges) were caused by the plaintiff's breach of contract. Since the reason for these expenses and their connection to the breach have not been explained, I would not, in any case, have allowed the defendant to recover them. The defendant, however, has a bigger problem. This is that it would not have incurred the ocean freight paid to ASB or the *Sea Castle's* detention charges if it had not breached the second fixture. These expenses arose out of its own inability to load the cargo on board the *AAL Dampier* and its subsequent repudiation of the second fixture. The defendant's additional expenses did not arise from the plaintiff's breach of the first fixture and therefore cannot be recovered.

The plaintiff

77 The plaintiff seeks to recover damages in the sum of US$236,000, or such other sum as may be assessed. The figure mentioned comprises the freight on the shipment of US$161,000 and detention charges of US$75,000 on the basis of the agreed rate of US$25,000 per day on a pro-rata basis.

78 In my judgment, whilst the plaintiff is entitled to recover the full quantum of the detention charges, it cannot recover the full freight it would have charged had the cargo been loaded.

79 In relation to the detention charges, it was a term of the contract that detention would be paid at the stated rate for the number of days the *AAL Dampier* was detained. The plaintiff's claim is based on a detention period of three days or part thereof from the service of the NOR on 20 August until the defendant's repudiation of the second fixture on 23 August 2012. The defendant did not challenge the plaintiff's computation; it only challenged the right of the plaintiff to claim detention. This challenge was mainly premised on the argument that there was no concluded second fixture. Since I have found against the defendant on that point, the defendant must pay detention charges at the agreed rate for the period stated.

80 On the damages claim, the plaintiff is not entitled to claim the full contractual freight charges of US$161,000. The second fixture provided that the freight was to be fully prepaid on completion of loading and to be deemed earned as the cargo was being loaded. The cargo was not loaded. Thus, the full freight was never earned. In the absence of a contractual entitlement to the full freight, the plaintiff is entitled to recover damages instead. As is well known, damages are compensatory and intended to place the innocent party in the position it would have been in had the other party not breached the contract. In this case, if the cargo had been loaded, the defendant would have paid the plaintiff freight of US$161,000 but the plaintiff in turn would have been obliged to pay FLS freight of US$155,000 for the carriage of the cargo. Thus, the damage suffered by the plaintiff was only the loss of the US$6,000 profit that it would have made on the overall transaction. Thus, it can only recover US$6,000 as damages for non-shipment.

81 Apart from damages, the plaintiff has prayed for an order that the defendant indemnify it against any sum that it may be liable to pay the head charterer (*ie*, FLS) arising out of the defendant's failure to ship the cargo on the *AAL Dampier*. The plaintiff contends that it had specifically chartered the vessel from FLS to perform the second fixture and that it now faces a claim from FLS as a result of the defendant's breach of the same. I accept this argument. The plaintiff's

failure to meet its contractual obligation to FLS in respect of the *AAL Dampier* was due entirely to the defendant's breach of the second fixture. If the plaintiff's liability to FLS had already been ascertained, the plaintiff could recover the same from the defendant as part of the compensatory principle. Since such liability has not yet been determined, the plaintiff is entitled to a declaration that the defendant must indemnify it when liability is ascertained.

Is the plaintiff liable for the tort of wrongful interference with trade?

82 The defendant has a separate counterclaim based on the assertion that the plaintiff has committed the tort of wrongful interference with trade. The defendant argues that two letters that the plaintiff sent to Herrenkencht on 2 and 11 October 2012 ("the two letters"), which raised the possibility of Herrenknecht being joined as an alternate defendant to the plaintiff's present proceedings against the defendant, were written with an intention to injure the defendant's business relationship with Herrenknecht. The defendant claims that the plaintiff knew at all times that the defendant was not acting as Herrenknecht's agents. Hence, there was no legal basis to include Herrenknecht in a proceeding against it. The defendant invites the court to draw the inference that the two letters were written with an intention to convey the message that "the defendant could not be trusted to do Herrenknecht's business without legal ramifications for Herrenknecht". The defendant claims that it suffered loss because, subsequently, Herrenknecht failed to award it two contracts it was expecting to receive and also barred the defendant from participating in any future tenders.

83 To establish a claim of wrongful interference with trade, the claimant must show that (a) the defendant has committed an unlawful act affecting a third party; (b) the defendant acted with an intention to injured the claimant; and (c) the defendant's conduct in fact resulted in damage to the claimant: Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at para 15.028. The defendant fails on all three counts.

84 First, the defendant has not even submitted on how the plaintiff's acts can be regarded as "unlawful". Second, the defendant has not shown that the plaintiff acted with an intention to cause loss to the defendant as an end in itself, or as a means to an end: *OBG Ltd v Allan* [2008] 1 AC at [42]–[43]. The plaintiff's solicitors, Joseph Tan Jude Benny LLP, drafted the two letters. The plaintiff's position is that the two letters were sent merely to establish the exact relationship between the defendant and Herrenknecht and which party it should sue. While their true intention might not have been quite so innocuous, I am of the view that the plaintiff's solicitors were merely exploring all their options before commencing litigation. The defendant has not shown that the two letters were sent with the intention to injure the defendant's business relationship with Herrenknecht. Third, there is no evidence to show that the Herrenknecht discontinued its business relations with the defendant because of the plaintiff's conduct. In fact, by 23 August 2012, Herrenknecht had already issued a lawyer's letter to the defendant because of the problems encountered in shipping the cargo to Singapore. Therefore, it is likely that relationship between the defendant and Herrenknecht had already broken down by then. Hence, the plaintiff's two letters cannot be said to have caused the defendant to lose Herrenknecht's business.

Conclusion

85 For the reasons given above:

(a) There will be judgment for the plaintiff in the sum of US$81,000 and interest thereon at the Court rate from the date of the writ to the date of payment as well as an order that the defendant do indemnify the plaintiff against any sum, including interest and costs, that the plaintiff may be found liable to pay FLS arising out of or in connection with the charter of the

AAL Dampier for the purpose of carrying the cargo from Nanwei to Singapore in August 2012; and

(b) The defendant's counterclaim is dismissed.

86 I will hear the parties on costs in view of the amount awarded to the plaintiff.

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