The "An Ji Jiang"
[2003] SGHC 224

Case Number : AM 600300/2001

Decision Date : 29 September 2003

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Scott Thillagaratnam (Ramdas & Wong) for the plaintiffs; Toh Kian Sing with Chia Song Yeow (Rajah & Tann) for the defendants

Parties : —

Admiralty and Shipping – Carriage of goods by sea – Voyage charterparties – Terms of charterparty – Whether terms of Asbatankvoy charterparty incorporated into parties' charterparty by agreement

Admiralty and Shipping – Carriage of goods by sea – Voyage charterparties – Whether inspection clause in charterparty gave rise to obligation on defendants' part to ensure vessel would be approved by nominated refinery

Admiralty and Shipping – Carriage of goods by sea – Voyage charterparties – Whether vessel ready to load – Whether plaintiffs entitled to cancel charter

Damages – Measure of damages – Contract – Measure of loss for wrongful termination of voyage charterparty

1 This action arises out of the charter by the plaintiffs, Sin Heng Long Metal Pte Ltd, of the defendants' vessel *An Ji Jiang* ('the vessel') to carry four shipments of bulk asphalt or bitumen from Singapore to the port of Haikou, China. The plaintiffs, asserting that the defendants were in breach of the charter, cancelled the contract before the first parcel of cargo was even loaded. They are now claiming from the defendants the losses they incurred by reason of the cancellation. The defendants deny they were in breach. They say the cancellation was wrongful and they are the ones entitled to damages.

Background

2 The plaintiffs trade in bitumen. In 1998, BP Singapore Pte Ltd ('BP Singapore') appointed them as a bitumen distributor for the People's Republic of China. Over the years, the plaintiffs effected several shipments of bitumen from Singapore to China. Their business was principally carried on by their general manager and director, Mr Tan Peng Seng. He was assisted by his younger brother, Mr Desmond Tan.

3 On 23 June 2001, the plaintiffs concluded two contracts with a company called China Construction International Corporation (S) Pte Ltd ('China Construction'). By the first the plaintiffs agreed to sell China Construction 6,500 metric tons of bitumen to be shipped in two parcels in July 2001 and, by the second, a further 7,500 metric tons of bitumen was to be shipped in two shipments in August 2001. Around the same time the plaintiffs entered into a contract to buy 6,500 metric tons of bitumen from BP Singapore and the same was to be delivered to the plaintiffs at the refinery of Singapore Refining Co Pte Ltd ('SRC') at Pulau Merlimau between 20 and 25 July 2001.

4 The defendants are a Chinese shipping company. In early 2001, they procured the conversion of their vessel *An Ji Jiang* from a dry bulk cargo vessel into a bitumen tanker. The conversion process was completed in April 2001. Whilst the vessel was being converted, the defendants asked Billion Gain Enterprise Pte Ltd ('Billion Gain') a shipbroking business based in

Singapore to help market the vessel as a bitumen carrier and to look for charterers for it. At all material times, the defendants dealt with one Ms Peggy Liu Wei Peng of Billion Gain. In March 2001, Ms Liu contacted Ms Jackki Yim of another Singapore shipbroking firm, Land Ocean Pacific Pte Ltd ('LOP'), to enquire whether she had any business for the vessel. LOP was then one of a group of brokers through whom Shell and ExxonMobil would charter vessels for the carriage of petroleum products including bitumen.

Negotiation of the charterparty

5 In early June 2001, Mr Tan was on the lookout for a vessel to deliver the cargo to China Construction. He was approached by Ms Yim. She had previously fixed a charter for the plaintiffs and in June she was looking around, at Ms Liu's request, for business for the *An Ji Jiang*. According to Ms Yim, she thought that if the plaintiffs had cargo for the vessel, she could act as their broker to negotiate a charter with the defendants.

6 Following a conversation between Mr Tan and Ms Yim during which he informed her that the plaintiffs had a cargo of bitumen to ship in July and August 2001 and that he would be interested in chartering a vessel from the defendants if they could offer him a competitive rate, Ms Yim called Ms Liu and asked if the vessel would be available in July and August 2001. On 22 June, Billion Gain sent LOP an offer from the defendants for the charter of the vessel for two shipments in July and August. Billion Gain's letter set out the main terms of the proposed charter which included a freight rate of US$26 per metric ton for the first shipment and US$28 per metric ton for the second shipment. Ms Yim sent this offer on to the plaintiffs but quoted freight of US$27 for the first shipment and US$29 for the second. Secondly, Ms Yim suggested that a clause should be included in the charter stating that the vessel was 'subject to the refinery's inspection prior acceptance and berthing and all inspection charges to be borne by Owner'.

7 On 25 June, Billion Gain sent LOP the defendants' revised offer. In this, the vessel was offered for four shipments of a maximum 4,200 metric tons per shipment on a continuous basis, the freight was US$26 pmt for the first shipment and US$28 pmt for the next three shipments. Among the other main terms stated in the letter were the following:

> Lycn: 12/15 July as 1st shpmnt
>
> Demurrage: USD 4,000.00PDPR in any case
>
> Others as per ASBATANKVOY Charter party to be mutually agreed
>
> Subj to refinery's inspection prior to acceptance n berthing n/or inspection exp TBF ownrs acct.

The reference to the Asbatankvoy charterparty was to a standard form of tanker voyage charter party issued by the Association of Ship Brokers & Agents (USA) Inc. The defendants wanted all the terms of this standard form (which I shall call 'Asbatankvoy') to be incorporated as part of the contract with the plaintiffs but, at that stage, Ms Yim was not willing to agree to this as she was not familiar with that form of contract. It had therefore been at her request that after the reference to the form, the words 'to be mutually agreed' had been inserted.

8 At that time, Mr Tan was overseas and it was Desmond Tan who was liasing directly with LOP on the proposed charter. On 26 June, he informed LOP that the plaintiffs accepted the terms offered. The same day LOP notified Billion Gain that all main terms were in good order except that the quantity was to be amended and the 'sub stem' was to be lifted by 27 June 1200 hours at the latest.

Ms Yim also asked for a copy of the Asbatankvoy terms. 'Sub Stem' meant 'subject stem' or 'subject to readiness of cargo'. This term therefore made the charterparty conditional upon the plaintiffs confirming the readiness of cargo by 1200 hours on 27 June 2001, in which case they would 'lift' or remove this condition thereby confirming the charterparty.

9 On 27 June, LOP asked the plaintiffs to confirm by 11 am that all the sub terms were lifted and that the charterparty was fixed. Ms Yim spoke with Mr Desmond Tan and the plaintiffs then sent LOP a facsimile in which Mr Desmond Tan had written 'we confirm sub terms lifted and clean fixed'. Later on the same day, Ms Yim told Ms Liu over the telephone that the plaintiffs had agreed to incorporate all the Asbatankvoy terms as part of the charter. The plaintiffs dispute that they had agreed to this and say that Ms Yim was not acting as their broker and had no authority to make such an agreement on their behalf.

10 On 29 June, Billion Gain sent LOP a document entitled 'Fixture Note' which was to be signed by both the plaintiffs and the defendants. This document set out the main terms of the charter that had been agreed. It included the clause relating to the inspection of the vessel by the refinery ('the inspection clause') and in relation to Asbatankvoy, it stated 'Others as per Asbatankvoy charter party to be mutually agreed' ('the Asbatankvoy clause'). LOP passed the fixture note on to the plaintiffs for their signature. The document was duly signed by both the plaintiffs and the defendants.

Events in July 2001

11 The vessel arrived in Singapore at about 1600 hours on Saturday, 14 July. Shortly thereafter, it was arrested by an unrelated third party in respect of claims against another vessel owned by the defendants. While the vessel was under arrest, it was inspected by an inspector appointed by SRC. On 16 July, the plaintiffs were informed by LOP that the inspection had gone smoothly and they were asked to arrange for the immediate berthing of the vessel. They were also notified that the vessel was ready to load the plaintiffs' cargo.

12 Mr Tan then carried out investigations and informed LOP that contrary to what had been stated up till then the vessel had not received the necessary approval from SRC and that under the fixture note the vessel was subject to SRC inspection and approval before loading. He also noted that the vessel was under arrest and that this might affect approval of the vessel. The plaintiffs did not at that stage accept that the vessel was ready to load.

13 The vessel was released from arrest on the afternoon of 16 July and the next morning the plaintiffs were informed of the release by LOP. LOP requested the plaintiffs to inform them when the vessel would be able to berth. On 18 July, the defendants sent LOP a message stating that the vessel had passed the SRC inspection, that lay time had commenced in accordance with the fixture note and any delay in the berthing of the vessel would be at the risk of the plaintiffs. On the other hand, the plaintiffs had been informed by BP Singapore that the vessel had still not been approved for berthing by SRC and Mr Tan therefore could not understand why the defendants were insisting that it had passed the inspection.

14 On 18 July, there were several telephone conversations between Mr Tan and a Mr Zhou Jia Zhong, the general manager of the defendants. The defendants' position remained that the vessel had been approved by SRC and that the plaintiffs should make arrangements for it to berth and start loading immediately. They insisted that the vessel was on demurrage. Mr Tan asked for a copy of SRC's inspection approval since BP Singapore had informed him that there was no such approval. He also stated that he was not prepared to arrange fresh loading dates with BP Singapore until the defendants dropped their claim for demurrage. The defendants did not furnish the plaintiffs with any

written evidence of SRC's approval.

15 On 19 July, the plaintiffs sent the defendants a letter rejecting the notice of readiness issued by the defendants on 17 July. The plaintiffs gave the defendants official notice that they were cancelling the entire fixture note and rejecting the notice of readiness since the laycan between 12 and 15 July 2001 had expired. The defendants did not accept that they were at fault. They considered the termination wrongful. Nevertheless, the defendants thereafter made a without prejudice offer to the plaintiffs to accept 23 July as the new loading date if the plaintiffs would compensate them for the detention of the vessel from 17 July until 23 July at the rate of US$6,000 a day. The plaintiffs rejected this offer and, on 20 July, the defendants accepted that the charter had come to an end.

16 The plaintiffs started this action on 23 July and arrested the vessel the same day.

The dispute

17 In their statement of claim, the plaintiffs pleaded that by the terms of the fixture note, the vessel was to be ready for loading in Singapore between 12 and 15 July 2001 for the first shipment and that it was subject to inspection by SRC prior to its acceptance and berthing. In breach of the fixture note, the defendants had failed to obtain the approval of SRC and/or to berth the vessel at SRC for loading of the first shipment. In the premises, the plaintiffs had suffered loss and damage.

18 The defendants filed both a defence and a counterclaim. They averred that the charterparty, as evidenced by the fixture note, incorporated the terms of Asbatankvoy and that, in the alternative, the fixture note had to be rectified in that in the clause reading 'others as per Asbatankvoy charterparty to be mutually agreed' should be amended to read 'others as per Asbatankvoy charterparty as agreed'. Their first counterclaim was therefore for rectification of the fixture note.

19 Secondly, the defendants denied that they were in breach of the charter and alleged that the plaintiffs had wrongfully repudiated it. They averred that they had sustained loss by reason of such breach on the part of the plaintiffs and their second counterclaim was for the sum they had allegedly lost.

20 It will assist in understanding the issues in dispute if I set out in some detail the main assertions in the defence and counterclaim and those made by the plaintiffs in their reply and defence to counterclaim.

21 The defendants started by denying that the fixture note provided that the vessel was to be ready for loading in Singapore between 12 and 15 July for the first shipment as averred by the plaintiffs. The fixture note states 'LYCN: 12/15 JULY As 1st SHIPMENT'. The defendants said that the effect of this clause is that the laytime for the plaintiffs to load the vessel with the first shipment was not to commence before 12 July 2001 and that the plaintiffs had a right to cancel the fixture note if the vessel was not ready to load the first shipment by 15 July 2001.

22 The defendants then set out the inspection clause and averred that the effect of it was to notify the defendants that the refinery at which the vessel was to call would require it to be inspected prior to accepting the vessel for berthing and that the expenses incurred in such inspection would be for the defendants' account. In the defendants' view, it was not a term of the fixture note that the vessel had to obtain the approval of SRC. The defendants said that they did not give any undertaking in the fixture note that the vessel would obtain such approval. In any event, the vessel

was ready for loading on 15 July 2001 and SRC approval for the vessel was given on 17 July 2001.

23 The defendants pleaded that they tendered a notice of readiness to the plaintiffs on 18 July 2001. Under the terms of the fixture note, the defendants were entitled to do so even if the vessel had not berthed. Before the SRC could allocate a berth for the vessel to commence loading operations, the fixture note was wrongfully repudiated by the plaintiffs. The defendants relied on cl 6 of Asbatankvoy as entitling them to give notice of readiness to the plaintiffs once the vessel arrived at the loading port whether or not it had berthed. They also relied on cl 5 of that charterparty which provided that if the vessel was not ready to load by 4 pm local time on the cancelling date stipulated, the charterer would have the option to cancel the charter by giving the owner notice of cancellation within 24 hours of such cancellation date. The defendants pleaded that the cancelling date stipulated in the fixture note was 15 July and therefore the latest possible time for the plaintiffs to cancel the charter would have been 1600 hours on 16 July. As the plaintiffs did not exercise their cancellation rights within the specified period, the fixture note remained in full force and effect and the subsequent purported cancellation on 19 July 2001 was wrongful.

24 In their reply the plaintiffs averred that LOP was not appointed to act as their brokers. Further or alternatively, the defendants and/or LOP did not at any time propose to the plaintiffs the incorporation of any term of Asbatankvoy into the fixture note and the plaintiffs did not agree to any terms other than those contained in the fixture note.

25 The plaintiffs did not admit that a notice of readiness was tendered on 18 July 2001 and that the defendants were entitled to serve such notice under the terms of the fixture note even though the vessel had not berthed. They averred further that the fixture note provided that 'Others as per Asbatankvoy Charter Party to be mutually agreed' and that there had been no mutual agreement to incorporate the terms of the charterparty. The plaintiffs took the stand that the fixture note provided that the vessel was subject to the refinery's inspection prior to its acceptance and berthing at the refinery, which in the case of the first shipment was SRC. The vessel therefore had to be accepted by SRC and be berthed at SRC's refinery before any notice of readiness could be tendered. Further, the plaintiffs denied that the alleged notice of readiness dated 18 July was a proper notice of readiness. They said that it was only a facsimile from LOP quoting a reply that LOP had received from the defendants.

26 In the alternative, if cl 6 of Asbatankvoy applied to the fixture note and LOP was authorised to tender notice of readiness on behalf of the defendants, the vessel was not ready to load under the terms of the fixture note on 18 July 2001. This was because the defendants failed to berth the vessel and/or obtain the approval of SRC. In the further alternative, the plaintiffs pleaded that if cl 5 of Asbatankvoy applied to the fixture note, they did not invoke their cancellation option due to erroneous and misleading information given to them before and after the expiration of the cancellation date regarding the inspection of the vessel and its acceptance by SRC and/or the vessel's readiness to load.

The issues

27 From the pleadings, it appears to me that the main issues to be decided are:

(1) whether all the Asbatankvoy terms were incorporated into the charter contract between the plaintiffs and the defendants;

(2) whether the inspection clause gave rise to an undertaking or obligation on the part of the defendants to ensure the vessel would be approved by SRC and/or would berth at SRC for loading of

cargo;

(3) whether the plaintiffs were entitled to terminate the charterparty on 19 July 2001; and

(4) depending on the answers to the above questions, whether the plaintiffs or, as the case may be, the defendants, are entitled to the damages claimed.

First issue: were the Asbatankvoy terms incorporated in the charter contract?

28 The plaintiffs submitted that the documentary evidence supported their contention that there was never any proposal to incorporate any of the terms of the Asbatankvoy form in the contract. They started by referring to the facsimile which Billion Gain sent to LOP on 25 June setting out the main terms of the proposed charter including the inspection clause and the Asbatankvoy clause. LOP had sent these terms on to the plaintiffs and had asked the plaintiffs to confirm by 1800 hours the same day that the charter was clean fixed. In this correspondence the Asbatankvoy clause still contained the words 'to be agreed'.

29 The plaintiffs had sent out their acceptance of these terms the next day, 26 June. On receipt of this reply, LOP had informed Billion Gain that the plaintiffs confirmed that all the main terms were in good order except that the quantity was to be amended to read '4000MT 10 PCT MOLCO BULK ASPHALT IN ONE GRADE (CHTRS AGREE MAX LOADABLE QTY IS 4200MT)' and that the sub stem was to be lifted by 1200 hours on 27 June. LOP asked Billion Gain to confirm the amended terms and to send over the Asbatankvoy terms in their reply. Billion Gain replied the same day and informed LOP that the defendants had confirmed that all the main terms were in order. This meant that the new wording of the term on quantity was agreed to but that otherwise the terms and conditions remained as set out in Billion Gain's facsimile of 25 June.

30 At about 9.58 am on 27 June, LOP sent a facsimile to the plaintiffs requesting them to 'confirm that all sub terms are lifted and clean fixed by today 1100 hours'. The plaintiffs replied at 11.32 am on the same day and stipulated 'we confirm sub terms lifted and clean fixed'. LOP accordingly sent a message to Billion Gain at 11.55 am notifying them that the charterer had confirmed that 'sub stem are lifted' and asking Billion Gain to 'fax us soon the Asbatankvoy charter party for both charterers/owners to agree'. Billion Gain then sent an e-mail at 12.38 pm that day to the defendants and advised them that the plaintiffs had confirmed the lifting of the sub stem. Billion Gain also asked the defendants whether they had any comments on the Asbatankvoy form.

31 On the basis of the documents referred to in the preceding three paragraphs, the plaintiffs submitted that the evidence was very clear that when they confirmed that 'sub terms lifted and clean fixed' at 11.32 am on 27 June, there was no agreement to incorporate the Asbatankvoy terms. They submitted that it was equally clear that if at all Mr Xu Lei, the defendants' employee who was handling the chartering arrangements on their behalf, had called Ms Liu to ask for the incorporation of the Asbatankvoy terms it would have been after 12.38 pm on 27 June after all the terms of the charter had been concluded.

32 I do not think that the matter is as easily disposed of as the plaintiffs have submitted it should be. Whilst this issue has not been explicitly raised since the defendants' contention is that some time that day the plaintiffs accepted the Asbatankvoy terms, there is a serious question as to whether a contract could have been concluded on 27 June at 11.32 am if one of the terms of that purported contract was 'others as per Asbatankvoy charterparty to be mutually agreed'. The Asbatankvoy form is a long and detailed document containing many terms which would help the smooth performance of the charter and more specifically delineate the parties' rights and

responsibilities under it. Leaving the status of the form hanging in the air would therefore have been to leave the charter in an uncertain situation and such uncertainty has on many occasions been held to constitute a complete barrier to the court finding that a contract exists.

33 In any case, even if what was agreed to by the plaintiffs at 11.32 am and conveyed to the defendants at 12.38 pm was certain enough to constitute a contract, it included a clause offering the parties a way to incorporate additional terms to the contract by subsequent agreement. By stating that the other terms of the charter were to be in accordance with the Asbatankvoy form 'as mutually agreed', the parties were providing a method of incorporating some or all of the Asbatankvoy terms into the contract. Thus, after the plaintiffs' confirmation that morning, the situation was either that there was still no contract because important terms had not been agreed or that there was a contract which admitted the possibility of additional clauses being subsequently incorporated. It is therefore important to consider what happened thereafter.

34 In this regard, the defendants submitted that there had been an explicit agreement on the part of the plaintiffs to incorporate the Asbatankvoy terms as part of the contract. They relied, in the main, on the evidence of Jackki Yim and also on the plaintiffs' subsequent conduct.

35 Ms Yim's evidence in chief was that she received a copy of the Asbatankvoy form from Ms Liu of Billion Gain between 11.22 am and 11.26 am on 27 June. After seeing it, she realised that it was a standard form charterparty for the chartering of tankers. She checked to see if the defendants had made any amendments to the standard form. No amendments had been made. She then called Desmond Tan to ask whether he agreed to incorporate all the terms of the Asbatankvoy in the contract. Mr Tan asked Ms Yim for her opinion and she told him that these were standard charterparty terms to be used with the main terms with the fixture note. He then confirmed that he agreed to the incorporation of all the terms. Ms Yim then asked Desmond Tan to send her a confirmation that all sub terms had been lifted and that the charterparty was clean fixed. She received this confirmation at about 11.32 am and forwarded it to Ms Liu immediately. Later on the same day, she told Ms Liu over the telephone that the plaintiffs had agreed to incorporate all the Asbatankvoy terms. It should be noted that while she was being cross-examined, Ms Yim informed me that her conversation with Desmond Tan on the Asbatankvoy form had taken place after 11.32 am and not before she received the plaintiffs' confirmation that the sub terms had been lifted. She also said that her telephone conversation with Ms Liu with regard to the acceptance of the Asbatankvoy form had been very much later on the same day. She maintained, however, that Desmond Tan had confirmed the plaintiffs' acceptance of the form.

36 Desmond Tan was a manager of the plaintiffs and he was the one who signed various documents on their behalf during the negotiations for the charter. He also signed the fixture note. His elder brother, Tan Peng Seng, was away from Singapore between 22 June and 13 July 2001 and Mr Tan gave evidence that while he was overseas he handled the negotiations on the charter through Desmond Tan who kept him informed of what was happening. It would therefore appear that Desmond Tan was authorised to speak and/or deal on behalf of the plaintiffs and Tan Peng Seng himself. Even if Desmond Tan did not have actual authority to bind the plaintiffs in relation to the charter, he had apparent authority to do so. He therefore also had actual and/or apparent authority to agree to the incorporation of the Asbatankvoy terms on behalf of the plaintiffs.

37 Although the plaintiffs denied that there had been any agreement to incorporate the Asbatankvoy terms, they did not call Desmond Tan to give evidence on the negotiations and his dealings with Ms Yim. Under s 116(g) of the Evidence Act (Cap 97), I am entitled to presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The plaintiffs did not explain why Desmond Tan was not giving evidence and I therefore

presume that the evidence that he would have given on his conversation with Ms Yim would not have supported the plaintiffs' stand that the plaintiffs had not agreed to the Asbatankvoy terms.

38 Ms Yim's story of Desmond Tan having consented to the terms was corroborated by the fact that she informed Ms Liu of that consent the very same day and Ms Liu herself testified to this. Further, as the defendants submitted, Ms Yim had absolutely no reason to inform the defendants or Billion Gain that the plaintiffs had agreed to incorporate the terms unless she had first obtained the plaintiffs' agreement. Otherwise, she would have been exposing herself and her company to liability for misrepresenting the position.

39 The Asbatankvoy terms were not new to the plaintiffs. In four previous charterparties with another shipping company, the plaintiffs had agreed to the incorporation of the Asbatankvoy terms. In cross-examination, Tan Peng Seng claimed on the one hand that he did not agree to the Asbatankvoy terms because the defendants did not show him these clauses but, on the other, he conceded that the other shipping company had not shown him the terms either. Mr Tan could not give any satisfactory explanation for taking such an inconsistent position. It was also of some significance that Mr Tan stated later in his cross-examination that he had cancelled the charterparty on 19 July 2001, the day after he received notice from the defendants of the contents of cl 5 of the Asbatankvoy terms, because he was advised that this clause stipulated that notice of cancellation had to be given within 24 hours. It would appear that at that time Mr Tan did not dispute that the Asbatankvoy terms were part of his contract.

40 Having considered the evidence, I find that on 27 June 2001, a contract was concluded between the plaintiffs and the defendants and that charter included the term that incorporated all the Asbatankvoy terms. This term was specifically agreed to by the plaintiffs through Mr Desmond Tan on that day. The fixture note that was signed by the parties to evidence the terms agreed on 27 June 2001 did not reflect the agreement on the Asbatankvoy terms. It stated erroneously that the other terms were to be as per the Asbatankvoy charter party 'to be mutually agreed'. The defendants seek the rectification of the fixture note by the deletion of the words 'to be mutually agreed' from that clause.

41 In *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, Denning LJ observed that in order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract but by an error wrote them down wrongly (at p 461). This observation was quoted by the Court of Appeal in *Kok Lee Kuen v Choon Fook Realty* [1997] 1 SLR 182 which noted that whilst Denning JL seemed to think that for rectification there must be a concluded antecedent contract, there had been other cases suggesting that all that need be shown is that there was an intention common to both parties at the time of contract to include in their bargain a term which by mutual mistake was omitted. The Court of Appeal also held that the degree of probability required to establish that the contract had been written down wrongly was that of convincing proof.

42 In the present case, how did the contract come to be written wrongly when the defendants had all along wanted the Asbatankvoy form to be part of the contract? Ms Liu, their broker, gave evidence that it was her mistake. She testified that she had received a phone call from Ms Yim on 27 June confirming the plaintiffs' acceptance of the Asbatankvoy terms. She said that the fixture note was prepared by her thereafter and she had erroneously used the terms recapitulated to the defendants in her e-mail of 26 June without amendment. The fixture note was sent out by her on 29 June to LOP for signature by the plaintiffs. Thereafter it was sent to the defendants for their signature. It was Ms Liu's evidence that while both parties signed a fixture note which stated that the Asbatankvoy terms were still to be mutually agreed, she had no doubt that both knew that in fact

the terms had been incorporated.

43 I am satisfied that there is convincing proof that by reason of a common mistake, the fixture note as signed did not reflect the parties' agreement to the inclusion of the Asbatankvoy terms. Accordingly, I grant the rectification order prayed for by the defendants.

Second issue: what is the true meaning and effect of the inspection clause?

44 In the fixture note, the inspection clause reads as follows:

> SUBJ TO REFINERY'S INSPECTION PRIOR TO ACCEPTANCE N BERTHING N/OR INSPECTION EXP TBF OWNRS ACCT

45 In their closing submission, the plaintiffs state that they have pleaded that the fixture note provided that the vessel was subject to the refinery's inspection prior to its acceptance and berthing and that they have further pleaded that the defendants breached the fixture note in that they failed to obtain the approval of SRC for the loading of the first shipment. I gather from this that it is the plaintiffs' position that the inspection clause required the defendants to subject the vessel to inspection by the refinery and to obtain the approval of the refinery for the loading of the vessel. This would mean that if such approval was not obtained, the defendants would be in breach of the charter.

46 The defendants have pleaded that the inspection clause did not impose an obligation on them to ensure that the vessel was approved by the refinery (in this case SRC) for berthing and loading of cargo. They say that the effect of the clause was to notify the defendants that the refinery where the vessel was to call would require it to be inspected prior to accepting the vessel for berthing and that the expenses incurred for such inspection would be for the defendants' account. In their closing submission, the defendants state that the clause was a condition subsequent and not an obligation and the effect of non-compliance with the condition subsequent was that both parties would be released from the charter which would come to an end. The defendants say that the clause should be read as having two parts as follows:

(1) 'Subject to refinery's inspection prior to acceptance'; and

(2) 'And berthing and/or inspection expenses to be for owners' account'.

They say that the plaintiffs' interpretation which implies that the first part of the clause is 'subject to refinery's inspection prior to acceptance and berthing' is not correct.

47 In interpreting a contractual provision, it is important to be aware of the commercial context in which the contract was entered into. As Lord Wilberforce observed 30 years ago:

> No contracts are made in vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. (see *Reardon Smith Line Ltd v Yngvar Hansentangen* [1976] 1 WLR 989 at 995)

The principles implied in this passage have been well elaborated recently by Lord Hoffmann in his

judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98. Of the five principles enunciated there, the following are the most relevant to my task today:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) …
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945.

48 It is therefore important that I set out the evidence on how the inspection clause came to be included in the contract and as to the situation in the carriage of bitumen by sea that it was intended to deal with.

49 The evidence on how the inspection clause came to be in this contract was given by Ms Yim. She stated that she had been the one to advise the plaintiffs to include the inspection clause. It must be remembered that Ms Yim had a great deal of experience in the shipment of bitumen arising from LOP's employment as an agent for Shell and ExxonMobil sourcing vessels for the shipment of petroleum products. Further, the vessel had just completed its conversion into a bitumen tanker and this was its first voyage to Singapore to load bitumen whether at the SRC refinery or at any other refinery on the island. Accordingly, neither the defendants nor the plaintiffs knew, initially, whether the vessel would meet the requirements of any of these refineries. Ms Yim stated:

> (i) In Singapore, large volume of bitumen cargo is only available from one of the three refineries – Shell, ExxonMobil and SRC.
>
> (ii) These refineries all require vessels berthing with them to be inspected first, to determine if the vessels comply with their operational and safety requirements, before allowing the vessels to berth. This is the case whether the bitumen is in drum or in bulk.
>
> (iii) If the vessel is not accepted by the refinery, then the Plaintiffs should not be bound to continue with the charterparty. Otherwise, they would still have to load the Vessel and pay charterparty freight.
>
> (iv) I therefore inserted the Inspection Clause so that the Plaintiffs can get out of the charterparty if the Vessel is not accepted by the refinery.

50 Ms Liu echoed the rationale for the inspection clause given by Ms Yim when in her affidavit of examination in chief she said that it was required because:

> 23 Oil refineries commonly require vessels calling at their terminals and berths to be inspected and approved according to their safety and operational requirements. From the point of view of charterers such as the Plaintiffs, if the Vessel cannot meet the requirements of the refinery, she would not be able to load the Plaintiffs' cargo. The Plaintiffs would then not want to continue with the charter.
>
> 24 From the view of the shipowners such as the Defendants, they cannot promise that the Vessel would be able to meet the refinery's requirement or to berth, because approval is at the discretion of the refinery, whose requirements were not known to the Defendants.
>
> 25 The Inspection Clause therefore reflected these competing interests by providing for the Defendants to incur the costs and expenses of sailing the Vessel to Singapore and of undergoing the required inspection. If the Vessel is approved, the charter party continues and the Defendants can earn the freight for the 4 shipments. If the Vessel is not approved, the charter party comes to an end. The Defendants would have wasted the expenses of sailing the Vessel to Singapore and of the inspection, and lost the opportunity to earn freight. The Plaintiffs would have to look for another vessel to carry their cargo. …

51 Ms Yim's assertion that she had suggested the incorporation of the inspection clause was contradicted by Mr Tan Peng Seng. He claimed in cross-examination that it was he who supplied the wording of the inspection clause to Ms Yim. He agreed that he had nothing in writing to substantiate this allegation but said that he had obtained the wording of the clause from contracts that he had signed with other shipowners such as China Shipping. He was, however, not able to point to any such clauses in any of the charterparties between the plaintiffs and China Shipping which were disclosed in court by the plaintiffs. His evidence on the point was self-serving and not believable. On the other hand, Ms Yim's version of events was backed-up by the correspondence. On 22 June, LOP had sent the plaintiffs the terms of the charterparty offered by the defendants. These terms do not contain any inspection clause. Ms Yim, however, had added the following comment at page 2 of her facsimile:

> In addition, we must include that the vessel is subject to refinery's inspection prior acceptance and berthing and all inspection charges to be borne by Owner.

If such an inspection clause had been an express requirement of the plaintiffs from the beginning, there would have been no need for Ms Yim to propose such a clause. Thereafter, Ms Yim relayed the inspection clause together with other comments to Ms Liu and Ms Liu then set out the revised charterparty terms in a facsimile dated 25 June to LOP. The inspection clause first appeared as part of the terms of the charter in this facsimile.

52 Having considered the evidence, I accept that the inspection clause was suggested by Ms Yim for the protection of the plaintiffs as charterers. It was intended to help the plaintiffs get out of the charterparty if the vessel were to prove unacceptable to the refinery nominated by the plaintiffs. It was not, however, intended (at least by Ms Yim) to impose an obligation on the shipowners that the vessel would meet the refinery's requirements. She explained in cross-examination that the requirements of the refinery would be decided by it and could not be decided by the shipowner or the charterer. In that situation, it was fair to oblige the shipowner to have the vessel inspected but it was not the responsibility of the shipowner to have the vessel pass the inspection since the shipowner had no control over the same. There was also evidence from SRC that it does not inform

shipowners before hand exactly what its requirements are. Mr Tan conceded during cross-examination that the different inspection criteria and terminal requirements of all three refineries in Singapore are not disclosed to shipowners.

53 I accept the evidence of Ms Yim and Ms Liu as to the background of the carriage of bitumen from refineries in Singapore and elsewhere. Their testimony was not undermined either by cross-examination or by other evidence adduced by the plaintiffs. Looking at the inspection clause in the light of that background, the defendants' interpretation is the only reasonable one that gives effect to the objective intention of the words used.

54 First, there is nothing in the clause which provides for or implies a promise or undertaking by the defendants that SRC's approval of the ship would definitely be obtained. In particular, the employment of the words 'subject to' does not import any positive obligation or undertaking on the part of the defendants. The entire clause makes only one specific reference to the defendants which is that they are to bear the expenses of inspection and/or berthing. The clause is not even as strong in this connection as a 'BP approval clause' which appeared in three charterparties between the plaintiffs and China Shipping. That clause provided 'owner shall make efforts to get SRC approval for loading at her terminal …'. The owners there had a positive obligation to use efforts to obtain approval from the refinery whereas in this case, the charterparty is simply made 'subject to the refinery's inspection' which meant that the owners simply had to allow the vessel to be inspected but did not need to do anything to obtain a satisfactory outcome from such inspection.

55 Secondly, as the defendants submit, the inspection clause can be divided into two parts:

(a) performance of the charterparty is subject to ie contingent upon the vessel being inspected and accepted by the refinery; and

(b) all berthing and inspection expenses are to be borne by the defendants.

The abbreviation 'N' for the word 'and' marks the place in the inspection clause which divides it into these two parts. The effect of the first part is to make the continuance of the charterparty conditional upon the vessel being inspected and accepted by the refinery prior to berthing. In other words, the inspection clause has the effect of a condition subsequent in that it provides that if the vessel is not accepted by SRC, the charterparty is to come to an end.

56 Thirdly, the plaintiffs appear to be reading the words 'acceptance N berthing' together as though they are the twin obligations which the defendants had to perform under this clause. Such a construction, however, is irreconcilable with the abbreviation 'N/OR' for 'and/or' which follows immediately after the word 'berthing'. The proper way to construe the second part of the clause is therefore that it reads 'berthing and/or inspection exp tbf owrs acct' which is an abbreviated manner of stating 'berthing and/or inspection expenses to be for Owners' account'. 'Acceptance', on the other hand, belongs to and is the tail piece of the first part of the clause.

57 The above interpretation of the inspection clause is consistent with the way in which bitumen cargo is shipped and the insistence of each refinery on a pre-berthing inspection of vessels which have not previously berthed at that refinery. It also is fair to both the owners and the charterers of vessels which have not had previous experience at the refinery concerned. It allows a concluded charter to go forward until the point where the vessel is found to be unsuitable for berthing and at that stage, both parties will be released from further performance of the charter. Both will no doubt suffer some loss by reason of this situation, but that is not unfair because the non-performance of the charterparty has been brought about by the act of a third party over which neither contracting

party has any control. Owners/charterers who are averse to running the risk of loss in such situations have a simple remedy: they should refrain from entering into charterparties which require the vessel concerned to load at a berth for which it has not yet been approved.

58 I therefore hold that there was no obligation on the part of the defendants to ensure that the vessel was approved by SRC for loading of the plaintiffs' bitumen cargo.

Third issue: did the plaintiffs have a right to terminate the charter on 19 July?

59 The plaintiffs pleaded the fixture note provided that the vessel was to be ready for loading in Singapore between 12 and 15 July 2001 for the first shipment. In this regard, they were relying on the clause of the fixture note that read 'LYCN: 12/15 JUL' as first shipment.

60 There is no dispute that although the vessel was in Singapore on 15 July, it was not ready for loading at that time as it was under arrest. It was not released from arrest until the afternoon of 16 July and the plaintiffs were only notified of the release the following day. The first sub-issue here therefore is whether the defendants were in breach of contract because the vessel was not ready to load by the end of the period 12 to 15 July.

61 Mr Xu Lei testified that in the clause 'LYCN: 12/15 July as first shipment', the word 'LYCN' was actually 'laycan' an abbreviation for lay date and cancellation date. The plaintiffs did not bring evidence to dispute that interpretation. According to common texts in the marine industry, the term 'laycan' is an abbreviation for 'lay days/cancelling'. Having stated that, Eric Sullivan's *Marine Encyclopaedic Dictionary* (6th Ed) gives the following definition of 'lay days':

> **Laydays** (1) The dates within which a ship is to present for loading. If she is too late to meet the last date – the cancelling date – she may be cancelled. (2) The range of days between calendar dates during which a chartered vessel should be available for loading and/or discharge. The last date is the Cancelling Date, after which the charterer may cancel the charter if the ship has not been presented. Hence the term Laydays/ cancelling or Laycan …. A cancelling clause in the charterparty may require the charterer to declare within a stated interval whether or not he will reject the charter if the vessel is late.

62 A cancellation clause gives the charterer a right to cancel the charterparty if the vessel is not ready by the cancelling date. It is not a promise by the owner that the vessel will be ready by the stipulated date. This was established by the case of *Smith v Dart* [1884] 14 QBD 105. In the case of *Fercometal SARL v Mediterranean Shipping Co SA* [1989] 1 AC 788, box 19 in the charterparty which was headed 'Cancelling date (Cl. 10)' contained the words 'LAYCAN 3/9 July 1982'. Clause 10 provided 'Should the vessel not be ready to load (whether in berth or not) on or before the date indicated in Box 19, charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading'. At p 795 of the report, Lord Ackner commented that:

> the charterers' right to cancel given by clause 10 was an independent option, only exercisable if the vessel was not ready to load on or before 9 July 1982. Clause 10 did not impose any contractual obligation upon the owners to commence loading by the cancellation date.

63 Thus, the meaning of the laycan clause in this charter was that the vessel would have to be presented for loading by 15 July and that if it was not, the plaintiffs would have a right to cancel the charter. It should be noted here that commensurate with the character of the clause (ie the fact that it is not a promise to arrive on a certain date) the right of cancellation does not carry with it a

right to claim damages for loss which may be suffered by reason of the delay in the arrival of the vessel. See *Carriage by Goods by Sea* (3rd Ed) by John F Wilson at p 66 and *Contracts for the Carriage of Goods* by David Yates at para 1.1.4.3.10.

64 The charterer's right to cancel for non-compliance with the laycan period may, however, be restricted by other clauses of the charterparty (an example of this can be seen in cl 10 of the charter in the *Fercometal* case). In this case, the defendants are relying on cl 5 of the Asbatankvoy terms which they say required the plaintiffs to exercise their option of cancelling the charter within 24 hours, failing which the charterparty was to continue with no further option for termination. Clause 5 reads:

> 5. LAYDAYS. Laytime shall not commence before the date stipulated in Part I except with the Charterer's sanction. Should the Vessel not be ready to load by 4:00 o'clock P.M. (local time) on the cancelling date stipulated in Part I, the Charterer shall have the option of cancelling this Charter by giving the Owner notice of such cancellation within twenty-four (24) hours after such cancellation date; otherwise this Charter to remain in full force and effect.

65 Clause 5 accordingly required that the plaintiffs exercised their option of cancelling the charterparty by 4 pm on 16 July 2001 (ie 24 hours after 4 pm on the cancelling date of 15 July 2001) failing which they would have lost their right to cancel the charterparty and the charter would remain in full force and effect. The plaintiffs did not cancel the charter before 4 pm on 16 July 2001; they waited till 19 July to give notice of cancellation. The defendants therefore submit that the purported notice of cancellation was wrongful and was a repudiatory breach of contract.

66 The plaintiffs submit that even if the Asbatankvoy terms apply, they were not obliged to cancel by 4 pm on 16 July because delivery of the vessel had not been tendered to them on 15 July. To support this contention, they rely on the following passage from *Voyage Charters* by Julian Cooke and others which appears under the general heading 'American Law' on p 418:

> Generally, if there is an agreed "cancelling" date and the vessel has not arrived at the load port by that date, the charterer is under no obligation to declare whether or not it intends to exercise the option to cancel until delivery of the vessel is actually tendered. Once given, an option is a one way affair. Even if the shipowner knows that the vessel cannot reach the loadport by the cancelling date, therefore, it remains obligated to continue the vessel's passage in order to give the charterer the opportunity to either use the ship or exercise its cancelling option. After all, the charterer would be perfectly justified in accepting the vessel even though late and this often occurs …

67 This argument is not persuasive. First, it was not pleaded that American law applied to this charter. Secondly, no expert on American law was called to give evidence on this point. Thirdly, even if American law did apply (which seems unlikely given the provision in the fixture note reading 'Arbitration if any in Singapore and English law to apply' and the lack of factors connecting this contract with American law), the passage cited is only, as it states itself, a general statement of the law. The passage does not deal with the situation where the charterparty in question contains a specific clause dealing with the exercise of the right of cancellation. As a specific expression of the parties' intention, cl 5 of the Asbatankvoy terms must override any general understanding to the contrary.

68 Prima facie therefore, the plaintiffs were bound to exercise their right of cancellation by 4 pm on 16 July since the vessel was not ready for loading at 4 pm on 15 July, the cancelling date. The plaintiffs, unfortunately, let this opportunity slip by. They submitted that their failure to cancel by 15

July cannot be held against them because the defendants' repeated insistence that the vessel had been approved for berthing misled them into thinking that the vessel was ready to load and there was no reason for them to cancel the charterparty as long as they were receiving such assurances. They only cancelled the charterparty on 19 July when it became apparent that the defendants were labouring under a mistaken belief that the vessel was approved for berthing by SRC. I must therefore consider what happened between 14 and 19 July.

69 In this connection the material evidence is that contained in the answers to interrogatories furnished by SRC and the oral evidence of Captain Tan Keng Hock who at the material time was the Oil Movements Superintendent of SRC. The gist of this evidence is as follows. SRC has in force a two stage process which a vessel has to go through before it is cleared for possible berthing. The first is that the vessel is required to pass the Health, Safety and Environment ('HSE') inspection, which is the responsibility of Captain Tan or, in his absence, that of the Oil Movements Manager. The second is that upon the vessel passing the HSE inspection, the matter is transferred to SRC's supply and production control section which is responsible for final clearing of and arranging the vessel for berthing.

70 The vessel cleared the HSE inspection on 17 July 2001. It was still not approved for berthing then, however, as there was a possibility of a connection problem in that SRC's shore loading arm may not have been able to connect to the vessel's cargo manifold. The clearance from the bottom of the SRC's cargo manifold flanges to the vessel's oil spill tray was only 16 cm and this might have caused problems. SRC needed the vessel to provide more information on its cargo manifold arrangements in order that the technical situation could be further assessed. According to Captain Tan, in the condition that the vessel was at the time of the inspection, it could not have been connected to the SRC jetty.

71 Captain Tan himself was on leave when the vessel underwent the HSE inspection. He only returned to the office on 19 July. He then read the report of SRC's appointed inspector, Douce Maritime Services, and noted the problem with the manifold. Captain Tan requested more detailed information from Mr Ricky Loh of Costar Shipping, the vessel's agents. On 20 July, the master of the vessel sent Captain Tan a sketch showing the cargo manifold arrangement. The information in this sketch, however, was still not sufficient for Captain Tan to make an assessment as to whether the vessel could berth safely. In court, Captain Tan confirmed that it may have been possible to get around the problem by modifying the equipment but said any modification would have had to be approved by him as he had to assess its extent and the pollution indications before agreeing to it.

72 Whilst Captain Tan's evidence made it quite clear that the vessel had not been approved for berthing by SRC on or before 19 July, the impression that the defendants had was somewhat different. The master of the ship, Captain Chen Chunjin, knew that there was some difficulty with the vessel's manifold arrangements and carried out minor modifications to try and improve the situation. He also stated that on the afternoon of 17 July he had been informed by Mr Ricky Loh that SRC was satisfied with the inspection of the vessel and that the vessel had to wait to berth only because there was then no berth available at the SRC terminal. Captain Chen communicated this information to the defendants by facsimile on the same day. In court, when asked whether he had any personal knowledge of the granting of the SRC approval for berthing of the vessel, he confirmed that he knew about it because of the telephone information he received from Mr Loh. The plaintiffs on the other hand were, at about the same time, receiving information that the vessel had not been approved for berthing by SRC.

73 The situation on 19 July was that the vessel had passed the first stage of the SRC approval procedure. It had been inspected and had cleared the inspection. It had not, however, been

approved for berthing. The defendants, under the mistaken impression that all was well and that they were simply waiting for a berth to be available, were insisting on demurrage whilst the plaintiffs, who had more accurate information on the approval status, did not see why they should pay such demurrage since the vessel's inability to berth was not due to any fault on their part. Mr Tan stated in his affidavit of evidence-in-chief that BP Singapore was insisting that the vessel had failed the SRC inspection and that in his conversations with Mr Zhou, he refused to be responsible for any demurrage.

74 First, I deal with the question of whether the plaintiffs' failure to cancel the contract by 4 pm on 16 July was due to any mis-information given to them by the defendants. The evidence adduced impels me to answer this question in the negative. Mr Tan's own affidavit of evidence-in-chief shows that he was steadfastly of the view at the material time that the vessel was not ready to load because it had not been approved by SRC. There is no hint there that he was misled or confused by anything the defendants said. Whilst the defendants took the position that they had approval, at all material times, Mr Tan's own sources were telling him that the opposite was the case. In any event, cl 5 required the option to cancel to be exercised within 24 hours of 4 pm on 15 July. On 15 July itself, the vessel was still under arrest and Mr Tan knew this. The vessel was only released the following afternoon and there is no evidence that Mr Tan wanted to cancel on 16 July itself but was persuaded not to do so by an assurance that the vessel was ready to load that day. The first information he got from the defendants about the vessel's readiness to load after its release only came on 17 July.

75 Since the plaintiffs did not cancel on 16 July, the charterparty remained in full force and effect. It was, however, still subject to the condition subsequent contained in the inspection clause. Accordingly, if the vessel was not approved for berthing by SRC, the charterparty would come to an end. The question is whether it did come to an end on 19 July. On that day, it had not been approved. However, it was not clear then that it would not or could not be approved. Whilst Captain Tan was back in his office, his evidence was that he did not see the report of Douce Maritime until after lunch that day and it was only then that he requested the further information on the equipment. His evidence also was that on the information he had the vessel could not berth but he did not rule out the possibility of further information or modifications to the manifold changing the situation. As the issue of approval had not been finally resolved on 19 July, it is my judgment that the inspection clause had not kicked in to terminate the charter and the charter was still afoot that day. In any event, even if there was a possibility that the vessel was going to be rejected by SRC, the defendants once they were aware of the exact problem would have been entitled to a reasonable time to take action to have the problem rectified and to re-tender the vessel.

76 The plaintiffs sent out their facsimile rejecting the vessel and the 17th July notice of readiness on the morning of 19 July. At that time, the defendants were not in breach of the charter in any way. Merely making a claim for demurrage which may not be sustainable is not a breach of charter. Thus the plaintiffs had no basis on which to cancel the charterparty and when they did so they were in breach of contract.

Fourth issue: entitlement to damages

77 In view of my finding that the plaintiffs acted wrongfully in purporting to cancel the charterparty, their claim against the defendants cannot succeed. The corollary of that finding is that the defendants' counterclaim for wrongful termination by the plaintiffs must succeed. I must therefore now consider whether the defendants are entitled to damages in the quantum claimed.

78 The defendants accepted the plaintiffs' wrongful termination on 20 July 2001. Thereafter,

they looked for another charter in order to mitigate their losses. They were fortunate in this respect. On 24 July, they chartered the vessel to Standard Tankers Bahamas Ltd, the chartering arm of ExxonMobil.

79 In the defence and counterclaim, the defendants had pleaded that they were entitled to damages in the sum of US$80,000 or, alternatively, in the sum of US$20,000. In their final submissions, the defendants went with the alternative claim. The sum of US$20,000 claimed is said to be the vessel's loss of earnings for the period from 19 July 2001 until 24 July 2001 when it started the subsequent charter. The defendants are claiming their loss of earnings based on the demurrage rate of US$4,000 a day found in the charter with the plaintiffs as they assert that the demurrage rate is meant to reflect the vessel's daily loss of earnings should it be delayed beyond the laytime period.

80 The reason for using the demurrage rate of US$4,000 a day and the calculation of that rate were explained by Mr Xu in his evidence. He said that normally in a negotiation of a charterparty, the demurrage rate represents the daily earnings of the vessel. If the vessel is delayed, say for a day, during a particular voyage, then the vessel would lose one day's earnings. The daily earnings of the vessel were derived from the gross earnings less the cost of those earnings. On the calculation of the rate, Mr Xu said:

> We assume that the amount of cargo is 4,000 tons and the freight is US$26/ton. So the income from carrying this cargo would be $104,000 less commission of 2.5% = $2,600.
>
> The entire voyage from Taizhou to Singapore takes 9 days and from Singapore to Haikou would take 4 days. Based on provisions in charterparty the time for loading and unloading is 4 days. Total days for entire voyage: 17 days. Total fuel consumption for all these days is estimated to be about $8,000. Total port charges at loading and discharge: US$8,000, wages of the crew members are estimated to be US$6,100. So income less expenses itemised above = US$68,670 ÷ by 17 days we arrive at daily profit which is slightly more than US$4,000.

The defendants did not produce any documents in support of the calculation of expenses given by Mr Xu. Further, they did not cite any legal authority or contractual basis for the proposition that the losses to them should be calculated on a daily basis based on the demurrage rate of the particular charter that has been breached.

81 The plaintiffs did not make any submissions on the quantum of damages recoverable by the defendants. The authorities, however, do not support the position taken by the defendants. They suggest that the basis on which compensation is to be calculated is the actual difference in earnings between the voyage that should have taken place and that, if any, which replaced it. If there is no replacement voyage, then the measure of loss would be the earnings under the charter contract less the expenditure required to gain those earnings. According to Article 193 of *Scrutton on Charterparties* (20th Ed at p 394-395):

> In an action against the charterer for not loading the cargo, the measure of damage is the amount of freight which would have been earned under the charter after deducting the expenses of earning it and any net profit the ship may, or might, have earned during the period of the charter on a substituted voyage. In calculating the net earnings on the substitute voyage, the Court will take account of the expenses of any deviation necessary to perform that voyage. … If the expense of earning freight on a substituted voyage of the same duration is the same as on the chartered voyage, the same result is arrived at by taking the difference between the charterparty rate of freight and the market rate of freight.

82 Article 193 was explained by Bingham J in *The Concordie C* [1985] 2 LLR 55, a decision that I followed in *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98. In *The Concordie C*, Bingham J was dealing with the assessment of damages due to the owners under a charterparty (which he described as the Rheinoel charter) that was repudiated by the charterers after the vessel arrived at the loading port and gave notice of readiness to load. He stated at pp 57/58:

> Had the owners been unable to find any employment for the vessel during the period which the Rheinoel charter would have taken to perform, their loss would prima facie have been the net revenue under that charter which they lost, assessed by the arbitrators at $225,143.00. Had the charter been performed the owners would at 0800 hours on Feb. 16 have had a net profit in their pocket of this sum, plus a free ship. As it was, the owners were able to find employment for the vessel during the tail-end of this period, laytime under this alternative charter beginning to run at 0001 hours on Feb 13. To put the owners in the same position as if the Rheinoel charter had been performed, it is accordingly necessary to reduce the net revenue which the owners would have earned under it by the net amount which the owners did in fact earn during its currency. This is what the vessel did earn 'during the period of the charter on a substituted voyage' (*Scrutton on Charterparties*, 19th Ed., art. 192).

83 On the basis of the foregoing, therefore, in order to enable me to calculate the damages that they sustained because the plaintiffs charter was cancelled, the defendants would have had to provide me with much more information. Apart from knowing that the chartered voyage to Haikou would have taken eight days including loading and unloading time so that if loading had started on 19 July the voyage would have been completed on 26 July and the vessel would have been free on that date, I would have had to know the expenses that would have been incurred in that voyage (with substantiating documents), the precise length of the substitute voyage (its start date and its end date) and the defendants' earnings from it and the expenditure they incurred on the substitute voyage. I would then be able to calculate the difference between the expected revenue and the actual revenue earned during the period when the charter with the plaintiffs would, in the natural course, have been performed. In fact the plaintiffs' charter was not simply for one voyage but for four covering a period of some 32 days on Mr Xu's calculation of voyage times and therefore a proper assessment of the defendants' loss would involve all substitute charters performed during the 32 day period commencing 19 July. The defendants chose not to take that route but to limit themselves to a claim involving only the 5 days between the plaintiffs' cancellation and the conclusion of the substitute charter.

84 Even then, I do not have the detailed figures. All I know from the charter documents disclosed was that the first voyage under the substitute charter to Standard Tankers was for the carriage of 4,000 metric tons of bitumen from Singapore to Ningbo and that the laydays were between 26 and 28 July 2001. The freight rate for the substituted voyage was US$35 per metric ton, a rate that was US$9 higher than the plaintiffs' rate. There is therefore a distinct possibility that the defendants gained rather than lost by reason of the cancellation of the plaintiffs' charter. Further, it is entirely probable that even if the plaintiffs had not cancelled the charter, the vessel would not have been ready to load until 21 or 22 July as modifications may have been required to be made to its cargo manifold. In my view, demurrage could not start to run until that problem had been dealt with and SRC had indicted that the vessel was acceptable for berthing. Thus, the period during which the substitute voyage overlapped with that of the original voyage may have increased in which case the likelihood of the defendants having lost any money by reason of the cancellation recedes even more.

85 In the absence of sufficient evidence on which a proper calculation of the defendants' losses, if any, arising from the plaintiffs' breach can be made, I am unable to make a substantive award of damages in the defendants' favour.

Conclusion

86 For the reasons given above, the plaintiffs' claim is dismissed. The defendants' counterclaim is allowed to the extent that I allow the rectification of the fixture note as prayed for by the defendants. The plaintiffs shall pay the defendants their costs of defending the action and of the counterclaim for rectification. The counterclaim for damages took up very little time in court and in submissions and since the defendants were not able to establish their loss, each party should bear its own costs in relation to the defendants' damage claim.