The “Asia Star”
[2010] SGCA 12

Case Number	: Civil Appeal No 63 of 2009
Decision Date	: 19 March 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Thio Ying Ying and Loh Yong Kah Alan (Kelvin Chia Partnership) for the appellant; Vinodh Coomaraswamy SC, David Chan and Tan Hui Ru Louisa (Shook Lin & Bok LLP) for the respondent.
Parties	: The "Asia Star"

Admiralty and Shipping

Contract

Damages

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2009] SGHC 91.]

19 March 2010 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge (“the Judge”) setting aside Assistant Registrar Chew Chin Yee’s assessment of the damages that arose from the appellant’s failure to deliver to the respondent a vessel (“the *Asia Star*”) in accordance with the terms of a voyage charterparty (“the Charterparty”). The assistant registrar (“the AR”) found that the respondent failed to act reasonably to mitigate its loss in that it did not hire an alternative vessel which was available at the material time – *viz*, the *Puma* – to carry the intended cargo. He awarded the respondent the sum of US$302,000, which represented the additional expense that the respondent would have been put to had it hired the *Puma* and thereby fulfilled its duty to mitigate its loss (see *The “Asia Star”* [2008] SGHC 92 (“the AR’s judgment”)). On appeal to the High Court, the AR’s factual findings on mitigation were reversed by the Judge and the award of damages increased nearly fivefold (see *The “Asia Star”* [2009] SGHC 91 (“the Judge’s judgment”), which is also reported as *The “Asia Star”* [2009] 2 Lloyd’s Rep 387).

2 The issue of mitigation lies at the heart of this appeal. Specifically, the question which we have to decide is this: did the respondent act reasonably to mitigate its loss after it learnt that the appellant would not be able to supply the *Asia Star* as promised? After carefully considering the parties’ submissions and the evidence, we have decided to allow the appeal and restore the decision of the AR – albeit with an arithmetical correction to the quantum of damages due to the respondent. We will give our detailed reasons after outlining the factual setting and the decisions made below.

The facts

3 The appellant is the owner of the *Asia Star*. The respondent is a Malaysian company which, amongst other businesses, trades in refined oil products. It claims to be one of the largest traders of palm oil in Malaysia and Indonesia, and charters up to five ships a month to carry the 800,000mt to 900,000mt of palm oil products that it trades in annually. The respondent may be said to be a sophisticated player in the palm oil trade, and one which is familiar with shipping practices and issues to boot.

4 In November 2003, the respondent entered into the Charterparty with the appellant for the hire of the *Asia Star* at a basic freight rate of US$32.00 per metric tonne ("pmt") based on one load port, with a further US$1.00 pmt to be paid for each additional load port. The vessel had a tonnage of 22,756mt and a capacity to carry up to 24,581mt of cargo. [note: 1] It was agreed that a minimum of 21,500mt of palm oil would be loaded onto the vessel for carriage to and delivery at ports in the Middle East, Turkey and the Black Sea.

5 The shipment of 21,500mt of palm oil was intended to fulfil the respondent's contractual obligations to sell palm oil to a Turkish company, Agrima Ic Ve Dis Ticaret Pazarlama Ltd ("Agrima"), under a series of contracts entered into between September and December 2003 ("the Agrima contracts"). Pursuant to the Agrima contracts, the respondent had to ship 21,500mt of palm oil between 15 December 2003 and 15 January 2004 ("the original Agrima shipment period"), with the cargo to be delivered by the middle of February 2004. Whilst the Agrima contracts were being concluded, the respondent entered into another series of contracts (collectively, "the purchase contracts") to purchase 24,500mt of palm oil from three suppliers (collectively, "the Suppliers") – namely, PT Pacific Indomas ("Indomas"), PT Pacific Medan Industri ("Pamin") and Pacific Oil and Fats Industries Sdn Bhd ("Pacoil"). The palm oil purchased under these contracts was later nominated as the cargo to be loaded onto and carried on board the *Asia Star* ("the Cargo").

6 We should at this juncture point out that the respondent did not enter into the purchase contracts with the specific intention of using the palm oil purchased thereunder (*ie*, the Cargo) to fulfil its obligations under the Agrima contracts. The respondent – being a large trader in edible oils (such as palm oil) – bought and sold a vast quantity of such oils every month. What it bought would subsequently be allocated to various purchasers depending on trade requirements and vessel availability. It also bears mentioning that the respondent and the Suppliers appear to be related to one another, and share some common directors. Further, Agrima has a close relationship with the respondent and has been the latter's sole agent in Turkey since 2004.

7 By agreement between the appellant and the respondent, the loading period for the *Asia Star* was to be between 27 December 2003 and 4 January 2004 ("the original loading period"). The appellant was obliged to present the vessel at the respondent's nominated load ports in Belawan, Indonesia, and Pasir Gudang, Malaysia, within that period, whereupon the Cargo would be loaded on board by the supplier concerned (specifically, loading at Belawan would be carried out by Indomas and Pamin, while loading at Pasir Gudang would be carried out by Pacoil). The vessel was to call at Belawan first.

8 Unfortunately, the *Asia Star* was unable to reach the nominated load ports within the original loading period. The vessel was initially delayed for a few days in South Korea due to bad weather and a change in her discharge schedule. Subsequently, on 5 January 2004, the appellant notified the respondent of a further delay when the vessel was unable to discharge her cargo in China due to the sudden imposition of a ban on beef tallow originating from the United States. The appellant asked for loading to commence only on 15 January 2004, a request which the respondent acceded to. In turn, the respondent asked the Suppliers for an extension of time to load the Cargo. Where Indomas was concerned, it had earlier agreed, when the *Asia Star* was delayed in South Korea, to extend the date

for completion of loading until 15 January 2004. After it was notified by the respondent about the further delay of the vessel in China, it agreed to extend the date for completion of loading again, this time, until 21 January 2004. Pamin and Pacoil, on their part, did not expressly agree to an extension of time for loading, and reserved their rights to charge any penalty, storage charges and other charges that they might incur as a result of the delay in loading. Where Agrima was concerned, it agreed to extend the original Agrima shipment period until 21 January 2004.

9 On 19 January 2004, the *Asia Star* finally berthed at Belawan. Upon arrival, however, the vessel's cargo tanks were found by the respondent's surveyors to be unfit for receiving the Cargo. According to the surveyors' report, the coating of the cargo tanks had rusted as well as blistered and the cargo tanks were generally in poor condition, giving rise to a risk of contamination. The respondent promptly sent the appellant a solicitor's notice on the same day (*ie*, 19 January 2004) asserting that the appellant was in breach of the Charterparty. At the same time, the respondent suggested that the appellant could discharge its obligations under the Charterparty by substituting the *Asia Star* with another more acceptable vessel to carry out the voyage. The appellant responded, likewise on 19 January 2004, to say that no substitute vessel was available. On 20 January 2004, it informed the respondent that it had made efforts to improve the condition of the *Asia Star*'s cargo tanks by cleaning them and invited the respondent to re-inspect the tanks in order to determine their suitability. The respondent did not respond to the offer and the *Asia Star* left Belawan on 21 January 2004. No cargo was ever loaded onto the vessel.

10 During this period, the respondent was not inactive. It attempted to secure an alternative vessel to carry the Cargo. Its inquiries began on 19 January 2004, even before the *Asia Star* was found to be unfit to receive the cargo. That same day, the respondent's shipbroker found a substitute vessel – *viz*, the *Puma*, which, with a maximum cargo capacity of 40,000mt, was a much larger vessel than the *Asia Star*. The owners of the *Puma* indicated that loading of the Cargo at Belawan could commence by 27 or 28 January 2004, based on the estimation that the vessel would arrive at Pasir Gudang on 26 or 27 January 2004. However, the respondent was unable to reach an agreement with the owners of the *Puma*.

11 On 20 January 2004, several exchanges took place between the owners of the *Puma* and the respondent. The offers made by the owners of the *Puma* and the counter-offers made by the respondent may be summarised as follows:

Offers and counter-offers made

	The *Puma*'s owners (9.50am)	**The respondent (time uncertain)**	**The *Puma*'s owners (10.19am)**
Capacity (mt)	40,000	40,000	40,000
Laycan (in 2004)	27–31 Jan	25–30 Jan	25–31 Jan
Freight (US$ pmt)	27.50	25.00	27.50
Demurrage (US$)	17,000	11,000	16,000

Offers and counter-offers made

	The respondent (2.20pm)	**The *Puma*'s owners (5.06pm)**	**The respondent (5.32pm)**
Capacity (mt)	40,000	36,000	36,000
Laycan (in 2004)	25–30 Jan	25–31 Jan	25–31 Jan

Freight (US$ pmt)	25.00	27.50	25.50
Demurrage (US$)	12,000	16,000	14,000

12 The negotiations between the owners of the *Puma* and the respondent broke off abruptly following the respondent's last counter-offer, which was made at 5.32pm on 20 January 2004. The owners of the *Puma* did not respond to that counter-offer and the respondent did not attempt to engage in further negotiations thereafter. From the picture sketched above, it seems that the discussions broke down as a result of the respondent's unwillingness to accept a difference in freight rate of just US$2.00 pmt (which was the difference between the highest freight rate demanded by the owners of the *Puma* (*viz*, US$27.50 pmt) and the highest freight rate which the respondent was willing to pay (*viz*, US$25.50 pmt)) – this, despite the willingness shown by the owners of the *Puma* to treat the vessel as having a total cargo capacity which was less than her actual total cargo capacity so that the dead freight payable by the respondent would be reduced.

13 On 21 January 2004, the respondent instructed its shipbroker to look afresh for a replacement vessel. It is pertinent to note that, by that time, the respondent had a different requirement. Specifically, it sought a vessel to carry 20,000mt of palm oil to the eastern part of the Mediterranean Sea *and another* 20,000mt of palm oil to the Red Sea on an urgent basis (see below at [69]). In other words, although the respondent had decided not to hire the *Puma*, it apparently still needed a vessel with the same total cargo capacity (*ie*, 40,000mt); it also required the vessel to call at other ports in addition to the original ports of discharge mentioned at [4] above.

14 Following the departure of the *Asia Star*, Indomas cancelled all of its contracts with the respondent on 22 January 2004 on the basis that the latter had not complied with the original loading period (as extended by Indomas in the manner outlined at [8] above). Agrima also cancelled the bulk of the Agrima contracts on 23 January 2004, but agreed to allow 5,750mt of palm oil (*cf* the 21,500mt originally ordered) to be shipped on the *Chembulk Barcelona*, a vessel which the respondent had earlier chartered on 30 December 2003, with loading to begin in February 2004. Pamin and Pacoil agreed to an extension of the original loading period so as to allow shipment on the *Chembulk Barcelona*. However, they also sought to penalise the respondent and charged consequential expenses for (*inter alia*) extended storage and heating in order to restore the quality of the Cargo, which had deteriorated due to the delay.

15 We pause here to draw attention to two findings made by the AR, which pertain to the facts set out above (see [34]–[35] of the AR's judgment). The first is the finding that both the Suppliers and Agrima were not informed of the difficulties which the respondent encountered in relation to the *Asia Star* during the material period. Although the respondent asked the Suppliers and Agrima for an extension of time to load and ship the Cargo, it did not inform them that the *Asia Star* had been rejected, and that a substitute vessel was available within the appropriate laycan period. The respondent also did not ask Agrima for a further extension of the original Agrima shipment period (see, in this regard, [8] above), and notified Agrima of the *Asia Star*'s cancellation only on 23 January 2004. The second finding to note is "the urgency of the matter at the material time" (see [35] of the AR's judgment) if one were to take the various contracts involved at face value. Originally, loading of the Cargo was to have been completed by 4 January 2004. Two extensions of time had already been granted to the respondent by Indomas to present the *Asia Star* for loading: first, up to 15 January 2004, and then up to 21 January 2004 (see [8] above). As for Agrima, it had agreed to extend the original Agrima shipment period up to 21 January 2004 (see, likewise, [8] above). If the respondent were not able to secure further extensions of time, it would be in breach of its obligations. From this

perspective, the respondent's contractual position at the material time was, as aptly described at [36] of the AR's judgment, "precarious".

16 On 13 February 2004, the respondent commenced Admiralty in Rem No 30 of 2004 (*viz*, the action from which this appeal stems) against the appellant for damages arising from the latter's breach of the Charterparty. The question of liability was tried, and the High Court held that the appellant had indeed breached the Charterparty (see *The "Asia Star"* [2006] 3 SLR(R) 612). The appeal against the High Court's decision on liability was dismissed by this court (see *The "Asia Star"* [2007] 3 SLR(R) 1). When the matter went before the AR for assessment of damages, the respondent's claim comprised the following:

(a) US$698,889.88 for loss incurred on account of the cancellation of the respondent's contracts with Indomas;

(b) US$823,800 for sums paid in settlement of Agrima's claim against the respondent as a result of the respondent's failure to deliver the palm oil promised under the Agrima contracts;

(c) US$357,000 for penalty charges imposed by Pamin for the delay in loading; and

(d) RM558,467.31 for various charges such as interest, storage, reprocessing, transportation and heating charges imposed by Pacoil.

In all, the total value of the respondent's various heads of claim amounted to about US$2m.

The judgments below

The AR's decision

17 The AR did not hesitate in dismissing the appellant's submission that the respondent had not suffered any identifiable damage as a result of the appellant's breach of the Charterparty. However, the AR found that the respondent had failed to act reasonably to mitigate its loss since the *Puma* had been available as a possible substitute vessel. He held that it was unreasonable, given the dire situation which the respondent was in, for the respondent to have pressed for a lower freight rate for the *Puma*. The respondent, the AR commented, was "*simply trying to maximise the revenue which could be generated from chartering the* Puma" [emphasis added] (see [33] of the AR's judgment). He found that "the larger capacity of the *Puma*, as compared to [the] *Asia Star*, was not a major consideration for [the respondent] in deciding whether to charter it [*ie*, the *Puma*] in substitution" (see, likewise, [33] of the AR's judgment). He was of the view that, when the owners of the *Puma* did not respond to the respondent's last counter-offer (*ie*, the counter-offer made at 5.32pm on 20 January 2004), the respondent should have chartered the *Puma* at the freight rate offered by her owners, instead of abandoning the option of chartering that vessel altogether (see the AR's judgment at [43]). Implicit in this ruling is the AR's recognition that the freight rate of US$27.50 pmt which the owners of the *Puma* insisted on was actually lower than the freight rate for the *Asia Star* (which was US$32.00 pmt), with the result that any costs incurred by the respondent on dead freight as a result of chartering the *Puma* would be offset by savings arising from the lower freight rate (see the AR's judgment at [43]).

18 The AR took a commonsensical approach in coming to his decision. After carefully analysing the evidence, he determined that "both Agrima and Indomas would, on a balance of probabilities, have accepted the substitution of the *Puma* to load and deliver the cargo" (see the AR's judgment at [51]). In addition, he found that the respondent acted unreasonably in not informing the Suppliers

and Agrima immediately of the *Puma*'s availability (albeit at a higher freight rate) and in not requesting for further extensions of time (see the AR's judgment at [36]). As the respondent knew at the material time that the market for palm oil was a rising one, it was inexplicable for the respondent not to have made strenuous efforts to avoid any cancellation of the purchase contracts since it would, in the event of such cancellation, have been exposed to "potentially ruinous damages" (see the AR's judgment at [38]). The AR therefore held that the proper measure of damages was the total amount of freight that the respondent would have paid if it had chartered the *Puma* as a substitute vessel less the amount of freight that it was originally bound to pay for the *Asia Star*. He calculated the difference between these two amounts to be US$302,000. Both parties now accept that the correct amount should be US$399,500 if the AR's decision is upheld.

The Judge's decision

19 Both the respondent and the appellant appealed against the AR's decision. The respondent appealed on the grounds that (*inter alia*) the AR erred in finding that it had not acted reasonably to mitigate its loss, while the appellant appealed on the basis that the respondent had not suffered any damage at all from the appellant's breach of contract. There were three main questions before the Judge: first, whether the loss suffered by the respondent was indeed caused by the appellant's breach; second, whether the respondent had acted reasonably to mitigate its loss; and, third, what the appropriate measure of damages should be if the respondent were found to have acted reasonably to mitigate its loss.

20 The Judge upheld the AR's finding on the first question (see the Judge's judgment at [49]). She also held that the respondent's duty to mitigate arose on 20 January 2004 (see the Judge's judgment at [57]) – the same day on which the respondent's negotiations with the owners of the *Puma* took place. However, she disagreed with the AR's findings on the second question and ruled that the respondent had acted reasonably to mitigate its loss (see the Judge's judgment at [78]). As a result, the respondent's appeal against the AR's decision was allowed while the appellant's appeal was dismissed. The detailed reasons for the Judge's disagreement with the AR will be examined below at [35]–[37]. For now, it suffices to say that the Judge found that: (a) the respondent had acted reasonably even though it failed to charter the *Puma* on the terms offered to it on 20 January 2004; and (b) consequently, the respondent was not limited to claiming as damages the difference between the freight which it would have paid had it chartered the *Puma* and the freight payable for the *Asia Star*. The final sums awarded to the respondent in respect of its various heads of damages were assessed by the Judge at US$1,485,140.55 and RM449,086.90 respectively.

General principles applicable to appeals against assessments of damages

21 Before dealing with the issues at hand in the present appeal, it is important to briefly set out the basis upon which this court may review a High Court judge's decision on an appeal from an assistant registrar's award of damages. The present appeal concerns the Judge's ruling on the appellant's appeal against the decision of the AR, who was the original finder of fact. Here, it was *the AR – and not the Judge* – who had the benefit of seeing and hearing the witnesses first-hand as they gave evidence. Even though this court will give proper deference to an appellate decision of a High Court judge apropos an assistant registrar's assessment of damages, the High Court judge will ordinarily be in no better a position than this court when it comes to evaluating the evidence. We note that, in this case, the Judge drew her own inferences from the documents tendered to the court, the affidavits filed by the respective parties and the notes of evidence of the hearing before the AR in determining whether the respondent had acted reasonably to mitigate its loss. This court, too, stands in a similar position and may draw the appropriate inferences from the same record of proceedings.

The key issue in this appeal: Mitigation

Overview of the law on mitigation

22 We turn now to the key issue in this appeal – *viz*, the question of mitigation; specifically, whether the respondent acted reasonably to discharge its duty to mitigate its loss. For ease of reference, we will in the rest of this judgment use the term "defaulting party" to denote the party who breaches a contract and the term "aggrieved party" to denote the party in respect of whom the contract in question is breached.

23 We begin with a brief overview of the law relating to mitigation. In a claim for damages for breach of contract, the failure of the aggrieved party to act reasonably to mitigate its loss is a standard defence which the defaulting party usually invokes to reduce the damages payable. It is important, however, to point out that the so-called "duty" to mitigate is not strictly speaking a legal duty which the aggrieved party owes to the defaulting party, in that the latter cannot bring an action against the former for failing to mitigate its loss. The term "duty" as employed repeatedly in the authorities is actually no more than a convenient term of reference for the legal requirement imposed on an aggrieved party to take prophylactic measures to minimise avoidable loss if it wishes to recover all of the loss sustained as a result of the defaulting party's breach of contract. A breach of the "duty" to mitigate *prima facie* disentitles the aggrieved party from claiming that part of its loss which, in the court's view, could have been avoided if reasonable mitigation measures had been taken. From this perspective, the "duty" to mitigate may give rise to an indirect legal "liability" in so far as a breach of this "duty" operates as a legal bar, *pro tanto*, to recovery of damages. The long-standing characterisation of the legal obligation of an aggrieved party to act reasonably to mitigate its loss as a "duty" is now too entrenched in legal discourse to be dropped. Subject to the clarification which we have just made, therefore, we will employ the terms "the duty to mitigate" and "the principle of mitigation" interchangeably in this judgment to denote this legal obligation.

24 The basic rules relating to mitigation are well settled. First, the aggrieved party must take all reasonable steps to mitigate the loss consequent on the defaulting party's breach, and cannot recover damages for any loss which it could have avoided but failed to avoid due to its own unreasonable action or inaction (see Harvey McGregor, *McGregor on Damages* (Thomson Reuters (Legal) Limited, 18th Ed, 2009) at para 7-004 and *British Westinghouse Electric and Manufacturing Company, Limited v Underground Electric Railways Company of London, Limited* [1912] AC 673 ("*British Westinghouse Electric*") at 689). Second, the aggrieved party who goes beyond what the law requires of it and avoids incurring any loss at all will not be entitled to recover any damages (see *McGregor on Damages* at para 7-097 and *British Westinghouse Electric* at 689–690). In such a case, the aggrieved party's efforts will in effect confer a gratuitous benefit on the defaulting party. Third, the aggrieved party may recover any expenses incurred in the course of taking reasonable steps to mitigate its loss (see *McGregor on Damages* at para 7-091). In short, the aggrieved party cannot recover avoidable or avoided loss; it may, however, recover expenses reasonably incurred in the course of taking mitigation measures. The evaluation of the aggrieved party's conduct in mitigation ought to start from the date of the defaulting party's breach, and the burden of proving that the aggrieved party has failed to fulfil its duty to mitigate falls on the defaulting party (see *McGregor on Damages* at para 7-019 and *Garnac Grain Company Incorporated v H M F Faure & Fairclough Ltd and Others* [1968] AC 1130 at 1140). This burden is ordinarily one which is not easily discharged.

25 The above-mentioned general rules have evolved over the last two centuries without any coherent overarching legal framework. No clear distinction has been drawn in applying these rules to the incapable, the unwilling and (in some cases even) the cynical defaulting party. Many of the early authorities that led to the crystallisation of these rules featured findings made by juries. These

findings were neither judicially explained nor capable of being justified by legal reasoning. One can therefore readily understand why Prof Michael G Bridge ("Prof Bridge") described the principle of mitigation in a tone of despair as being "to a surprising degree theoretically undernourished and underwritten, and subject to hardly any critical examination in the leading texts" (see Michael G Bridge, "Mitigation of Damages in Contract and The Meaning of Avoidable Loss" (1989) 105 LQR 398 ("Prof Bridge's article") at p 399).

26 In Prof Bridge's article, various theoretical justifications which have been advanced in support of the principle of mitigation are examined. Of these various rationales (which include factual causation, remoteness of damage, contributory negligence, promises and expectations and self-help), what we shall call "the 'economic efficiency' theory" is the most attractive and most popular school of thought. This theory suggests that the duty to mitigate seeks to encourage economic efficiency by discouraging waste. It rests on the premise that no legal system should sanction economic waste by allowing an aggrieved party to accumulate loss arising from the defaulting party's breach of contract when it was within the aggrieved party's power to curb such loss. While this approach is *prima facie* attractive, it is, in our view, not entirely convincing for two reasons.

27 First, it is simply not possible to explain certain aspects of the principle of mitigation by reference to the "economic efficiency" theory alone. As Prof Bridge astutely pointed out, "adverse market movement, to the profit of some actors and to the correlative disadvantage of others, is not in itself [economically] wasteful" (see Prof Bridge's article at p 405). If the principle of mitigation were justifiable solely by the importance of avoiding or minimising economic waste, then, in a case where the defaulting party's breach of contract consists of a failure to supply or deliver goods, the aggrieved party ought not to be penalised for its lack of agility in entering a falling market to purchase replacement goods in order to mitigate its loss. The reality, however, is that, where the aggrieved party's delay in entering a falling market in such a scenario is unreasonable, the principle of mitigation does operate to penalise the aggrieved party even though its delay has caused no loss in the literal sense of the word (see *Patel and Another v Hooper & Jackson (a firm)* [1999] 1 WLR 1792).

28 The second reason why we are unconvinced by the "economic efficiency" theory is that, if the law on mitigation were indeed solely underpinned by concerns about economic efficiency, then an aggrieved party whose attempts at mitigation generate even greater loss than the loss which would have arisen had it done nothing at all should not be allowed to recover the additional loss. Yet, the prevailing legal position is that, subject to the reasonableness of the actions of the aggrieved party and the foreseeability of its additional loss, recovery of such additional loss is allowed (see the *dicta* of Browne-Wilkinson LJ in *Gebruder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614 at 633; see also *The "Sivand"* [1998] 2 Lloyd's Rep 97).

29 Prof Bridge concluded, after analysing all the relevant authorities, that "[n]o single [factor] sufficiently explains the requirement of mitigation as a general rule" (see Prof Bridge's article at p 410). Instead, it would be more accurate to see the principle of mitigation as the product of a complex amalgam of competing sensibilities – one that reflects "several impulses that mollify the strictness of contractual obligation and that are hard, perhaps impossible, to rationalise in their totality" (see Prof Bridge's article at pp 407–408). We agree.

30 We should at the same time point out that the complexity involved in identifying a single theoretical justification for the principle of mitigation belies the singular practical focus of the central inquiry which lies at the heart of this principle – namely, the inquiry into whether or not the aggrieved party acted reasonably to mitigate its loss ("the reasonableness inquiry"). Reasonableness forms the one identifiable foundation on which this inquiry – and, in turn, the principle of mitigation – rests. The central question which underpins the reasonableness inquiry is what a reasonable and prudent man in

the trade would have done in the ordinary course of his business if he had been in the aggrieved party's shoes (*per* James LJ in *Dunkirk Colliery Company v Lever* (1878) 9 Ch D 20 at 25). Naturally, any answer to the question "What would the reasonable businessman have done?" can, will and may reflect a wide range of values and concerns, some of which may compete with and/or contradict others. For instance, while the principle of mitigation does not require an aggrieved party to nurse the defaulting party's interests at the expense of its own interests (see *Harlow & Jones, Ltd v Panex (International), Ltd* [1967] 2 Lloyd's Rep 509 at 530 *per* Roskill J), it has also long been said that the aggrieved party must act with both the defaulting party's interests as well as its own interests in mind (see *Smailes and Son v Hans Dessen and Co* (1906) 94 LT 492 at 493 *per* Channell J).

31 The existence of the duty to mitigate may also appear to be an unfair obligation to impose on the aggrieved party as it is the innocent party in relation to a breach of contract (in that the defaulting party is to blame for the breach of contract). To minimise any potential unfairness to the aggrieved party in this regard, the courts have sought to ensure that the standard of reasonableness required of the aggrieved party will not be too difficult to meet (see, *eg*, *OCBC Securities Pte Ltd v Phang Yul Cher Yeow and another action* [1997] 3 SLR(R) 906 at [86]). For instance, the aggrieved party is not required to act in a way which exposes it to financial or moral hazard, such as taking steps which might jeopardise its commercial reputation or partaking in hazardous litigation against a third party to reduce its loss (see *Goode on Commercial Law* (Ewan McKendrick ed) (LexisNexis, 4th Ed, 2009) at p 136 as well as *McGregor on Damages* at paras 7-081 and 7-087). The requisite standard of reasonableness is said to be an objective one; yet, it clearly also takes into account subjective circumstances such as the aggrieved party's financial position (see below at [58]). The reasonableness inquiry, therefore, falls short of being purely objective.

32 The many sub-rules, qualifications and nuances that have built up around the reasonableness inquiry may not infrequently appear to be confusing and unwieldy. Nevertheless, when one takes a step back to look at the object of this inquiry as a whole, it becomes clear that the inquiry amounts to nothing more than the common law's attempt to reflect *commercial and fact-sensitive fairness* at the remedial stage of a legal inquiry into the extent of liability on the defaulting party's part. The concept of reasonableness in the context of mitigation is a flexible one. In essence, it bars an aggrieved party from profiting or behaving unreasonably at the expense of the defaulting party, and encapsulates complex interplaying notions of responsibility and fairness. As with any principle of law that encapsulates notions of fairness, the principle of mitigation confers on the courts considerable discretion in evaluating the facts of the case at hand in order to arrive at a commercially just determination. The principle embodies a fact-centric flexibility which, whilst remaining in harmony with sound business practice, stands in vivid contrast to the strictness with which rules in other areas of contract law are applied.

33 Turning specifically to the situation where a contract for the carriage of goods by sea is breached due to the shipowner's failure to provide the charterer with the promised vessel, the usual mitigation measures involve the charterer (which is the aggrieved party in this scenario) either engaging an alternative vessel to carry the same goods or obtaining substitute goods at the intended place of delivery. The charterer need only act reasonably in deciding which of these alternative measures to adopt. It will usually, however, be bound to adopt the least costly option (see *McGregor on Damages* at para 27-049). Ordinarily speaking, if a substitute vessel is available on reasonable terms, the charterer ought to mitigate its loss by engaging that vessel (see the *dicta* of Moore-Bick J in *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc (The "Kriti Rex")* [1996] 2 Lloyd's Rep 171 at 193). If the charterer cannot get a ship of the same size as that which it originally chartered, it is entitled to take the next best reasonable option that is available, which may include chartering a larger vessel if a failure to do so will cause greater loss to the defaulting party (see Raoul Colinvaux, *Carver's Carriage by Sea* (Stevens & Sons, 13th Ed, 1982)

at vol 2, para 2178). In this regard, it should be noted that *Carver's Carriage by Sea* cautions at the same time (at vol 2, para 2142) that the charterer must not act in "an imprudent or extravagant manner".

34 The reasonableness inquiry, therefore, is very much a factual one (see Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract: Second Singapore and Malaysian Edition* (Butterworths Asia, 1998) at p 1029). For this reason, case precedents are of limited guidance as they are specific to their particular factual matrices. Indeed, the dispute in this case essentially boils down to the proper application of the settled principles outlined above to the facts. Ultimately, the questions that need to be asked (and determined) are:

(a) whether – having regard to the potential damages which the respondent would have to pay Agrima if, as a result of the appellant's default, it failed to deliver the palm oil due under the Agrima contracts – it was reasonable of the respondent to persist in seeking ever lower rates of freight for the *Puma* when chartering that vessel on the terms offered by her owners would have allowed the respondent to both mitigate its own loss as well as reduce the damages payable by the appellant; and

(b) whether the reasons that caused the respondent to reject the terms offered for the charter of the *Puma* could justify the Judge's decision to increase the damages claimable by the respondent from the appellant.

The basis for the Judge's decision

35 The Judge gave several reasons why she found the respondent's failure to charter the *Puma* reasonable. These included the following:

(a) Negotiating over the cost of hire was not *per se* an unreasonable act, and the AR erred in holding that the respondent was merely trying to maximise the profits which could be made from chartering the *Puma*.

(b) It was prudent of the respondent to avoid conveying information of the *Asia Star*'s rejection to Agrima and the Suppliers until a viable alternative vessel had been found.

(c) It was not clear that both Indomas and Agrima would not have cancelled their respective contracts with the respondent (and would instead have agreed to further extensions of the relevant deadlines) if they had been informed of the *Puma*'s availability.

36 The Judge's most significant finding, however, concerned the failure of the respondent to commit itself to the final freight rate offered by the owners of the *Puma*. The appellant, both before the AR and before the Judge, made much of the fact that the negotiations between the respondent and the owners of the *Puma* appeared to have abruptly broken down solely over the relatively paltry difference of just US$2.00 pmt in the proposed freight rate. The Judge found the appellant's arguments overly simplistic. She pointed out that the difference between the amount payable for chartering the *Puma* based on the respondent's proposal and the amount payable based on the proposal of the *Puma*'s owners was significant once two factors were taken into account, namely: (a) the dead freight payable in respect of at least 14,500 mt of unutilised cargo space on board the *Puma* (due to her larger capacity), taking the difference between the maximum cargo capacity of the *Puma* (which her owners were willing to peg at 36,000mt) and the minimum quantity of cargo to be carried on board the *Asia Star* (*viz*, 21,500mt of palm oil (see [4] above)); and (b) the lump sum payments which the respondent proposed to make (in place of rateable charges) for each additional

load port and each additional discharge port (see the Judge's judgment at [64]).

37 The additional cost which the respondent would have incurred if it had chartered the *Puma* was a critical consideration for the Judge in two ways. First, she was of the view that this factor justified her finding that the respondent's conduct in negotiating with the owners of the *Puma* in order to reduce the quantum of the additional sum payable could not, without more, amount to unreasonable conduct. Second, and more crucially, she regarded the additional cost to the respondent as being substantial enough to make it unreasonable to expect the respondent to incur that additional expenditure. It would, according to the Judge, have amounted to requiring the respondent to risk its money, which was not part and parcel of the obligation imposed by the principle of mitigation on an aggrieved party.

The parties' arguments on appeal

38 On appeal, the respondent supported the Judge's reasoning by arguing that a defaulting party must take an impecunious aggrieved party as it found the latter. It pointed to the oral testimony of its head of chartering/operations, Mr Sheik Abdul Malik Mohamed Kassim ("Mr Malik"), to support its contention that the additional payment of US$399,500 which it would have had to make had it hired the *Puma* did amount, both objectively and subjectively, to a big drain on its resources.

39 The appellant, on its part, criticised the Judge's reasoning and argued that a reasonable person in the respondent's shoes would have chartered the *Puma* (or would at least have arranged to charter it on a "subject to" basis) for the following reasons:

(a) The failure by the respondent to deliver the promised 21,500mt of palm oil to Agrima and to take delivery of the 24,500mt of palm oil purchased from the Suppliers could have exposed it to potentially large (or "ruinous" (see [38] of the AR's judgment)) claims from the respective parties concerned.

(b) The cost of hiring the *Puma* as a replacement vessel was neither objectively prohibitive nor a large drain on the respondent's resources.

(c) The potential additional expenses that would have been incurred by the respondent if it had chartered the *Puma* (which would have worked out to US$399,500 at most) were not nearly as prohibitive as the potential loss which the respondent would have faced if it had failed to deliver the Cargo (the potential loss worked out in the end to over US$1m).

(d) The issue of having to pay dead freight if the *Puma* were chartered was not an obstacle in reality as the real reason for the respondent's reluctance to accept the terms proposed by the owners of the *Puma* was the respondent's desire to earn a larger profit by driving the freight rate down.

40 The appellant submitted that, while it was not unreasonable of the respondent to have negotiated with the owners of the *Puma* for a better freight rate, it *was* unreasonable of the respondent to fail to continue those negotiations when it knew that it was unlikely to find another ship and would be exposed to even greater loss if it failed to deliver the Cargo. The appellant also argued that the Judge erred in substituting her own judgment for the AR's finding that it was unreasonable of the respondent to have failed to notify Agrima and the Suppliers of the availability of the *Puma* and to have failed to ask for further extensions of time. The Judge, it was submitted, should have respected the AR's decision as it was made with the AR having had the benefit of seeing and hearing the witnesses in person as they gave evidence in court. Consequently, the appellant

contended, the failure by the respondent to act reasonably to mitigate its loss meant that the damages which it could recover should be limited to the additional cost which it would have incurred if it had chartered the *Puma* as reasonably required. This additional sum would amount to US$399,500 at most. The appellant submitted alternatively that, if dead freight were left out of the equation (as it suggested), the respondent would not incur any additional cost at all in chartering the *Puma* as a replacement vessel as the freight rate for the *Puma* was actually lower than that for the *Asia Star*.

Whether the respondent acted reasonably to mitigate its loss

Overview

41 We accept the Judge's ruling that the mere act of negotiating for a more advantageous deal cannot in itself be regarded as unreasonable. The duty to mitigate requires the respondent to do what is reasonable in the ordinary course of business and, in the present case, no reasonable or prudent businessman would undertake to charter a replacement ship without attempting to reduce the cost of doing so. In our view, the lack of other available replacement vessels at the material time (apart from the *Puma*) only affected the respondent's bargaining power and the likelihood of the negotiations between the respondent and the *Puma*'s owners concluding on terms favourable to the former. In other words, the reasonableness or otherwise of the act of negotiating *per se* cannot be called into question in the present case. The issue of reasonableness does not, therefore, turn on the respondent's conduct in negotiating with the *Puma's* owners; it turns instead on the question of whether the sum of US$399,500 which the respondent would have had to pay if it had chartered the *Puma* was really, proportionately speaking, so large an additional upfront cost as to ultimately warrant the respondent's decision *not* to charter that vessel – even on a provisional "subject to contract" basis. We should add that, in our view, the Judge was correct in determining that the Charterparty terminated on the evening of 19 January 2004 and that the duty to mitigate arose the next day (see the Judge's judgment at [57]).

The appropriate level of judicial scrutiny in assessing whether an aggrieved party's conduct in mitigation was reasonable

42 At the outset, the respondent contended that this court should not evaluate the reasonableness or otherwise of its (the respondent's) conduct in mitigation by combining the unsympathetic vision of hindsight with the use of a fine-toothed legal comb. Ultimately, the respondent's contentions on this issue boiled down to a single proposition, namely: the court should not subject the mitigation actions taken by an aggrieved party to a minute-by-minute, day-by-day scrutiny with the benefit of hindsight, which form of scrutiny would benefit the defaulting party.

43 There is certainly support for the view that the court should adopt a generous approach in assessing the aggrieved party's conduct in mitigation. The respondent relied in particular upon Lord Macmillan's oft-cited observations in *Banco de Portugal v Waterlow and Sons, Limited* [1932] AC 452 ("*Banco de Portugal*") at 506 as follows:

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment[,] the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but *such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held [to be] disentitled to*

> *recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken*. [emphasis added]

In a similar vein, the High Court in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("*Jia Min Building Construction*") noted at [73] that:

> Mitigation is neither an exact science nor a mathematical exercise. It must be viewed through a commercial lens and measured by commercial common sense. The court will not audit every decision made in the turmoil of a difficult and fluid commercial situation.

44 While we certainly agree with the foregoing observations, we must also emphasise that they must be understood in their proper context. In *Banco de Portugal*, the aggrieved party had in fact taken *some* action to mitigate the situation which it found itself in, *viz*, it had withdrawn the entire series of compromised notes and had undertaken to exchange all such notes which were presented to it within a limited time. Lord Macmillan's comments (at 506) were made in response to the defaulting party's invitation to the court to find that the aggrieved party should have taken some *other* action which would have reduced its loss even further. There were good reasons for Lord Macmillan to caution that the court should not adopt too stringent a standard in enforcing the duty to mitigate *vis-à-vis* an aggrieved party – the court is not, after all, the best-equipped arbiter of economic efficiency and the options available to the aggrieved party at the material time. Thus, in cases such as *Banco de Portugal*, the correct approach for the court to take would be to refrain from engaging in an exacting scrutiny of the aggrieved party's every act and/or omission. In this regard, it is important to bear in mind that the question which the principle of mitigation requires the court to determine is whether the mitigation measures taken by the aggrieved party were reasonable, and not whether the aggrieved party took the best possible measures to reduce its loss.

45 Having said that, we are of the view that Lord Macmillan's observations (at 506 of *Banco de Portugal*) apply less strongly in a case where the aggrieved party rejected a reasonable opportunity to reduce its own loss. In other words, while it may be a general principle of the law on mitigation that the court will not nicely weigh on sensitive scales the measures taken by an aggrieved party to mitigate its loss, this principle will ordinarily apply more strongly in cases where the question before the court is whether the aggrieved party engaged in unreasonable *action* as opposed to unreasonable *inaction*. Once the defaulting party establishes that the aggrieved party had reasonable options before it, greater justification will usually be needed from the aggrieved party which, despite knowing that it must act reasonably to mitigate its loss, does nothing at all. After all, the duty to mitigate encapsulates a policy consideration of the law that, once a civil wrong has occurred, the aggrieved party should be encouraged to be self-reliant or proactive in attempting to reduce its loss, instead of pinning all its loss on the defaulting party (see Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd Ed, 2004) at p 122). Doing nothing at all will only infrequently be the most efficient, the most reasonable or the least costly option available to an aggrieved party. In the final analysis, both Lord Macmillan's comments in *Banco de Portugal* and the High Court's remarks in *Jia Min Building Construction* merely suggest that the standard of reasonableness is to be applied in a practical and commonsensical way, with particular sympathy for the aggrieved party. These cautionary remarks do no more than colourfully reiterate what has already been factored into the subjective element inherent in the reasonableness inquiry.

Whether it would have been reasonable for the respondent to pay an additional US$399,500 to charter the Puma

46 We now return to the question posed at [41] above, namely: was the sum of US$399,500 which the respondent would have had to pay if it had chartered the *Puma* really so large an additional

upfront cost as to justify the respondent's failure to charter that vessel? The Judge clearly thought that this sum was objectively substantial enough to invoke the rule that an aggrieved party "*need not risk [its] money too far*" [emphasis in original] (see *McGregor on Damages* at para 7-078).

47 It is, of course, axiomatic that the duty to mitigate has its limits. It cannot oblige an aggrieved party to incur great expense or put itself to great inconvenience in stemming the loss resulting from the defaulting party's breach. Thus, in *Lesters Leather & Skin Company, Ltd v Home & Overseas Brokers, Ltd* (1948) 82 Ll L Rep 202 at 205, Lord Goddard CJ observed that, where a contract for the sale of goods was breached by the seller failing to deliver the promised goods, the prospective purchaser was not:

> … bound to go hunting [all over] the globe to find out where he can get [replacement goods] and then have them shipped, months after the contract time, so that they will arrive [at their intended destination] many months after the date [on] which, had they been shipped in accordance with the contract, they would have arrived.

In this regard, it is important to bear in mind that it is always a question of fact as to what amounts to too great an expense for the aggrieved party to incur or too great a risk of its money.

48 We note that the Judge found the Canadian case of *Elizabeth Jean Costello and Mary Ann Dickhoff v The City of Calgary* (1995) 163 AR 241 ("*Costello v Calgary (No 1)*") particularly instructive and made a lengthy reference to it (see [71]–[72] of the Judge's judgment). In *Costello v Calgary (No 1)*, the plaintiffs applied for permission to build a 40-room motel on their land (known as "Ranch Site"), but any possible development was frozen as a result of the defendant city authority's wrongful expropriation of the land. After the expropriation of Ranch Site was ruled to be illegal by the Supreme Court of Canada, the plaintiffs sued the defendant for damages for trespass. The defendant argued that the damages should be reduced to reflect the failure by the plaintiffs to mitigate their loss by acquiring or developing a similar motel on a different parcel of land. The Judge set out the ruling of the Alberta Court of Queen's Bench on this argument as follows (see [71] of the Judge's judgment, quoting from *Costello v Calgary (No 1)* at 285–286):

> The court made the following observations in relation to the [plaintiffs'] duty to mitigate:
>
> > … the evidence also established that the [plaintiffs] had sufficient credit capability to make such a purchase [*ie*, to purchase another plot of land as a replacement for Ranch Site] had they so wished. However, the point is that the argument of the [defendant] must be rejected because it has failed to establish that other comparable property was available at [the] equivalent compensation [which] the [defendant] was offering, and the law is clear that the plaintiffs need not incur unreasonable expenses to mitigate a loss caused by the [d]efendant. …

49 We pause to note that the Judge felt that the present case was (see [72] of the Judge's judgment):

> … similar to *Costello v Calgary [(No 1)]* in the sense that the expenditure required to avoid the loss was a substantial amount and it would have been unreasonable to require the [respondent] to undertake it.

Curiously, this observation was made despite the fact that the plaintiffs in *Costello v Calgary (No 1)* could, on the facts of that case, have afforded to purchase an alternative plot of land – *ie*, in *Costello v Calgary (No 1)*, there was no issue of the aggrieved party being impecunious or being

unable to afford the cost of adopting the particular mitigation measure which, according to the defaulting party, should have been taken.

50 Having carefully read the above extract from *Costello v Calgary (No 1)* at 285–286 which was cited in the Judge's judgment at [71], we find that we are unable to derive any guidance from it. The Judge cited only a portion of what Rooke J said at 285–286 of *Costello v Calgary (No 1)*. The following is a more complete version of what Rooke J held (see *Costello v Calgary (No 1)* at 285–286):

> [T]here is a further reason for rejecting this argument [that the plaintiffs should have mitigated their loss by purchasing a replacement property]. Even if there had been such a duty (and I have found in law there was not), the evidence does not support the [defendant's] argument. The evidence of the [plaintiffs], which I accept as fact, is that they were unable to acquire a comparable property for the value that the [defendant] was offering at the time of the purported expropriation. … As at the time of the purported expropriation (November 20, 1972), [the defendant's expert appraiser] could point … to no comparable property on MacLeod Trail [where Ranch Site was located] as low as the [defendant's] offered value. … I note that, in [*Marsan v Grand Trunk Pacific Railway Co* (1912) 1 DLR 850], the plaintiff endeavoured to secure other suitable property, but was unable to do so, and the court held (headnote and at 695):
>
> > "If other suitable premises were in fact available for [the plaintiff] for his purpose I think it was incumbent upon the defendant to show that these could have been secured without unreasonable expense and trouble."
>
> Here the evidence, which I accept, is to the contrary, namely that the [plaintiffs] could not acquire other comparable property at the price the [defendant] was offering for … Ranch Site, and the [d]efendant … has not met the onus placed upon it – indeed, even at trial it could not identify one such truly comparable property, and only one at any location in Calgary. Furthermore, while it was under no statutory duty to do so under the then existing [expropriation legislation], it is relevant to note that at no time did the [defendant] tender any compensation to assist in that purpose … *although the evidence also established that the [plaintiffs] had sufficient credit capability to make such a purchase had they so wished. However, the point is that the argument of the [defendant] must be rejected because it has failed to establish that other comparable property was available at [the] equivalent compensation [which] the [defendant] was offering, and the law is clear … that the plaintiffs need not incur unreasonable expenses to mitigate a loss caused by the [d]efendant*.
>
> [emphasis added]

51 It appears to us that, in *Costello v Calgary (No 1)*, the argument that the plaintiffs were not obliged to incur unreasonable expenses in mitigating their loss was never applied to the facts of that case and was, on the face of what Rooke J said at 285–286, added merely for completeness. The *dicta* cited from *Costello v Calgary (No 1)* are not, in the ultimate analysis, really helpful here. In the present case, there was an alternative ship available for charter (*viz*, the *Puma*), and the only issue was whether it was reasonable to expect the respondent to pay upfront the additional US$399,500 needed to charter that replacement vessel.

52 There is also a second dimension to Rooke J's analysis in *Costello v Calgary (No 1)*. In a passage preceding the extract reproduced at [50] above, Rooke J emphatically stated that the plaintiffs were not required in law to seek an alternative property (see *Costello v Calgary (No 1)* at 285). Land is regarded as physically and commercially unique. It is not easily replaced with another plot of land or with money *per se* – a fact recognised by the courts through (*inter alia*) the remedy of

specific performance of contracts relating to land (see, *eg*, *Hexter v Pearce* [1900] 1 Ch 341 at 346 and *Rudd v Lascelles* [1900] 1 Ch 815 at 819). Thus, in *Costello v Calgary (No 1)*, Rooke J was rightly sceptical of the defendant's submissions that the plaintiffs should have mitigated their loss by simply acquiring *some other* plot of land. His statement that an aggrieved party should not be put to "unreasonable expenses" (see *Costello v Calgary (No 1)* at 286) should be read in that light: almost any expense to replace something which is irreplaceable or extremely difficult to replace (such as land) would be unreasonable. Cases concerning carriage of goods by sea are, however, quite different from cases concerning land. Ships may differ in terms of suitability and availability for use, but they are generally not unique objects. The expenses incurred in hiring a substitute vessel, therefore, can hardly be described as unreasonable by reference to the arguments which apply in cases concerning land.

53 We observe further that *Costello v Calgary (No 1)* was a decision of the Alberta Court of Queen's Bench. There was, in fact, a subsequent decision by the Alberta Court of Appeal which the Judge did not consider, *viz*, *Costello et al v City of Calgary* (1997) 152 DLR (4th) 453 ("*Costello v Calgary (No 2)*"). Picard JA, in delivering the judgment of the Alberta Court of Appeal, employed a rather more sophisticated analysis in rejecting the defendant's submission that the plaintiffs should have mitigated their loss by purchasing an alternative plot of land as a replacement for Ranch Site. He reasoned at 482:

> It is important to appreciate the significance of those figures [*ie*, the figures indicating the estimated market value of Ranch Site at the material time]. As noted above, the duty to mitigate essentially is an obligation to act reasonably in the circumstances. During the period in question (1972–1983), the [plaintiffs] received appraisals as high as $226,570 and as low as $112,410 [for Ranch Site]. They also knew that the [defendant] offered to pay only $74,000 as a purchase price or $91,700 as compensation for an expropriation. Moreover, while the [plaintiffs] suspected the invalidity of the purported expropriation by February of 1976, the issue by no means was clear. Indeed, while their argument eventually found favour with the Supreme Court of Canada in January of 1983 …, the Court of Queen's Bench … and the Court of Appeal … both had held for the [defendant].
>
> As viewed at the time in question, then, it was entirely possible that the [defendant] was correct and that the [plaintiffs] eventually would receive something in the order of $91,700 as compensation for the purported taking. Certainly, that was the [defendant's] position prior to the Supreme Court of Canada's decision. And yet, during oral argument in this appeal, counsel for the [defendant] suggested that it would have been reasonable for the [plaintiffs] to spend as much as $375,000 in mitigation of their losses. … *[I]t would have been extremely speculative for the [plaintiffs] to have spent $375,000 when there was a very real possibility that they ultimately would recover from the [defendant] less than a third of that amount*.
>
> [emphasis added]

54 Picard JA made it clear that hindsight should play no part in the evaluation of the plaintiffs' conduct. He reasoned that, as a matter of commercial common sense, the court ought to look at the difference between the amount which the plaintiffs would have had to expend in mitigation and the amount which they could, at the material time, have expected to be able to recover. Having compared the two figures, which indicated that the amount which the plaintiffs would have had to spend in mitigation was nearly three times the amount which they could have expected to receive as compensation, Picard JA held that it would have been "extremely speculative" (see *Costello v Calgary (No 2)* at 482) for the plaintiffs to have risked such a large sum of money.

55 Returning to the facts before us, the issue to be addressed is this: was the sum of US$399,500 too great an expense to reasonably expect the respondent to incur upfront in order to mitigate the loss flowing from the appellant's breach of the Charterparty? The Judge certainly felt that a global sum of nearly US$0.5m was too much for the respondent to pay for a replacement ship. She found some support for this conclusion in the testimony of Mr Malik, who stated during cross-examination that the additional expenditure of US$399,500 was "too huge" [note: 2] and would amount to a "big drain" [note: 3] on the respondent's finances. It should be noted that this was a bare assertion by Mr Malik and was, furthermore, made for the first time only in the course of cross-examination.

56 In our view, the sum of US$399,500 must be assessed in its proper objective context. The Agrima contracts had a total value of US$11,691,300, while the purchase contracts had a combined value of US$10,137,500. Based on a rough calculation of the difference between these two figures, the respondent would have expected to make a profit of approximately US$1,553,800 from the prospective sale of palm oil to Agrima. Rather than being similar to *Costello v Calgary (No 1)*, the facts of this case appear to be quite the opposite. In *Costello v Calgary (No 1)*, the expense to which the plaintiffs would have been put had they bought an alternative piece of land as a mitigation measure was nearly three times the amount which they could, at the material time, have realistically expected to have recovered as compensation for their loss. In contrast, in the present case, the potential expected loss – even if it is viewed from the respondent's perspective at the time of the appellant's breach – would have been far greater than the additional outlay required of the respondent if it had chartered the *Puma* as a mitigation measure. Indeed, the respondent's various heads of claim at the assessment of damages before the AR amounted to nearly US$2m (see [16] above) – in comparison, the additional cost which the respondent would have incurred had it hired the *Puma* was less than a third of that sum. For this reason, the additional sum of US$399,500 would not, proportionately speaking, have been too great an outlay to expect the respondent to incur, considering the "potentially ruinous damages" (see the AR's judgment at [38]) which it faced if it did nothing. After taking into account the prevailing circumstances, we are not at all convinced that the respondent was ever seriously concerned that expending an additional US$399,500 would put a severe strain on its financial resources (*contra* the Judge's view at [67] of the Judge's judgment).

The alleged impecuniosity of the respondent

57 Our conclusion in the preceding paragraph also disposes of what we will refer to as "the respondent's impecuniosity argument" – *viz*, the argument that spending an additional US$399,500 to charter the *Puma* would have been a huge drain on the respondent's resources. This was an entirely new argument which counsel for the respondent raised before this court in support of the Judge's decision. It appears to us that it may have been the Judge's reliance on Mr Malik's assertion that the additional sum of US$399,500 would have been a "big drain" [note: 4] on the respondent's resources (see [55] above) which encouraged counsel for the respondent to pursue this new argument on appeal.

58 The respondent's impecuniosity argument is based on the principle set out in para 7-088 of *McGregor on Damages* that "*[an aggrieved party] will not be prejudiced by [its] financial inability to take steps in mitigation*" [emphasis in original]. This principle appears to be a corollary of the eggshell-skull rule that the defaulting party must take the aggrieved party as it finds the latter. If the position of the aggrieved party is aggravated because it lacks the means to mitigate the loss suffered, the defaulting party nevertheless remains answerable for the consequences flowing from its wrongful act (see *The Clippens Oil Company, Limited v The Edinburgh and District Water Trustees* [1907] AC 291 at 303). Applied in the context of a claim for damages for breach of contract, this rule entails that, so long as the aggrieved party acts reasonably to mitigate its loss, it will not be

disbarred from pursuing its claim for the actual loss suffered simply because it was unable to take certain mitigation measures which it could otherwise have taken had it had the requisite financial resources.

59 In support of its contention that the additional outlay of US$399,500 needed for the charter of the *Puma* would have put a severe strain on its financial resources, the respondent relied entirely on Mr Malik's *bare assertion* as outlined at [55] above. Counsel for the respondent was keen to point out that Mr Malik's assertion was never directly challenged by the appellant. It was also brought to our attention that the words "big drain" [note: 5] were first used by counsel for the appellant herself when she cross-examined Mr Malik; the latter merely agreed to the use of those words to describe the additional expenditure needed to charter the *Puma*. Relying, in addition, on this court's decision in *Ho Soo Fong and another v Standard Chartered Bank* [2007] 2 SLR(R) 181, counsel for the respondent argued that, since an aggrieved party was not obliged to take measures which it could not afford or which were financially prohibitive and onerous, the respondent's refusal to charter the *Puma* as a replacement vessel at the freight rate quoted by her owners was reasonable.

60 In our view, the respondent's impecuniosity argument is not supported by the facts before the court. The rule referred to in *McGregor on Damages* at para 7-088 (see above at [58]) is meant to protect an aggrieved party which is handicapped by financial *inability* from being compelled to take measures that would be financially prohibitive. In the present case, there was no objective evidence adduced by the respondent that the sum of US$399,500 *was* indeed financially prohibitive. If the respondent intended to rely on such an assertion, it had to adduce concrete evidence to establish that point – this, it did not do.

61 In this regard, we should mention that the appellant relied on the case of *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2008] SGHC 230 as authority for the proposition that a party which seeks to rely on its financial position bears the burden of proving its own financial position. That case, we note, addressed the specific question of what would constitute proof of impecuniosity where a defendant applies for security for costs from a plaintiff company on the basis that "there is reason to believe that the [plaintiff company] will be unable to pay the costs of the defendant if successful in his defence" (*per* s 388(1) of the Companies Act (Cap 50, 2006 Rev Ed)).

62 In our view, a more pertinent statute to refer to would be the Evidence Act (Cap 97, 1997 Rev Ed), which states as follows:

> **Burden of proof as to particular fact**
>
> **105**. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> …
>
> **Burden of proving fact especially within knowledge**
>
> **108**. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

63 In the present case, the respondent wished to rely on the alleged fact that the additional US$399,500 which it would have had to pay if it had chartered the *Puma* was a financially prohibitive sum that it could not afford – *ie*, it wanted the court to believe in the existence of this fact (see

s 105 of the Evidence Act). This fact was "especially within the knowledge of [the respondent]" for the purposes of s 108 of the Evidence Act since only the respondent could be fully aware of all the relevant particulars of its own financial position at the material time. Thus, in order to take advantage of the principle set out in para 7-088 of *McGregor on Damages*, the respondent must satisfactorily establish with cogent evidence that it *was* indeed unable to afford to spend an additional US$399,500 at the material point in time. As we mentioned earlier (at [60] above), the respondent failed to adduce such evidence. *The only evidence raised by the respondent in its favour (apropos its alleged impecuniosity) consisted of the bare assertion of Mr Malik – which was an assertion made for the first time in the heat of cross-examination*. The claim by the respondent that the sum of US$399,500 amounted to a "big drain" [note: 6] on its resources was never made prior to Mr Malik's cross-examination and no objective evidence was ever adduced to support it. The only "proof" cited by the respondent was "negative proof" in the form of the appellant's failure to query further Mr Malik's testimony. Given these circumstances, such "proof" is simply not a sufficient basis for this court to regard the respondent's alleged impecuniosity as having been proved.

64 We should also point out that Mr Malik's testimony as to the respondent's alleged impecuniosity is particularly unconvincing in the light of two additional factors. The first is that the respondent is a large company which has been in the business of trading for some time, and currently trades in about 800,000mt to 900,000mt of palm oil products a year (see [3] above). While there is no evidence before the court of the respondent's profitability, some sense of this may be had from a rough calculation of the respondent's expected profit from the sale of palm oil to Agrima under the Agrima contracts. That transaction alone would have resulted in an expected profit of approximately US$1,553,800 (see [56] above). It is hard to believe that a company which trades in such large volumes and which expects such a large profit from a single transaction would find paying the relatively small sum of US$399,500 a particular hardship. Second, while the Judge was right to point out that the freight rate set out in the respondent's final counter-offer to the owners of the *Puma* on 20 January 2004 (*ie*, the counter-offer made by the respondent at 5.32pm on that day) was lower overall than the freight rate offered by the *Puma*'s owners, the total freight charges payable for the *Puma* based on that counter-offer would still have amounted to at least US$231,500 more than the freight charges payable in respect of the *Asia Star*. *Given that the respondent was clearly willing to consider paying over US$200,000 for an alternative vessel, it is difficult to see why increasing that sum by just a further US$168,000 (taking the difference between US$399,500 and US$231,500) would suddenly make the additional cost involved in hiring the* Puma *onerous or, to paraphrase* McGregor on Damages *at para 7-078 (see* [46] *above), too far an amount to risk from the respondent's point of view*.

The respondent's alleged concerns about dead freight

65 We now turn to the issue of dead freight, which was said to be another reason underlying the respondent's decision not to charter the *Puma* as a replacement vessel. At [68] of the Judge's judgment, the Judge elaborated on her reasons for finding that the respondent acted reasonably in not accepting the last offer made by the owners of the *Puma vis-à-vis* the charter of the vessel as follows:

> It turned out that the [respondent] would have lost less had its chartered the *Puma* and paid the dead freight on the basis of the rates quoted by the [*Puma*'s] owners. This result cannot mean that the [respondent] was unreasonable in putting forward a counteroffer. On 20 January 2004, the [respondent] knew that it was faced with a substantial additional expenditure for the *Puma* but did not know what the reaction of [the Suppliers] and [Agrima] would be. … If it had chartered the vessel [*ie*, the *Puma*], the [respondent] would have been exposed to very substantial dead freight and would have had to risk expense in buying additional cargo at spot

> prices in the hope that it would be able to sell that cargo at its destination. Such a sub-sale might not have made a profit for it because, as the [appellant's] expert on palm oil trade testified, back-to-back buying/selling on the spot market usually did not give a trader any profit margin due to the fact that [the palm oil market] was a very open market. In order to make a profit, most companies would take a position in that they would either buy in advance if they thought the market was going up or they would sell in advance if they thought the market was going down. Spot trading was not a desirable activity.

66 The above passage, when read alongside the comments at [69]–[70] of the Judge's judgment, creates the impression that the respondent was, at the time of its negotiations with the owners of the *Puma*, concerned about the problems posed by dead freight. This, however, is not borne out by the facts. The Judge also entered into a detailed analysis (see [64] of the Judge's judgment) of the difference between the last offer made by the *Puma*'s owners (*ie*, the offer made at 5.06pm on 20 January 2004) and the last counter-offer made by the respondent (*ie*, the counter-offer made at 5.32pm on the same day). The effect of this was to magnify the problem of dead freight supposedly faced by the respondent at the material time.

67 With respect, we do not find the Judge's analysis on dead freight persuasive. We note that the respondent, in its affidavit evidence and in its witnesses' testimony in court, did not assert that dead freight was a critical factor in its decision not to hire the *Puma*. Whilst the respondent did claim in its written submissions that it had been concerned about the additional cost arising from dead freight as well as the difficulties of obtaining extra cargo to carry and sell so as to reduce the dead freight payable (see, in this regard, para 21 of the respondent's written submissions filed on 15 November 2007, [note: 7] paras 159(vi)–159(vii) of the respondent's written submissions filed on 18 December 2007 [note: 8] and paras 36–37 as well as para 42 of the respondent's written submissions filed on 11 July 2008), [note: 9] this submission was flatly contradicted by Mr Malik (the respondent's head of chartering/operations) when he gave evidence in court. The following exchange between the AR and Mr Malik during the hearing of the assessment of damages is quite revealing: [note: 10]

> Court: … [J]ust a hypothetical question. If the Puma [*sic*] had come back and agreed to your [US]$25.50 on the 20th [of January 2004], would you have chartered the ship immediately?
>
> [Mr Malik]: *Most likely yes*, but definitely I'll put her on subs [*ie*, engage her on a "subject-to-contract" basis] a day or 2.
>
> [emphasis added]

68 Evidently, the issue of dead freight was not as crucial to the respondent as the Judge thought it to be. Furthermore, the issue of securing additional cargo to transport and sell so as to reduce the dead freight payable in respect of the *Puma* was not a decisive consideration that resulted in the respondent's failure to charter that vessel. The critical factor was, instead, the freight rate to be paid for the *Puma*, as can be seen from the following exchange between the AR and Mr Malik: [note: 11]

Court: … [A]s I understand from your affidavit [*ie*, the affidavit of evidence in chief affirmed by Mr Malik on 17 September 2007], particularly paragraph 7 – I don't think you need to refer to it, I'll just tell you, and if you don't agree you can refer to it – the only reason why you did not engage the Puma on the 20th of January 2004 was the freight rate. That's as I understand your affidavit, do you agree? If you don't agree, I can refer you to the line.

[Mr Malik]: Sorry, Sir, the dead weight?

Court: The freight rate.

[Mr Malik]: Uh-huh.

Court: *That they* [*ie*, the *Puma*'s owners] *did not agree to your freight rate of USD25.50*.

[Mr Malik]: *Yah, that was my main concern*.

Court: That was your main concern, and that is why you did not engage the Puma?

[Mr Malik]: Yah, because I have to make sure that the potential next cargo that we – I was thinking of is to Red Sea. So by carrying at 27½ [*ie*, US$27.50 pmt], I'll literally pay at least 7 to 6 dollars more for Red Sea quantity – I mean, for Red Sea volume of the 18 thousand and a half, so it's – that again is a loss for us.

[emphasis added]

69 In addition, we note that the respondent's shipbroker was instructed to send an e-mail on 21 January 2004 (the day after the negotiations between the respondent and the owners of the *Puma* broke down, but before the cancellation of all of the respondent's contracts with Indomas and the bulk of the Agrima contracts) to an entity known as "Sound Tankers" asking it to propose a vessel for the respondent to charter. The material parts of this e-mail ("the 21 January 2004 e-mail") are set out below: [note: 12]

Subject .. : Firm cargo

Attn tanker chartering

Re: Firm Enquiry

===

Please propose for following *firm cargo*: –

40,000mts (20K to east med + 20K to red sea)

Load : 1–2sp/1sb each out of Pasir Gudang/Port Klang/Belawan

Disch : 1–3sp/1sb each out of Tartous/Beirut/Mersin/

Izmer/Gebze/Terkidag.

Laycan : prompt onwards

* Need fosfa acceptable as immediate last cargo, 2nd & 3rd NOBL for Turkey ports.

* last 3 cargoes NOBL, acceptable for Tartous + Beirut ports.

Chtrs can also do smaller shipment (10–15K) to east med or red sea, basis prompt dates.

Aw[a]it your offer, thanks.

[emphasis added]

70 The contents of the 21 January 2004 e-mail indicate that, even though the respondent was supposedly reluctant to charter the *Puma* due to the additional costs (in terms of dead freight) flowing from her larger capacity, it was still willing to charter and make a *firm offer* for an equally large vessel – albeit with the flexibility of having that vessel call at other ports in addition to the original ports of discharge mentioned at [4] above. It would appear that the respondent must have expected to make a profit from this alternative charter. Thus, contrary to the Judge's *ex post facto* rationalisation, the evidence indicates that the problem of minimising the dead freight payable did not vex the respondent. We do not, therefore, find that the issue of dead freight and the purported difficulties of securing and then selling off additional cargo in a disadvantageous spot market so as to reduce the dead freight payable played any part in the respondent's failure to charter the *Puma*. The respondent cannot be said to have reasonably believed that it would be assuming not only the risk of dead freight, but also the risk of ending up with unsaleable cargo on its hands – the contemporaneous facts simply do not support this.

Our decision on whether the respondent acted reasonably to mitigate its loss

71 In the final analysis, it seems to us that the respondent could, with relative ease, have afforded the additional US$399,500 which it would have had to pay had it chartered the *Puma*. The respondent knew that, ultimately, it would be the appellant which would bear the burden of paying for the additional cost of securing alternative transport. Counsel for the respondent made the point that it would be a brave or foolhardy businessman who would incur additional costs in mitigation in the face of uncertainty as to whether those costs could be recovered later through legal recourse. While such a fear may be reasonable where an inexperienced businessman is concerned, it bears emphasis here that the respondent – whether viewed as a corporate entity as a whole or in terms of the individuals who represent its directing mind and will – cannot in any sense be said to be inexperienced in the ways of commerce. The respondent has been in the business of importing and exporting raw materials, commodities, consumer goods, timber products and building materials since its incorporation in 1988. Mr Malik, its head of chartering/operations, also considered himself to be experienced in ship chartering. While claiming that this was the first breach of charterparty case which he had actually come across himself, he affirmed during cross-examination that, based on his understanding and knowledge of the market as he knew it, where a charterparty was breached as a result of the shipowner failing to provide the promised vessel, the first duty of the charterer (the aggrieved party in this scenario) was to obtain a replacement vessel and then claim from the shipowner any loss in terms of the freight payable for the replacement vessel. We also note that, crucially, the respondent did not at the material time evince any concerns about the appellant's ability to reimburse it for the additional sum payable if it hired the *Puma*.

72 In our view, one important issue which the Judge should have considered was whether, in the circumstances, the respondent should have notified the appellant of the option of chartering the *Puma* at the freight rate offered by her owners. This would have given the appellant the opportunity to object to this option if it did not deem it reasonable. The essence of the respondent's submissions

o n this point was this: where additional expense had to be incurred in mitigating loss, it was reasonable for an aggrieved party which was experienced in the ways of business to simply unilaterally evaluate whether the additional sum was an amount which it was willing to pay, and then decide whether or not to proceed with the mitigation measure in question. There is, according to the respondent, *no obligation whatsoever* on the aggrieved party's part to notify or consult the defaulting party *vis-à-vis* the available options for mitigating losses.

73 We find ourselves unable to agree with the respondent's contention as an absolute proposition. The more reasonable position appears to us to be that encapsulated in *Mitchell and Another v Kahl and Others* (1862) 175 ER 1250; 2 F&F 709 ("*Mitchell v Kahl*"). In that case, the plaintiffs entered into a contract, through the defendants, with the defendants' principal for the charter of a vessel. The charterparty was entered into on the basis of the warranty by the defendants that they had the requisite authority to enter into the contract on their principal's behalf. In fact, the defendants had no such authority and their principal subsequently objected to the charterparty. The plaintiffs thus had to procure a larger replacement ship at a higher rate of freight in order to transport their cargo. Several other pertinent facts are stated in the (very short) judgment: first, there was positive evidence on the part of the plaintiffs that they could not have obtained a smaller vessel as a substitute; second, the plaintiffs did not give the defendants any notice of the replacement vessel which had been chartered until after all the cargo in question had been delivered by that vessel; and, third, it was not shown whether or not the defendants could or would have used the surplus space on board the replacement ship for their own purposes.

74 The issue before the court in *Mitchell v Kahl* was the extent of the defendants' liability – specifically, whether the defendants should be liable for the difference in freight based on only the tonnage of the original ship or on the larger capacity of the replacement vessel. The plaintiffs, naturally, claimed damages based on the latter measure. Cockburn CJ, in giving his directions to the jury, made it clear at 1251; 711 that:

> If you think either that the plaintiffs *might* have got a smaller vessel, *or* that *they improperly neglected to give the defendants notice of the substituted charter, so as to give [them] the option of using the surplus space*, you may find for the defendants; otherwise, for the plaintiffs, for the sum claimed. [emphasis added]

The report goes on to note, without further elaboration, that judgment was given in favour of the defendants.

75 It appears to us that the point which can be gleaned from Cockburn CJ's statement of the law (apropos the situation where the breach of a charterparty takes on the form of a failure to provide the chartered vessel) is this: where the aggrieved party has to incur substantial additional expenditure in chartering a replacement vessel so as to mitigate its loss, it should ordinarily notify the defaulting party of both the alternative vessel or vessels available for charter as well as the particular course of action which it (*ie*, the aggrieved party) proposes to take. This would give both parties an opportunity to consider, holistically, how their respective losses could be minimised.

76 It seems to us that encouraging communication between the aggrieved party and the defaulting party as regards the various mitigation measures available accords with the notion of fairness, particularly where the aggrieved party expends large sums on mitigation with a view to subsequently recovering those sums from the defaulting party. From the wider policy perspective, such communication will also help to minimise avoidable economic wastage. This is not to say, however, that the aggrieved party must in every case invariably give the defaulting party notice of the available mitigation options and the particular option which it proposes to take. For example, there will

not infrequently be situations where the grave urgency of making a decision renders such communication impractical. Absent such cases of urgency, however, when an aggrieved party is required to come up with additional outlay in order to mitigate its loss, it ought to inform the defaulting party of this and ask the latter if it is willing to bear (or, in an appropriate case, to share) the additional cost. It seems to us that this is what the objective standard of reasonableness requires in the area of mitigation; indeed, this is no more than what an experienced fair-minded businessman would ordinarily do in the course of his business.

77 The approach outlined in the preceding paragraph will assist an aggrieved party in fulfilling its duty to mitigate in more than one way. In *Remedies for Torts and Breach of Contract*, Prof Andrew Burrows suggests (at p 122) that the duty to mitigate is best regarded as comprising two principles: the first focuses on unreasonable inaction and the second, on unreasonable action. The requirement that the aggrieved party notify the defaulting party of the mitigation options available and of the particular option which it proposes to take addresses the first of these principles by setting a standard *vis-à-vis* the type of action which the aggrieved party should take. It also addresses the second principle, which was raised as a concern by counsel for the respondent in his oral submissions. Emphasising the uncertainty which the respondent faced in the days immediately following the appellant's breach, counsel pointed out that, if the respondent had chartered the *Puma* as a replacement vessel, the likelihood was that the same parties would still be before the court today, albeit arguing that the additional cost incurred in hiring the *Puma* was unreasonably incurred. In our view, that possibility might have been avoided if the respondent had notified the appellant of the intended additional expenditure and offered the appellant a choice to pay for that sum or even use the surplus space on board the *Puma* for its (the appellant's) own purposes. Had the appellant agreed to pay the additional freight, the respondent might have avoided incurring any loss at all. On the other hand, had the appellant opted not to pay the additional freight, it would have faced an uphill task in convincing the court that the respondent acted unreasonably in incurring the additional expense of chartering the *Puma*, especially when (in the hypothetical scenario discussed here) the respondent had, quite reasonably, informed the appellant that the *Puma* was the only available replacement vessel and had offered it the opportunity to either pay the additional freight involved or participate in the charter of that vessel.

78 In summary, therefore, the respondent ought to have notified the appellant of the availability of the *Puma* and of the additional cost involved in chartering her. Had the respondent done so and had the appellant been unwilling to pay the additional cost, the respondent could have chartered the *Puma*, secure in the knowledge that it had acted reasonably and that the court's scrutiny would be focused instead on the appellant's conduct. However, as no notice was given in this case before the respondent's abrupt decision to forego the opportunity of hiring the *Puma*, this is another ground for concluding that the respondent failed to act reasonably to mitigate its loss. It is thus limited to recovering only the sum of US$399,500 which it would have incurred in additional costs if it had chartered the *Puma*.

Conclusion

79 To summarise, we find that the respondent did not take reasonable steps to contain the loss which it knew it would incur by inaction. Having decided the question of mitigation in the appellant's favour, it is not necessary for us to consider the third question before the Judge, which concerned the appropriate measure of damages to adopt (see [19] above), even though it appears to us that certain aspects of the Judge's quantification may be questionable.

80 We therefore allow this appeal (with the usual consequential orders) on the basis that the respondent failed to take reasonable steps to mitigate its loss. As a result, it is *not* entitled to

recover the full extent of the loss which it allegedly suffered as a result of the appellant's breach of the Charterparty. In our view, the Judge was not justified in overruling the AR's well-reasoned findings of fact on the issue of mitigation (see above at [17]–[18]). The respondent is thus entitled to recover only the sum of US$399,500, which is the additional expense that it would have been put to had it chartered the *Puma*, together with interest on that sum fixed at 3% per annum from the date on which the writ in the present action was filed until payment. With regard to costs, the appellant is entitled to both the costs of this appeal and the costs of the hearing before the Judge. As for the costs of the hearing before the AR, we make no order as to those costs since each party failed in several of the contentions which it canvassed at that hearing.

[note: 1] See the Appellant's Core Bundle at vol 2, p 68.

[note: 2] See p 678 of the certified transcript of the notes of evidence ("the NE") of the hearing before the AR on 11 October 2007 (at Record of Appeal ("ROA") vol 3(G), p 2046).

[note: 3] See p 668 of the NE of the hearing before the AR on 11 October 2007 (at ROA vol 3(G), p 2036).

[note: 4] *Ibid*.

[note: 5] *Ibid*.

[note: 6] *Ibid*.

[note: 7] See ROA vol 6(A), pp 3643–3644.

[note: 8] See ROA vol 6(B), pp 4036–4037.

[note: 9] See ROA vol 6(C), pp 4284–4289 and pp 4292–4293 respectively.

[note: 10] See the NE of the hearing before the AR on 12 October 2007 at p 724 (at ROA vol 3(G), p 2095).

[note: 11] See the NE of the hearing before the AR on 12 October 2007 at p 723 (at ROA vol 3(G), p 2094).

[note: 12] See ROA vol 5(A), p 2832.