Fairmacs Shipping & Transport Services Pte Ltd *v* Harikutai Engineering Pte Ltd and another [2014] SGHC 262

Case Number	: Admiralty in Personam No 324 of 2011 (Registrar's Appeal No 290 of 2013)
Decision Date	: 12 December 2014
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: Joseph Tan and Joanna Poh (Legal Solutions LLC) for the plaintiff; Mathiew Christophe Rajoo and Andrew Tow (M/s DennisMathiew) for the second defendant.
Parties	: Fairmacs Shipping & Transport Services Pte Ltd — Harikutai Engineering Pte Ltd — Marco Polo Shipping Company Pte Ltd

Tort – Conversion

Damages – Assessment

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 129 of 2014 was allowed by the Court of Appeal on 8 July 2015. See [2015] SGCA 44.]

12 December 2014

Belinda Ang Saw Ean J:

Introduction

1 This Registrar's Appeal No 290 of 2013 ("RA 290"), which was brought by the plaintiff, Fairmacs Shipping & Transport Services Pte Ltd ("FSPL"), arose from the decision of the Assistant Registrar ("AR") on the quantum of damages awarded on conversion of a consignment of river sand by the second defendant, Marco Polo Shipping Company Pte Ltd ("D2"). The main ground of appeal in RA 290 related to the method of assessment of damages consequent on the conversion of the consignment of river sand and the essential principles that govern this area of the law.

2 The first defendant, Harikutai Engineering Pte Ltd ("D1"), did not appear at the assessment of damages before the AR. RA 290 did not concern D1.

3 At the conclusion of the hearing on 22 July 2014, I allowed FSPL's appeal and awarded the sum of US$141,226 as the quantum of damages payable by D2 with interest thereon computed at the rate of 5.33% per annum from the date of the Writ of Summons to the date of payment. I also ordered costs of the appeal to be taxed if not agreed.

4 D2 has appealed against my decision in RA 290. I now give my grounds of decision.

Background facts leading to the conversion of the river sand shipped on board the *Bina Marine 36*

5 By a contract of sale dated 18 August 2011 ("the S&P contract"), FSPL agreed to purchase river sand from one Marine Alliance Group (Singapore) Pte Ltd ("Marine Alliance") on CNF terms. The

S&P contract provided for three shipments of 4000 metric tonnes ("mt") (+/- 5%) of river sand from Myeik, Myanmar to Port Blair, India.

6 This action concerned the second shipment of river sand under the S&P contract. The second shipment was for a consignment of 4,300 mt of river sand of Myeik origin ("the cargo") that was loaded on board D2's unmanned barge *Bina Marine 36* at Myeik for carriage to and discharge at Port Blair. Bill of lading no HKE-0712 dated 12 September 2011 ("the bill of lading"), which was on the Congenbill 2007 form, was issued by D1 as the contracting carrier. The bill of lading named Marine Alliance as the shipper of the cargo. FSPL was the owner of the cargo, and the bill of lading named FSPL as the consignee. At all material times, D2, as the performing carrier, was sub-bailee of the cargo.

7 At all material times, the *Bina Marine 36* was paired with the tugboat *Bina Marine 35*. The tug-barge combination (hereafter referred to as "the tow") was expected to discharge the cargo at Port Blair on 1 October 2011, but the tow did not turn up at Port Blair on 1 October 2011 or at any time thereafter. When FSPL made inquiries about the whereabouts of the cargo on or about 3 October 2011, it was told by one Mr Danads Wong, an employee of D2, that the tow was on the "last leg of the voyage proceeding very slowly to Port Blair due to weather conditions". [note: 1]

8 On 18 October 2011, FSPL's solicitors wrote to both defendants demanding delivery up of the cargo. The present action was commenced on 15 December 2011 following the defendants' failure to deliver up the cargo. FSPL's principal claim against D2 was for the delivery up of the cargo by D2. At that time, FSPL was not aware that the cargo had been sold.

9 FSPL filed for summary judgment on 20 February 2012. Both defendants opposed FSPL's application for summary judgment.

10 Earlier, D2 applied for security for costs on 28 December 2011. It was at that point that FSPL learnt for the first time that the cargo had been sold. Mr Azhari Bin Mohd Jadi ("Mr Azhari"), the Operations Manager of D2, deposed in his first affidavit that D2 withdrew the tow and, in the process, sold the cargo on account of D1's default in the payment of charter hire owed to D2. Mr Azhari's second affidavit filed on 13 January 2012 stated that the cargo was sold by its wholly owned subsidiary, MP Shipping Pte Ltd ("MP Shipping"). There was no other information on how much the cargo was sold for.

11 FSPL succeeded in obtaining interlocutory judgment with damages to be assessed against the defendants on 15 June 2012. The defendants were found to be severally liable to FSPL for the loss of the cargo. D2 appealed against the decision on liability, but the appeal was dismissed on 3 August 2012.

The Assistant Registrar's assessment of damages

12 FSPL asked for damages to be assessed at US$201,455. Mr Joseph Tan ("Mr Tan"), counsel for FSPL, submitted that the value of the cargo based on the market price of comparable river sand at Port Blair in the first week of October 2011 was US$46.85 per metric tonne ("pmt"). For this, he relied on invoices from FSPL's sister company, Fairmacs Trading Company Pte Ltd ("Fairmacs Trading"), that supported comparable sales of river sand to third parties at Port Blair from 3 October 2011 to 7 October 2011 to arrive at an average price of US$46.85 pmt. [note: 2] He thus quantified FSPL's claims against both defendants severally at US$201,455 (US$46.85 pmt x 4,300 mt of the cargo quantity shipped on board the *Bina Marine 36*).

13 Counsel for D2, Mr Mathiew Christophe Rajoo ("Mr Rajoo"), disagreed with FSPL's method of assessment of damages. He submitted that there was no readily available market for river sand at Port Blair in the first week of October 2011. As such, there was no ascertainable market value to fix the value of the cargo.

14 The AR rejected FSPL's valuation and held that damages should be assessed at US$62,950. That figure reflected: (a) the cost incurred by FSPL in obtaining the cargo; and (b) the loss actually sustained by FSPL. The AR's reasoning was as follows: [note: 3]

(i) There was no market index for river sand at Port Blair in the first week of October 2011;

(ii) The market value of US$46.85 pmt was arrived at without any specific breakdown as to the cost of the river sand, the freight charges, and other relevant expenses in respect of the shipments such that the actual profits of Fairmacs Trading, which constitute part of the US$46.85 pmt rate, could not be ascertained — this was especially pertinent given that the cost price of the cargo under the S&P contract was US$22.30 pmt, a rate substantially lower than US$46.85 pmt; and

(iii) The market value of US$46.85 pmt was arrived at by comparing low-volume sales of river sand at no more than 7 mt per sale and it was therefore unlikely for the same rate of US$46.85 pmt to apply to the cargo of 4,300 mt.

15 Given his finding that there was no ascertainable market value for river sand at Port Blair in the first week of October 2011, the AR opined that the proper basis of assessment in this case was the cost of replacing the cargo. He relied on the S&P contract between FSPL and Marine Alliance where FSPL bought the cargo for US$95,890 (*ie*, US$22.30 pmt x 4,300 mt). Having noted that FSPL had in fact only paid US$62,950 for its purchase of the cargo (see [14] above), the AR proceeded to assess damages to be paid by D2 for its wrongful conversion of the cargo at US$62,950.

16 FSPL pressed for an award of damages against D1 despite D1's absence at the hearing of the assessment. The AR's award of damages against D1 was the consequence of the summary judgment against D1 as contractual carrier, and in principle each conversion amounted to a separate wrong causing its own separate damage. The AR held D1 to be severally liable for the same amount of damages that D2 was liable for.

Outline of the parties' arguments in RA 290

17 As stated earlier, the main ground of appeal related to the method of assessment of damages consequent on the conversion of the cargo and the essential principles that govern this area of the law. Hence, the argument between the parties focussed on the monetary liability of D2 to FSPL as a consequence of D2's conversion of the cargo by the wrongful sale.

18 Mr Tan submitted that the normal measure of damages in a conversion case was the market value of the goods converted at the place and date of conversion plus any consequential losses that were not too remote in law. Mr Tan confirmed at the hearing of RA 290 that FSPL was not claiming for consequential losses.

19 For RA 290, FSPL resorted to the same evidence it had relied on at the hearing before the AR. That is to say, the evidence of Mr Babuvenkatesh Loganathan ("Mr Loganathan"), the General Manager of Fairmacs Trading, and the invoices provided by Fairmacs Shipping (see [12] above). It was submitted that FSPL's evidence was adequate proof that US$46.85 pmt was the market value of

the cargo at the relevant time and place, and that this was the valuation the court should adopt in determining the value of the cargo.

20 For D2, Mr Rajoo contended that Mr Tan's approach was incorrect as there was no readily available market at Port Blair in the first week of October 2011, and, hence, there was no ascertainable market value. To Mr Rajoo, the cargo was converted at sea and subsequently sold, and as such, a different basis from the market value of the goods converted applied. The proper valuation to adopt *vis-à-vis* the value of the cargo would be to use the cost price of the goods and the freight paid as was the case in *Ewbank v Nutting* (1849) 7CB 797 ("*Ewbank*"). He submitted that the *Ewbank* approach should be used, but subject always to FSPL's actual loss. [note: 4] He accepted that the *Ewbank* approach and the AR's methodology, based on the cost incurred by FSPL in purchasing the cargo from Marine Alliance under the S&P contract, would lead to the same conclusion and result.

21 Mr Rajoo accepted that the AR was right in assessing damages payable by D2 for the tort of conversion at US$62,950, which quantum of damages took into consideration the actual cost incurred by FSPL.

Issues for decision

22 On the basis of these arguments (at [17]–[21] above), the main issue for decision was the proper measure of damages for conversion of the cargo by D2 on the facts of this case. In other words, did the facts of this case require the application of a different basis of valuation instead of the market value measure of damages for conversion? In particular:

(a) Was there a market for river sand at Port Blair in the first week of October 2011?

(b) Was US$46.85 pmt the market value of river sand at Port Blair for the first week of October 2011?

(c) Alternatively, should the replacement cost of the cargo be US$22.30 pmt based on S&P contract price which was the price FSPL bought the cargo from Marine Alliance?

Preliminary points

23 In this action, FSPL sought compensatory damages for the misappropriation of the cargo by the wrongful sale of the same. By way of observation, there is potentially an alternative remedy for such a wrong at common law. A modern way of putting this alternative remedy is an award of restitutionary damages rather than the usual compensatory damages. I will elaborate on this alternative remedy in due course (at [84]–[90] below).

24 It is not controversial that the object of an award of damages for conversion is to compensate a plaintiff for the loss which he has suffered as a result of the conversion. Typically, the normal measure of damages is the value of the goods converted at the time and place of conversation. It is also not controversial that one way of putting a monetary figure on the value of the goods converted is to use "market value" because "market value" is looked upon as the fairest way to objectively assess the value of the goods converted. In *The Arpad* [1934] P 189, the English Court of Appeal held that the market value was the best evidence of the converted wheat's value, *not* the amount the plaintiff bought and sold it for. Greer LJ said, at p 210:

> If there is a market at the time when the goods should be delivered in which goods of a kind fit to implement the contract made by the owner of the bill of lading at the time of the breach can be

bought or sold, the measure of damage is the value of the goods ascertained by the market price of identically similar goods. … [T]he price at which the buyer has resold the goods may be accepted as evidence of their value, but the court is not bound to accept such evidence as conclusive of the value if the value can otherwise be ascertained.

25 Similarly, in *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 2 SLR(R) 1010 ("*Chartered Electronics*"), a case that involved the conversion of defective kits, our Court of Appeal at [18] sanctioned the use of market value as a convenient way of calculating the value of the goods converted. However, attention was drawn to the use of alternative ways to calculate the value of the goods where there was no market for the goods converted. In this regard, the appellate court observed at [23]:

> Based on the principles espoused above with respect to the calculation of the measure of damages, there were three alternatives in determining the value of the defective kits:
>
> (a) firstly, the market value for defective printer kits that could not be assembled into working printers; or
>
> (b) secondly, *if no market existed*, the cost of replacing such defective kits; or
>
> (c) thirdly, if no such market existed to replace the kits, the value would be determined by what the respondents could obtain through a sale to a solvent buyer.
>
> [emphasis added]

26 As is obvious, the question is therefore what is the value of the goods converted to be taken as? The starting point is to look at the market value of the goods at the place and date of the conversion, but that basis may yield to some other basis of valuation if the facts of the case required it. Hence, examples are seen in cases where different valuations are used. This is expected because of the particular kinds of property converted. The type of evidence admissible to value the goods converted can vary widely depending on whether the assessment is concerned with everyday commodities, shares, business enterprises, specialised and rare items and items for personal use such as clothing, jewellery and personal mementos.

27 To illustrate, in *Mohammed Idris Jabir v H A Jordan & Co Ltd* [2010] EWHC 3465 ("*Idris Jabir*"), where a rare pearl was converted, it was observed that the market in rare and costly pearls was small and ultimate purchasers would be individuals both rich and discreet. Unlike open markets of everyday commodities where prices are widely estimated and advertised, the Judge there found that he was looking at a niche market where the actual operating market that evidenced the value of the goods was between informed and discreet buyers and sellers. Likewise, in *France v Gaudet* (1871) 6 QB 199 ("*France v Gaudet*"), the plaintiff there had agreed to sell champagne that could not be replaced because the champagne of like quality and description could not have been purchased in the market to enable the plaintiff to fulfil his contract (see further at [69] below).

28 In the final analysis, what is the appropriate value of the goods converted in any particular case is thus a question of fact. The inquiry commonly turns on the evidence adduced by parties and their ability to prove or disprove the respective values asserted by them.

29 This brings me to the next preliminary point. It has to do with the fair number of authorities cited by Mr Rajoo. Generally speaking, the authorities were said to be either in support of or served to illustrate Mr Rajoo's submission as to how I should approach the assessment of damages for

conversion in this case in a manner desired by D2. I make three points. First, parties and their counsel must be discerning in the choice and use of authorities that are placed before the courts. It is never wise to overburden the court with unnecessary material. Secondly, given the fact-sensitive nature of the inquiry as to what the value of the goods converted should be taken as, indiscriminate reliance on precedents and dicta tended to obscure rather than illuminate the applicable principles. Thirdly, most of the cases cited by Mr Rajoo that computed damages at the cost price of the converted goods had very distinct factual matrices and therefore did not assist D2 at all or even went against D2's case (see [42] and [68]–[70] below).

30 Having said all that, the point to note in the final analysis is that the appropriate value to adopt in any particular case depended on the facts of the case.

31 Before coming to the first main issue between the parties, it is convenient to dispose of Mr Rajoo's singular contention that this court should adopt the *Ewbank* approach to assess damages on a basis different from the market value of the goods converted at the date of the conversion (at [20] above). He argued that "the factual matrix of *Ewbank* bears similarities with the factual matrix in this [case] in that the cargo was allegedly converted on the high seas and subsequently sold." [note: 5] Mr Rajoo then cited *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Thomson Reuters (Legal) Limited, 20th Ed, 2010) at para 17-97 that relied on *Ewbank* for the following proposition:

> In one case, where goods had been wrongfully sold in the course of a voyage, the owner obtained as damages the cost price of the goods and the freight paid and it was held that this was in the circumstances a proper method of arriving at their value.

32 In *Ewbank*, a cargo of salt was converted in the course of the sea voyage and sold. The vessel was damaged en route and the master sought refuge at Bahia, Brazil, where the cargo of salt was sold to purportedly lighten the vessel. The sale was unauthorised because it was not a sale by necessity to save the voyage. The master and shipowner were found guilty of converting the salt. On the matter of damages, the question raised there was this: what was the value of the cargo at Bahia under the existing circumstances? Creswell J rhetorically asked at 805:

> Suppose the conversion had been by throwing the cargo overboard, what would have been the measure of damage in that case? What would the cargo have been worth to the owner?

And in answering his own question, Cresswell J continued on the same page:

> May we not reasonably conclude that the goods would be worth the invoice price and the cost of carriage?

33 The supposition was that since misappropriation took place at sea, the normal measure of damages that requires determination of the market value at the place of conversion was patently inappropriate. In that case, the invoice price and freight paid was used for determining the value of the converted salt which was to be delivered to Calcutta, India.

34 Mr Rajoo's submission that the basis of assessment adopted in *Ewbank* would yield an appropriate award on the facts in this case ignored two points. First, the unauthorised sale of the salt was at Bahia and the issue there was the value of the cargo at Bahia. Besides, in *Ewbank*, the only evidence before the jury was the invoice price of the salt and the freight charges to Calcutta. As noted by Wilde CJ at 809, the plaintiff in *Ewbank* had adduced no evidence at all of the existence of a market for the salt in Calcutta, or the market value of the salt in that regard, and "[t]he only materials that were laid before the jury, were, proof of the cost price of the salt here, and the sum

paid by the plaintiff on account of the freight." Creswell J also observed at 811:

> I do not very well see how else the jury] could estimate the value of the goods to the shipper, than by taking the cost price, and adding thereto the expense incurred in getting them towards the merchant. What the cargo fetched by a forced sale at Bahia clearly was no fair test. The plaintiff did not want the goods there.

35 Although the value of the goods at the port of delivery at the relevant time in *Ewbank* could not be determined, Creswell J was suggesting the possibility that such a value would have been a viable option if evidence was led to prove it.

36 Secondly, for goods converted at sea, the value of the goods should be determined at the place of delivery where delivery up of possession of the goods ought to have taken place. In this regard, the Privy Council in *The "Jag Shakti"* [1985-1986] SLR(R) 448 ("*The Jag Shakti*") held as follows (at [13]):

> So far as the first question is concerned, it is not in dispute that the pledgee of a bill of lading is entitled, on presentation of it to the ship at the port of discharge, to the possession of the goods represented by it. It has further, in their Lordships' opinion, been established, by authority of long standing, that where one person, A, who has or is entitled to have the possession of goods, is deprived of such possession by the tortuous conduct of another person, B, whether such conduct consists in conversion or negligence, the *proper measure in law of the damages recoverable by A from B is the full market value of the goods at the time when and the place where possession of them should have been given* … [emphasis added]

37 That the market value of the goods converted should be based on the time and place of delivery accords with the general rule that FSPL should be placed in the same position as though the goods were not converted, *ie* as though they were actually delivered to and FSPL took possession of them at Port Blair at the expected time of delivery. In the present case, the value of the cargo should therefore *prima facie* be based upon the market value of the cargo at Port Blair during the first week of October 2011.

38 D2's fall-back argument was that there was no such market value of the cargo which the court could utilise in valuing the cargo despite the evidence adduced by FSPL. It advanced two main submissions to this effect: (a) that there was no market for river sand at Port Blair at the relevant time; and (b) that FSPL's evidence was insufficient for ascertaining the market value. Notably, D2 led no countervailing evidence and D2's submissions were plainly argumentative in its bid to poke holes in FSPL's case. I shall deal with each issue in turn.

Evidence of market for river sand at Port Blair

39 I begin by stating that I was satisfied that FSPL's evidence supported the existence of a market for river sand at Port Blair in the first week of October 2011.

40 By definition, there is a market for a particular chattel if there is a willing seller and willing buyer after negotiations. Furthermore, an available market value implies not only a willing buyer, but a willing seller. However, the converse situation is not necessarily true — absence of evidence of market value of a particular chattel does not equate or mean that there is no market for that particular chattel. From this perspective, there is a difference between a finding that there is an available market for the goods converted and a finding as to the exact market value of the goods converted. This difference is crystal clear when one compares every day commodities with a rare article where there is no

published or advertised price and where the circle of sellers and buyers is small (see for example *Idris Jabir* at [27] above).

41 The AR appeared to have equated an absence of evidence of market value as sufficient evidence of no market for river sand at Port Blair in the first week of October 2011.

42 *The Endurance* 1 [1998] 3 SLR (R) 970, which was cited by Mr Rajoo to support a finding that there was no market for river sand in this case, made clear that evidence must be led to show that no market existed at the relevant time and place. In that case, which dealt with the conversion of used water-makers, the Court of Appeal disagreed with the trial judge's finding that there was no market for used water-makers and held that it was wrong to infer that there was no market from a finding that "there was no current market price for used water-makers" (see *Cotan Petroleum Pte Ltd v The Owners of The Ship or Vessel "Endurance 1" ex Tokai Maru* [1998] SGHC 160 at [57]). The Court of Appeal held at [35]:

> The owners submit that the learned judge was wrong to have proceeded on the basis that there was no market for the water-makers at the time of the conversion which was when the vessel was withdrawn from the charter. *No evidence was led to this effect*. The owners also submit that the cost of replacement should take into account depreciation of the water-makers at the time of conversion. We agree with these submissions. In our view the damages payable for the conversion of the two water-makers should be reassessed. [emphasis added]

43 From this extract, the Court of Appeal agreed with the owner's submission that the trial judge was wrong in finding that there was no market for the converted goods since "[n]o evidence was led to this effect" at the trial below. It is also clear that the evidential burden shifts to the party asserting the absence of a market. Notably, D2 did not adduce any evidence in this regard.

44 Evidence was led by FSPL to show that river sand was "available" in Port Blair. FSPL's evidence, in the form of Fairmacs Trading's invoices for the sale of river sand at Port Blair for the first week of October 2011, was proof that there was a market with willing buyers and sellers of river sand. Further, Mr Loganathan testified at the assessment of damages that there were other sellers of river sand at Port Blair and that they were competitors of FSPL and Fairmacs Trading. His testimony was not challenged by D2. [note: 6]

45 However, D2, in argument attempted to undermine FSPL's evidence as to the existence of a market for river sand at Port Blair in the first week of October 2011. D2 raised two arguments. The first was the absence of a market price index for river sand at Port Blair. The second was the fact that based on Mr Loganathan's testimony, it would take a minimum of 20 to 25 days for any seller of river sand to deliver the goods to Port Blair.

46 I disagreed with D2's first contention. I am mindful that a market price index that tracks the changes in the price of a particular commodity over time is one way of demonstrating the market price and that it is indicative of the existence of an available market. However, the converse situation is not necessarily true. It is worth nothing that only certain commodity markets rely on market price indices to do business or trade. I interpreted the evidence before me as follows: that river sand is not a commodity whose pricing is defined by a market price index at Port Blair and nothing more. Hence, it was wrong to regard the absence of a market price index as evidence of no market and evidence of no market value for river sand at Port Blair.

47 I now come to D2's second objection that arose from Mr Loganathan's testimony that sellers would have taken a minimum of 20 to 25 days to deliver the equivalent 4,300 mt of river sand to Port

Blair. [note: 7] D2 had argued that the amount of time required for such a delivery (*ie*, 20 to 25 days) meant that river sand could not be "readily bought" at Port Blair in the first week of October 2011.

48 D2 relied on the case of *J & E Hall Ltd v Barclay* [1937] 3 All ER 620 ("*J & E Hall*") to support its argument that the goods have to be "readily" available. Greer LJ in *J & E Hall* said at 623:

> Where you are dealing with goods which can be readily bought in the market, a man whose rights have been interfered with is never entitled to more than what he would have to pay to buy a similar article in the market.

49 Notably, J & E Hall was unique as it concerned experimental davits that had to be manufactured, and the finding in that case that there was no market was premised on the fact that there were no "ready made" goods that could be bought which meant that the goods in question could not have been purchased in the first place. That case therefore did not address the issue as to delivery.

50 In this regard, FSPL relied on the definition of "available market" in the context of s 50(3) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) as described in *Benjamin's Sale of Goods* (Michael G Bridge gen ed) (Sweet & Maxwell, 9th Ed, 2014) at para 16-066:

> It is submitted that the courts are likely to eschew formal limitations on the meaning of "available market", especially in light of the fact that the concept provides only a *prima facie* measure of damages … the availability of buyers and sellers, and their ready capacity to supply or to absorb the relevant goods is the basic concept of an "available market": It is submitted that there is no need to add to this the test of a price liable to fluctuations in accordance with supply and demand, as occurs in official exchanges or certain commodity markets. … A fluctuating market price indicates the existence of an available market, but it should not be a necessary test, "there must be sufficient traders, who are in touch with each other".

51 The market price rule and the concept of an available market are straightforward in the sale of goods context. Like the measure of damages for conversion, the market price rule accords with the principle that the plaintiff is entitled to have his loss vindicated as at the date of the breach/loss. The concept of an available market is therefore not confined to the sale of goods context and may be applied by analogy to the measure of damages for conversion. I therefore agreed with FSPL's reliance on the definition of "available market" in the sale of goods context to this case.

52 Availability of goods in the market is not measured by the length of time it to takes to deliver goods. *Garnac Grain Company Incorporated v HMF Faure & Fairclough Ltd and others* [1968] 1 AC 1130 concerned a claim against a seller for failure to deliver 15,000 tonnes of lard. As Lord Pearson explained at 1138:

> First, it was contended that no assessment could properly be made on the basis of the difference between the contract price and the market price on February 4, 1964 (or any other date that might be material), because there was then no market in the United Kingdom for 15,000 tons of lard for immediate delivery, and the evidence did not reveal any other basis for assessing damages. There was evidence that at all material times (towards the end of January and early in February, 1964) you could not buy that quantity for immediate delivery in the United Kingdom. There was, however, evidence that you could buy smaller quantities - up to 2,000 tons at a time - in the U.S.A. for delivery to ports for shipment to the United Kingdom; and there was a market price, given by one witness as 242.50 and by another witness as 243.60 dollars per ton, for such purchases on February 4. If you wished to buy 15,000 tons at those prices you would have to do

so over a period. According to one witness, if you were able to buy 15,000 tons of lard at one time you would have to pay a higher price. There was thus some evidence on which Megaw J. could find that there was a market price and that it was 242.50 dollars per ton on February 4. No argument to the effect that there was no market price proved was presented at the trial of the action. No such point was included in the "respondents' notice" given by Garnac to the Court of Appeal. It may have been raised in the Court of Appeal, but it is not mentioned in the judgments. In these circumstances I do not think the finding of fact of Megaw J. on this point can be successfully challenged.

53 In that case, the goods in question need not be purchased immediately or delivered immediately. Immediate delivery was not a necessary condition for establishing a market. Although the House of Lord's decision related to a breach of contract for the sale of goods, a similar approach applies to wrongful conversion, and as I had explained at [51] above, there was no reason for me to distinguish between definitions of "market" when it comes to these different claims.

54 In this regard, there was no merit in Mr Rajoo's second argument that a delay of three weeks or thereabouts warranted a finding that there was no market.

55 For these reasons, I disagreed with the AR and instead concluded on the evidence that there was a market for river sand at Port Blair where FSPL could have readily bought the equivalent 4,300 mt of river sand.

Evidence of market value

56 I now turn to the value of the converted cargo.

57 It was not disputed that the burden of proof was on FSPL to establish the relevant market value of river sand at Port Blair. FSPL explained that US$46.85 pmt was the best evidence it could derive for the value of river sand at Port Blair in the first week of October 2011.

58 D2's objection to the US$46.85 pmt market value adduced in evidence by FSPL was on the premise that it was based on the retail price and not the wholesale price of river sand. D2 argued that:

(i) The figure of US$46.85 pmt was based on the sale of much lower volumes of river sand as compared to the cargo; and

(ii) The figure of US$46.85 pmt included the profit which Fairmacs Trading would have made given that Fairmacs Trading was selling to third parties and that the figure of US$46.85 was substantially higher than the actual cost price of the cargo.

59 D2 argued that the AR had relied on the same reasons in his decision to conclude that there was insufficient evidence as to the relevant market value of river sand at Port Blair.

60 Typically, where precise evidence of the value of goods converted are obtainable, the court naturally expects to have it, but where it is not the court must do the best it can: per Devlin J in *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 at 438 whose view was cited and adopted in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay Investment*") at [30]. By doing the best it can, the court may have regard to a variety of evidence. As I had observed in *Yip Holdings Ltd v Asia Link Marine Industries Pte Ltd* [2012] 1 SLR 131 ("*Yip Holdings*") at [39]–[40]:

39 I now come to what evidence the court can take into consideration if there is no meaningful market value. The commentary in para 14.11, *Butterworth's Law of Damages* ([13] *supra*) is instructive:

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

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

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

It should also be noted that the range of evidence is wide and other probative types of evidence not stated in the passage above may be considered. In this case, Fairmacs Trading's invoices constituted evidence in the form of "sales of similar chattels".

61 In short, the market value of the goods converted, or any other value asserted, must be proven with reasonable certainty by showing sufficient evidence to enable the court to reach a fair and reasonable approximation of damages. I pointed out in *Yip Holdings* at [38] that the impossibility of laying down any definitive rule as to what might constitute adequate proof meant that, in practical terms, a court would have to carry out assessment of damages in a flexible manner as regards what would be adequate proof of damage so as to achieve the purpose of compensatory damages. A flexible approach towards a plaintiff's proof of damages was explained in *Robertson Quay Investment* at [27]–[28] and [30]–[31]:

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

therefore necessarily contingent, loss. [emphasis added]

...

30 Accordingly, a court has to adopt a flexible approach with regard to the proof of damage. Different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. ... The correct approach that a court should adopt is perhaps best summarised by Devlin J in the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 ("*Biggin*"), where he held (at 438) that:

> [W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.

This is in fact the approach that this court has adopted (see *Raffles Town Club Pte Ltd v Tan Chin Seng* [2005] 4 SLR(R) 351 at [17]-[19], where both *Chaplin* and *Biggin* were cited with approval and the above observation by Devlin J emphasised by this court).

31 To summarise, a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss *and* the evidence is cogent, the court should allow it to recover the damages claimed. …

[emphasis in original]

62 I now turn to the state of the evidence at the appeal. FSPL accepted that it could not give precise evidence of the market value of the river sand at Port Blair in the first week of October 2011. Notably, D2 took issue with the value adduced by FSPL, but D2's witness was unable to provide contrary evidence of its own. D2's witness, Mr Lau Chong Hon ("Mr Lau"), the former Technical Superintendent of D2, was not a satisfactory witness. His testimony as to the market value of the cargo was entirely hearsay based upon his "conversations with the buyer and the seller." [note: 8] I therefore gave no weight at all to his claim that the price of the river sand was between S$7 to S$7.50 pmt [note: 9] "[a]round that region, but of course not exact". [note: 10]

63 D2 urged this court to assess damages at the cost of replacement applied by the AR because the market value of the cargo was not ascertainable given the issues D2 took with FSPL's evidence. In my view, this was once again an attempt by D2 to undermine FSPL's evidence without adducing any countervailing evidence of its own.

64 Having found that there was a market in Port Blair for river sand, the next step was for this court to endeavour to ascertain the market value of river sand. I did not agree with D2 that the market value of river sand was, on the evidence, unascertainable. It was open to this court to evaluate FSPL's evidence to see if there was sufficient information to establish the likely value of the cargo. In my analysis and evaluation of the evidence in this particular case, there was adequate proof of the market value of the cargo in the form of Fairmacs Trading's invoices and Mr Logonathan's testimony, which I accepted.

65 I pause here to refer to some of the cases cited by Mr Rajoo. The cases showed that typically, courts would move away from the market value in their assessment of damages for conversion where there was effectively no evidence at all of a market or market value, and for that reason, replacement cost was used. This approach was evident in *Ewbank*, a case cited by Mr Rajoo which I

have already dealt with (at [31]–[37] above).

66 The next case cited by D2 was *Fairfax Gerrard Holdings Ltd v Capital Bank plc* [2007] 1 Lloyd's Rep 171 ("*Fairfax*"). In that case, the plaintiff was in the business of trade finance and it sued the defendant for conversion of a machine which it had intended to sell on to a customer. The sale price was to be £175,000 whereas the purchase price of the machine in China was £87,227.41. Mr Rajoo, in particular, relied on this portion of Justice Mackie QC's decision at [42]:

> Mr Casement cited *Hall v Barclay* [1937] 3 All ER 620 a case where the Court of Appeal held that a claimant recovering damages for conversion was entitled to the market price but, where there was none, the cost of replacement. In the course of his judgment Greer LJ said "where you are dealing with goods which can be readily bought in the market, a man whose rights have been interfered with is never entitled to more than what he would have to pay to buy a similar article in the market. That rule has been enacted on over and over again …" But for the decision of the House of Lords in *Kuwait* I would have followed this guidance and ordered a figure closer to the price paid for the machine to the manufacturer in China. A more flexible approach does it seems to me to enable of the court to do better justice …

67 Mr Rajoo was keen to rely on the fact that Justice Mackie QC had decided to value the machine at a "figure closer to the price paid for the machine to the manufacturer in China" as support for his proposition that a value closer to the cost price of the cargo should be adopted. This, unfortunately, was an inaccurate reading of the case. Justice Mackie QC had in fact fixed damages at £132,500, a midpoint between the contractual sale price of the machine and the purchase price of the machine (which was actually closer to the contractual sale price) — he had not fixed damages at a value closer to the purchase price. Justice Mackie QC was in fact faced with the problem of determining the market value of the machine given that the contractual sale price of the machine was not reflective of the market value. In the passage above, he had in fact acknowledged the decision in *J & E Hall* which stated that in the absence of an ascertainable market value he should award the cost of replacement. However, he found that he would have ordered a figure closer to the purchase price "[b]ut for" the House of Lords decision in *Kuwait Airways Corpn v Iraqi Airways Co (nos 4 and 5)* [2002] 2 AC 833 which called for flexibility in the assessment of damages. In this regard, Justice Mackie QC exercised this flexibility in favour of the plaintiff and ordered a figure closer to the contractual sale price, taking into consideration (at [42]) that the plaintiff had no desire to obtain another like machine and that it had only been interested in the benefits to be accrued from the one-time sale of the converted machine. This decision, in fact, supported FSPL's case here since it showed that the cost price of the goods converted is not necessarily the alternative in the event that the market value is extremely difficult to ascertain, and that the sale price of the goods converted may be considered as well in quantifying damages.

68 The third authority on D2's list was *Chua Keng Mong v Hong Realty Pte Ltd* [1993] 3 SLR (R) 317. In that case, Goh Joon Seng J awarded the cost of replacement of the goods lost in the fire caused by the defendants' negligence. Notably, Goh J actually found at [33] that "[o]n the evidence, the prices of [the goods lost] at the date of the loss and of the hearing were about the same as the prices paid for by the plaintiff". It was therefore clear that Goh J awarded the cost of replacement of the goods because it was equivalent to the market value of the goods.

69 Lastly, there was the case of *France v Gaudet* which I have discussed above at [27]. I make three points here. First, that case concerned champagne of a particular quality and description, unlike river sand in this case which was a more homogenous commodity. Secondly, in that case, the English Court of Appeal had assessed damages based upon what the plaintiff would have obtained from a sale of the goods converted to a solvent buyer, the third alternative listed by the Court of Appeal in

Chartered Electronics (see [25] above), not the cost price. Thirdly, Mellor J also noted (at 204) that the plaintiff in that case had admitted that "champagne of the like quality and description could not have been purchased in the [open] market". In this case, there was no similar admission by FSPL who instead adduced evidence to prove the market value of the cargo.

70 I now turn to D2's complaint that the value of US$46.85 pmt was significantly higher than the cost price of the cargo, namely US$22.30 pmt. First, this disparity could easily be explained on the basis that the markets from which those values were derived were different. Secondly, even if US$46.85 pmt included profits made by Fairmacs Trading, they were profits made by Fairmacs Trading, or any other potential competitor, and not FSPL itself. There was no element of windfall to FSPL to begin with. Thirdly, as a matter of principle, if required by the particular facts of the case, the court may, even in the absence of a market value, nonetheless ascertain the value of the goods converted at a value higher than the plaintiff's purchase price of the goods converted as was done in *Fairfax* (see [66]–[67] above).

71 As for the contention that US$46.85 pmt was based on the sale of much lower volumes of river sand as compared to the bulk purchase of 4,300 mt of the cargo, D2 did not adduce any countervailing evidence of the applicable rate in the case of a bulk sale whereas Mr Loganathan had, in his testimony, at least attempted to explain the reasons why there would be no significant pricing difference. [note: 11] Mr Tan had also pointed out that FSPL faced difficulty in gathering additional information as to the market value of river sand at Port Blair. Its other source of information would have been other sellers of river sand who were the competitors of Fairmacs Trading and it was understandable that competitors would loathe cooperating with FSPL by revealing their pricing to FSPL. [note: 12]

72 For these reasons, I accepted the market value of US$46.85 pmt in its entirety based on the evidence adduced by FSPL. However, that was not the end of the matter as there was still the matter of other expenses that would have to be considered at the place of delivery of the cargo, which I will now come to.

Deductions from the market value of the cargo

73 It was raised at the hearing of the appeal that the cargo was supposed to be delivered at anchorage, Port Blair. As such, a discount should be applied to the rate of US$46.85 pmt. Mr Loganathan testified that if the cargo was delivered at Port Blair at the expected time of delivery, FSPL would have had to pay 5% of the value of US$46.85 pmt in the form of customs duty and 8% to 10% of the same value in the form of further expenses incurred for landing. [note: 13]

74 Mr Tan argued that the court should not discount those additional expenses that FSPL would have had to incur had the cargo been delivered to Port Blair. Mr Tan relied on *The Jag Shakti* for the proposition that the damages recoverable by the claimant whose goods were converted during the course of the voyage should be the "full market value" of the goods at the time of delivery (see [36] above). He referred to [13] of the judgment:

> … For this purpose it is irrelevant whether A has the general property in the goods as the outright owner of them, or only a special property in them as pledgee, or only possession or a right to possession of them as a bailee. Furthermore the circumstance that, if A recovers the full market value of the goods from B, he may be liable to account for the whole or part of what he has recovered to a third party, C, is also irrelevant, as being *res inter alios acta*.

75 Mr Tan therefore submitted that any expenses which FSPL would have incurred if the cargo was delivered should only form the subject matter of an account of such sums to the relevant third party — such expenses should still constitute part of the damages awarded to FSPL in this present suit.

76 FSPL's analysis of *The Jag Shakti* was misunderstood and misapplied. The passage quoted above discusses the entitlement of a party with an immediate right of possession over the goods converted to claim for the full value of the goods instead of being limited to the value of his possessory interest. However, he would be required to account to the party with proprietary interest in the goods for the difference. The "full value" described in the *Jag Shakti* has to be understood in this context, and not in the erroneous manner explained by Mr Tan. In the present case, there was no question that FSPL was the owner of the cargo and that it sued as owner and consignee of the cargo. Whilst FSPL's case was that its loss was the "full market value" of the cargo, the latter value, however, included the expenses for clearing the cargo from the port area.

77 I was therefore of the view that since the cargo was to be delivered at anchorage, the market value of the cargo in situ at anchorage should reflect deductions for customs duty and landing charges in order to arrive at a fair award of damages. I therefore deducted 15% (5% customs and 10% landing costs) from the value of US$46.85 pmt to arrive at a figure of US$39.82 pmt.

78 I also took into consideration the sum of US$30,000 being freight that would have to be paid by FSPL to Marine Alliance upon the delivery of the cargo at Port Blair. This freight was not paid because of the conversion.

79 Accordingly, I awarded damages at US$141,226 being the value of the cargo converted by D2 after deducting US$30,000. The computation is as follows: US$171,226 (US$39.82 pmt x 4,300 mt) minus US$30,000. In broad terms, the sum of US$141,226 was what FSPL should receive for its proprietary interest in the cargo that was sold.

Other matters

Mitigation of damages

80 D2 argued that FSPL should have mitigated its loss by purchasing an equivalent volume of river sand after the conversion. D2 asserted that FSPL would have only incurred the purchase price of the cargo if it did so. In making this submission, D2 relied on the authority of the decision in *The Endurance 1* where the Court of Appeal held at [34]:

> Where there is a market the charterers are expected to diminish the damage by going into the market and buying the water-makers in the market, so as to put themselves in the position they would have been if they had not suffered any wrong at all. If there is no market for the goods converted, the measure of damages would be the cost of replacement and the charterers must go to their suppliers to purchase the water-makers so as to put themselves in the same position as if they would have if not for the conversion (see *Hall v Barclay* [1937] 3 All ER 620).

81 I dismissed D2's submissions on mitigation for the following reasons: First, mitigation of damages as a defence must be properly pleaded and proved. D2's pleadings did not put this defence of mitigation of damages in issue. The pleadings therefore contravened the established procedural rule that an assertion that the plaintiff had failed to mitigate its loss must be pleaded and proved by the defendant relying on it: see *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 at [71]. In particular, I reiterated in *Yip Holdings* [24]:

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

82 Secondly, D2's submission that FSPL failed to mitigate its damages did not consider the fact that the reason why the plaintiff did not purchase an equivalent amount of river sand after the conversion was mostly due to the fact that the defendants had ignored FSPL's inquiries as to the whereabouts of the cargo and had kept FSPL in the dark. When FSPL commenced the present action, the relief it sought was for delivery up of the cargo. By the time FSPL was made aware that the cargo had been sold by D2, it was already 28 December 2011 (see [9] above) and nearly three months after the expected period of delivery of the cargo. D2 filed its defence without pleading mitigation as a defence and its assertion that FSPL should have mitigated its damages by purchasing an equivalent amount of river sand was plainly a non-starter.

83 Thirdly, D2's mitigation arguments were lacking in detail and evidence.

Observations on the existence of an alternative remedy

84 Claims to waive the tort to seek recovery of the sale proceeds received by the defendant or to recover damages for the goods converted are well established. As explained in Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) at para 12-016:

> Apart from using the claimant's goods, a defendant may dispose of them by sale. It is worth remembering that it has been accepted for three hundred years, since *Lamine v Dorrell*, that the claimant may claim the price at which the defendant sold. Should this sale be at a favourable price, one that is above the market value of the goods at the time of conversion which marks the claimant's loss, this recovery can be looked at as essentially one of restitutionary damages, although of course in those days we were in the very different world of *indebitatus assumpsit* and quasi-contract.

85 The decision in *Lamine v Dorrell* (1790) 2 Raym Ld 1216 cited by McGregor in the passage above was also followed Lai Kew Chai J in *Schindler Lifts (Singapore) Pte Ltd v People's Park Chinatown Development Pte Ltd (in liquidation)* [1990] 1 SLR(R) 583 at [15]:

> On 25 August 1988 the plaintiffs filed this originating summons which was heard before me on 16 and 18 May 1989 at the conclusion of which I made the declarations and the orders I mentioned earlier in this judgment. I ordered the defendants to pay over the proceeds of the goods *in lieu* of damages for conversion in accordance with what was decided in *Lamine v Dorrell* (1790) 92 ER 303. That case laid down the proposition that where a man takes goods to which he has no right and sells them, the owner may waive the tort of conversion, and recover the price for which they

were sold in an *indebitatus assumpsit* for money had and received.

86 From the passage quoted above, when a conversion consists of a wrongful sale of the goods converted, the owner of the goods may elect to claim from the defendant the price which the defendant obtained for them, as money received by the defendant for the use of the plaintiff. The law allows the plaintiff to "waive" the tort thereby ratifying the defendant's conduct to create a quasi-contractual relationship which would allow the plaintiff to sue the defendant for money had and received for the plaintiff's use.

87 The House of Lords in *United Australia Ltd v Barclays Bank Ltd* [1941] 1 AC 1 recognised that the waiver of tort doctrine enabled recovery of the sale proceeds as a choice of two remedies against the wrongdoer in the context of proprietary torts. Thus, there was no requirement for the plaintiff to waive a tort claim or ratify the defendant's tortuous conduct. In short, the plaintiff does not have to "waive" the tort, rather, he pursues the tort claim and then elects to waive the remedy of damages, claiming instead the defendant's wrongfully obtained benefit.

88 Lord Romer in his speech said at 34:

> A person whose goods have been wrongfully converted by another has the choice of two remedies against the wrongdoer. He may sue for the proceeds of the conversion as money had and received to his use or he may sue for damages that he has sustained by the conversion. If he obtains judgment for the proceeds, it is certain that he is precluded from thereafter claiming damages for the conversion. But, in my opinion, this is not due to his having waived the tort but to his having finally elected to pursue one of his two alternative remedies. The phrase "waive the tort" is a picturesque one. It has a pleasing sound. Perhaps it was for these reasons that it was regarded with so much affection by the old Common Lawyers, one of whom, indeed, was moved to break into verse upon the subject. But with all respect to their memories, I firmly believe that the phrase was an inaccurate one if and so far as it meant that the tortious act was affirmed. What was waived by the judgment was not the tort, but the right to recover damages for the tort.

89 The doctrine of alternative remedies, as described by Lord Romer above, calls for consideration of the principles governing election between remedies. Generally, a plaintiff is not required to choose before judgment is given between the two alternative remedies which he may pursue in his proceedings that rely on the same pleading of the same tort on the facts. In other words, he may claim both remedies as alternatives.

90 Whether the redress in question is viewed as a claim for money had and received or an election between remedies, I will leave this debate for resolution on another occasion. Suffice it to say that a more modern way of putting this alternative remedy of money had and received is, as is described in *McGregor* (at [84] above), that the plaintiff seeks restitutionary damages for a wrong at common law rather than the more usual compensatory damages. This alternative remedy is attractive from an evidential view point: it is easier to prove the sum the defendant had received for the sale than to establish the market price of the goods in question.

91 In this case, FSPL did not know how much D2 had sold the cargo for and that affected FSPL's choice of remedies.

Conclusion

92 For the reasons given above, I allowed FSPL's appeal. I awarded FSPL the sum of US$141,226

in damages and interest thereon at the rate of 5.33% per annum from the date of the Writ of Summons to the date of payment. I also awarded FSPL the costs of the appeal since it succeeded on a substantial part of its claim (more than 50% of the additional US$138,505 claimed) to be taxed if not agreed.

[note: 1] Sreenath Rajendhranath's 1st Affidavit, p 32.

[note: 2] Babuvenkatesh Loganathan's 1st Affdavit, pp 10–24.

[note: 3] Notes of Evidence, AD No 16/2013, 12 August 2013, pp 3–4 at lines 21–19.

[note: 4] D2's Written Submissions, para 26.

[note: 5] D2's Written Submissions at [26].

[note: 6] Notes of Evidence, AD No 16/2013, 15 May 2013, p 24 at lines 1–10 and pp 25–26 at lines 20–9.

[note: 7] Notes of Evidence, AD No 16/2013, 15 May 2013, p 23 at lines 13–16.

[note: 8] Notes of Evidence, AD No 16/2013, 15 May 2013, p 29 at line 11.

[note: 9] Notes of Evidence, AD No 16/2013, 15 May 2013, p 29 at line 23.

[note: 10] Notes of Evidence, AD No 16/2013, 15 May 2013, p 29 at lines 7–8.

[note: 11] Notes of Evidence, AD No 16/2013, 15 May 2013, p 24 at lines 1–6.

[note: 12] Notes of Evidence, AD No 16/2013, 15 May 2013, pp 23–25.

[note: 13] Notes of Evidence, AD No 16/2013, 15 May 2013, p 21 at lines 23–31.