

The "Asia Star"
[2006] SGHC 115

Case Number : Adm in Rem 30/2004

Decision Date : 29 June 2006

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : R Govintharasah (Gurbani & Co) for the plaintiff; P Jeya Putra and Magdalene Chew (AsiaLegal LLC) for the defendant

Parties : —

Admiralty and Shipping – Carriage of goods by sea – Voyage charterparties – Plaintiff requiring vessel with epoxy-coated cargo tanks – Fixture note for defendant's vessel stating that vessel's tanks epoxy-coated – Charterparty in Vegoilvoy form – Vessel's tanks discovered to be unfit to receive and carry plaintiff's cargo to destination due to severe breakdown of epoxy coating – Defendant cancelling charterparty – Whether defendant breaching term in fixture note stating that vessel epoxy-coated – Whether defendant breaching clause in charterparty to tender vessel fit to carry plaintiff's cargo to its destination – Whether defendant entitled to rely on cancellation clauses in charterparty to avoid liability to plaintiff

29 June 2006

Judgment reserved.

Tan Lee Meng J:

1 This case, which concerns a voyage charterer's claim for damages from a shipowner for losses suffered as a result of the alleged unfitness of the chartered vessel to carry the agreed cargo from the loading port to its destination, raises important questions regarding the interpretation of charterparties in the Vegoilvoy form.

Background

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

3 Pacific required epoxy-coated cargo tanks to carry the refined palm oil and the "Standard Tanker Voyage Chartering Questionnaire 1988" ("Questionnaire 88") forwarded to it by the shipping broker stated as follows in relation to the *Asia Star*'s cargo tanks:

2.16 Cargo tanks *fully* coated/type of coating Yes/Epoxy [emphasis added]

4 The fixture note specifically stated that the *Asia Star* was "epoxy coated/coiled". The voyage charterparty, which was dated 15 November 2003, was in the Vegoilvoy form.

5 The *Asia Star* arrived at Belawan on 14 January 2004 and notice of readiness to load was tendered on the same day. She moved alongside the berth on 19 January 2004 and was subjected to a pre-loading cargo tank inspection by Pacific's surveyors, Intertek Testing Services (M) Sdn Bhd ("Intertek").

6 The surveyor, Mr Zulkiflee bin Jamal ("Zulkiflee"), found that the vessel's cargo tanks were unfit to receive and carry the refined palm oil to its destination. He noted that around 40% of the epoxy coating of the vessel's cargo tanks had "broken down" and that there were loose scales and rust covering the exposed steel surface of the cargo tanks where the epoxy coating had deteriorated. Furthermore, there were blisters in the epoxy coating and remnants of cargo previously carried were found in the blisters.

7 After informing Pacific of his findings, Zulkiflee prepared a notice reserving the cargo owner's rights for the attention of the master of the *Asia Star*, Mr Cheng Xian Kun ("Mr Cheng"). It was in the following terms:

Based on the ... condition and after further discussion with the Charterer's representative, we regret to inform you that we [are rejecting] the above nominated ship's tanks as the tank condition is not suitable to [receive] the said cargo as it may [affect] and/or deteriorate the quality of the nominated cargo.

8 The master acknowledged receipt of the notice of reserve and added the following words onto it:

We have ... carried vegoils by *M/T Asia Star* for the past two years without any quality problem. All surveyor[s] accept my ship.

9 On 19 January 2004, the charterer rejected the vessel by an e-mail, which was worded as follows:

[Charterers] note that [vessel] has failed the pre loading tank inspection on 19/01/04 am due to poor tank coating. As per surveyors report only about 40% of the epoxy tank coating is intact. [Charterers] are unable to use this vessel for carriage of their cargo due to [the] high possibility of contamination due to such poor tank condition.

[Charterers] hereby hold owners responsible for all delays, costs and consequences arising from ... failure to provide suitably coated tanks for carriage of [charterer's] intended cargoes as per the charter party dated 15 Nov 03.

Alternatively owners may substitute another vessel acceptable to [charterers] to carry out this voyage. [Charterers] await owner's positive reply soonest.

10 The e-mail was not altogether accurate as Zulkiflee had reported that 40% of the epoxy tank coating was not intact.

11 On the same day, Mr Jason Wang Jian Jun (Mr Jason Wang"), the assistant business manager of CSC Oil Transportation (S) Pte Ltd, the managers and operators of the *Asia Star*, asked the shipowner's P & I Club to send a surveyor on board the *Asia Star* at Belawan to determine if the condition of the tanks was "really that bad or just an excuse from surveyor to fail the tanks".

12 The P & I Club's surveyors boarded the vessel within hours of the request from the vessel's managers and confirmed just before 4.00pm on 19 January 2004 that the vessel was indeed unfit to load the cargo.

13 At 5.42pm on 19 January 2004, Mr Jason Wang, cancelled the charterparty. His e-mail was as follows:

We noted that subject vessel is failed for loading cargo due to her tank coating's condition at loading port Belawan, Indonesia.

...

Due to this fact, we have no choice but to cancel this shipment with charterer. We already thought all other possible ways to rectify the situation but unfortunately the further tanks cleaning is doing no help to the coating. Further our other two small vessels Gold River/Silver River were all fixed with other cargo & they are all fully engaged in the near future, we are sorry to say that we are unable to substitute both ships to this shipment.

[emphasis added]

14 After cancelling the charterparty and conceding in his e-mail on 19 January 2004 that further cleaning of the vessel's cargo tanks would not solve the problem of the defective epoxy coating, Mr Jason Wang invited the charterer to re-inspect the *Asia Star's* tanks at 5.56pm on 20 January 2004 and gave the latter only until 8.00pm local time on the same day to respond to his invitation. His fax was as follows:

Our crew carried out intensive cleaning & other remedies to the tanks & the coatings without stoppages, including removal of loose scale, mop out the reachable rusty part, removed the cargo remain in the blister as practicable as possible, etc.

We now would like to invite charterer to re-inspect the tanks at anchorage to determine if same can be accepted without delay. If they fail to do so before 2000 hours local time, we shall take needed steps to prevent further delay and to protect our interest.

15 When there was no positive response to the invitation to re-inspect the cargo tanks of the *Asia Star*, the vessel was withdrawn at 11.57am on 21 January 2004.

16 Pacific claimed to have suffered loss and damage amounting to US\$1,834,050 as it was unable to fulfill its contractual obligations to the sellers of the refined palm oil in Indonesia, from whom it purchased the palm oil, and to its buyers in Turkey.

17 OAS denied that the *Asia Star* was unfit to carry the agreed cargo and pleaded that it was, in any case, entitled to avoid liability to Pacific because of specific clauses in the Vegoilvoy charterparty, which will be discussed later on. OAS also filed a counterclaim against Pacific for refusing to load the agreed cargo at Belawan.

18 On 1 March 2006, the High Court ordered that the issue of liability be determined at the trial, with damages, if any, to be assessed by the Registrar.

Abandonment of part of the claim and the entire counterclaim

19 On the first day of the trial, Pacific's counsel, Mr R Govintharasah, informed the court that his client would not be arguing that OAS had a duty to provide a substitute vessel after the *Asia Star* had been rejected while OAS's counsel, Mr Jeya Putra, confirmed that his client would not be proceeding with its counterclaim against Pacific. These developments limited the scope of the trial.

Breach of the term in the fixture note regarding epoxy coating

20 As has been mentioned, the fixture note for the *Asia Star* expressly provided that the vessel's cargo tanks were to be "epoxy coated/coiled". Pacific asserted that regardless of the terms of the Vegoilvoy charterparty, OAS breached this important term in the fixture note requiring epoxy-coated cargo tanks because 40% of the epoxy coating had broken down.

21 Surprisingly, although the *Asia Star* was described as "fully epoxy coated" in Questionnaire 88, which was submitted by the shipping broker to Pacific before the charterparty was concluded, OAS claimed that the charterparty did not require the tanks to be 100% epoxy coated and that Questionnaire 88 was not a part of the charterparty documents. OAS also clutched at straws when it asserted that the term "epoxy coating" had no technical meaning.

22 Obviously, a term requiring a vessel to be epoxy coated must mean that the epoxy coating had to be in a sound condition. A vessel whose epoxy coating had broken down by as much as 40% on average cannot satisfy such a term in the fixture note. Whether or not Questionnaire 88 was part of the charterparty, the rationale for epoxy coating is well-known. Shipowners whose vessels carry edible oil cannot be unaware of the regulations of the Federation of Oils, Seeds and Fats Associations Ltd ("FOSFA") and other organisations requiring epoxy coating for certain types of liquid cargo to ensure that the cargo would not be oxidised, discoloured or damaged by exposure to the mild steel surface of cargo tanks. Pacific's expert witness, Mr Go Peng Hai ("Mr Go"), a regional manager of Inspectorate (Singapore) Pte Ltd, which is in the business of inspection, testing and verification of commodities to facilitate trade, regulatory and quality control requirements, explained as follows:

[I]t is a generally and widely accepted requirement that palm oil products be carried in properly coated mild steel tanks. Apart from its function of preventing corrosion of mild steel tanks, *coatings also prevent palm based products from coming into contact with the bare mild steel surface or rusty surface which is a potential source of iron (Fe) contamination due to iron pick up.* [emphasis in original]

23 It follows that whether or not FOSFA or other regulations were pleaded in relation to the cargo in question, any argument that the words "epoxy coated", as stated in the fixture note, have no real meaning cannot be countenanced. As such, OAS is in breach of the fixture note if the epoxy coating in the *Asia Star*'s tanks had deteriorated by as much as 40%, as alleged by Pacific's surveyor, Zulkiflee.

OAS's obligation relating to seaworthiness

24 Pacific also asserted that apart from breaching the fixture note regarding epoxy coating, OAS also breached its contractual obligation under the Vegoilvoy charterparty to tender a vessel that was fit to carry the agreed cargo of refined palm oil from Belawan to Turkey.

25 At common law, a shipowner has an implied obligation to provide a voyage charterer with a seaworthy vessel that is fit not only to traverse the oceans but also fit to receive and carry the agreed cargo safely to its agreed destination. In *Virginia Carolina Chemical Company v Norfolk and North American Steam Shipping Company* [1912] 1 KB 229 at 243-244, Kennedy LJ explained:

[T]here is in every contract with regard to the carriage of goods by sea an absolute warranty that the carrying vessel must ... have that degree of fitness as regards both the safety of the ship and also *the safe carriage of the cargo in the ship* which an ordinarily careful and prudent owner would require his vessel to have at the commencement of the voyage, having regard to the probable circumstances of that voyage and its nature. [emphasis added]

26 The common law implied obligation of seaworthiness is absolute but it may be modified by contract. In the present case, it was modified by cl 1(a) of Part II of the Vegoilvoy charterparty, which merely requires a shipowner to exercise due diligence to "make the tanks, holds and other spaces in which cargo is carried fit and safe for its carriage and preservation".

27 Pacific's surveyor, Zulkiflee, had no doubt after surveying the *Asia Star's* cargo tanks that the vessel was unfit to carry the cargo of refined palm oil to Turkey. As has been mentioned, he found that about 40% of the epoxy coating of the vessel's tanks had "broken down" and that where the epoxy coating had deteriorated, loose scales and rust covered the exposed steel surface of the cargo tanks. In addition, blisters with remnants of cargo previously carried were found in the epoxy coating.

28 It is worth reiterating that on 19 January 2004, the managers and operators of the *Asia Star* requested the shipowner's P & I Club to send a surveyor to determine the condition of the cargo tanks of the *Asia Star* and that the P & I Club's surveyor, PT Buana Multiguna ("PTBM"), confirmed that the tanks were not suitable to receive the agreed cargo. Spica Services (Indonesia), the correspondents for the P & I Club, stated in a fax on 19 January 2004 to the vessel's managers as follows:

Attached in a copy of surveyor prelim findings for your reference.

From the surveyor findings it appeared that the tanks ... *not suitable to use* for loading edible oil, *hence it required to coat before loading the cargo*.

[emphasis added]

29 It is admittedly startling that the material part of PTBM's preliminary report was worded in exactly the same way as Zulkiflee's earlier report and it reproduced all the spelling mistakes in the earlier report. Whether the second report copied the first report is not an issue because neither the P & I Club nor OAS rejected PTBM's report at the material time and they did not arrange for another surveyor to look into the matter. In any case, whatever flaws its preliminary report may have had, PTBM promised to furnish a full formal report with photographs of the cargo tanks at a later date. Surprisingly, PTBM's full report was not issued because in Mr Jason Wang's own words, this was to "save costs" for the shipowner. It is astonishing that no attempt was made by OAS to retrieve the photographs for the trial. These photographs would have shed much light on the state of the cargo tanks. Pacific's counsel, Mr Govintharasah, understandably asserted that the photographs were not produced as evidence because they would have revealed the poor state of the epoxy coating of the cargo tanks of the *Asia Star*.

30 OAS did not furnish any concrete evidence of the state of the cargo tanks in the *Asia Star* at the material time. Its main argument appeared to be that the finding of Zulkiflee, and presumably that of its own P & I Club's surveyor, that the vessel was unfit to carry Pacific's cargo of palm oil must be untrue because the *Asia Star* carried oil cargo before and after Pacific rejected the vessel in January 2004. Its expert witness, Mr Ong Ngai Gee ("Mr Ong"), a director of Maritime Consultants & Engineers Pte Ltd, also laid emphasis in para 5.1 of his expert evidence report on the fact that the *Asia Star* had "demonstrated in three of her subsequent voyages ... that she could carry out her assignment in loading and successfully discharging palm oil and palm kernel products in bulk ... without any problem". This line of argument led Pacific to introduce evidence that in a subsequent carriage after it rejected the *Asia Star*, the surveyors passed the vessel for carriage of a cargo even though they thought that the vessel was not cargo-worthy because they had been instructed by the charterers to do so and had received an indemnity from the latter. These arguments need not be considered any further because in the light of clear evidence from both Zulkiflee and the surveyor from OAS's own P & I Club

that the vessel was not cargo-worthy in January 2004, whether or not she successfully carried cargo before or after Pacific rejected the vessel is not relevant.

31 OAS also tried to discredit Zulkiflee's findings by asserting that he had examined the cargo tanks in the night without sufficient lighting. Its expert witness, Mr Ong, suggested in para 4.1 of his report that an accurate assessment of the condition of the cargo tanks could not have been made by Zulkiflee. It ought to be noted that the ship's master, Mr Cheng, who accompanied Zulkiflee during part of the survey, did not complain about the inadequacy of lighting in his affidavit of evidence-in-chief ("AEIC") and this issue was also not raised by Mr Jason Wang in his AEIC. Zulkiflee's survey commenced at 0340 hours and lasted until 0830 hours. He was accompanied by four other shippers' surveyors on a joint survey of the cargo tanks and after the inspection of the first tank with torch lights, the surveyors requested the activation of the ship's lights and cluster lights for a better assessment of the state of the cargo tanks. Furthermore, the surveyor from the P & I Club inspected the cargo tanks during the day and also found them to be unfit. I was satisfied that Zulkiflee did a fairly thorough job in assessing the state of the cargo tanks of the *Asia Star*.

32 Mention must also be made of the assertion by OAS that the conclusions of Pacific's surveyors, Intertek, cannot be given much weight because its divisional manager in Penang, Mr Ong Keng Guan ("Mr K G Ong"), admitted during cross-examination that his company was prepared, if given an indemnity by a charterer, to certify that a vessel was fit to carry cargo even though it was not. Of course, this practice of certifying a vessel that is not cargo-worthy as fit to carry the agreed cargo in exchange for the charterer's indemnity cannot be countenanced. Those who do so should bear in mind cases such as *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 633. More recently, in *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] 1 Lloyd's Rep 1, Creswell J aptly pointed out (at 5) that leaving aside the law of contract, the position of inspection companies "is a classic example of the situation envisaged by Lord Morris in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, in which a person with particular expertise is instructed to produce a report which he knows will be passed on to another, who can be expected to rely on it". What is relevant for present purposes is that although Mr K G Ong was taken to task by the court for not fully appreciating the ramifications of his company's practice of certifying an unfit vessel as fit in exchange for the charterer's indemnity, there was no evidence that there was anything improper about Zulkiflee's finding that the *Asia Star* was unfit for the carriage of the agreed cargo of refined palm oil on 19 January 2004, and especially so since his findings were endorsed by the surveyor from the P & I Club, who investigated the matter at the request of the operators and managers of the *Asia Star*.

33 It is Pacific's case that it was entitled to refuse to load its cargo of refined palm oil onto the *Asia Star* because the oil would have been contaminated, discoloured or damaged by coming into contact with the exposed steel surface of the cargo tanks, the rust and the remnants of the cargo previously carried in its holds. Pacific had reason to be cautious because the effect of cl 17(b) of the Vegoilvoy charterparty was that it could not claim damages for any contamination of the cargo once its surveyor has accepted the cargo tanks as fit for loading.

34 Pacific's expert witness, Mr Go, explained in para 8 of his expert evidence report the dangers that poorly epoxy coated vessels pose to refined palm oil in the following terms:

During storage handling and transportation, the quality of palm oil products could deteriorate either by chemical reaction or contamination. One of the major sources contributing to quality deterioration of palm oil products during shipping is the carriage of palm oil products in mild steel tanks (or coated tanks with significant area of mild steel exposure). The mild steel will be absorbed in the palm oil during the whole transportation process from origin to destination resulting in iron contamination. The longer the voyage, the greater the contamination. The

presence of free rust and loose scale which is a sign of tank coating failure will severely aggravate the contamination of the cargo. [emphasis in original]

35 Mr Go added that the presence of iron contaminants in palm oil may lead to oxidation rancidity, increase of insoluble impurities, reduction in oil stability and colour deterioration. In addition, it may also affect the bleachability of the oil for refining purposes. In para 28 of his report, he summed up the position as follows:

The findings as stipulated in the respective Notice of Reserve (ITS) and Statement of Facts (PT Buana Multiguna) clearly showed that the "ASIA STAR"'s nominated cargo tanks were unfit for the safe carriage and preservation of quality of palm oil products in bulk. Therefore ITS' and PT Buana Multiguna's findings and rejection at the material place and time of the vessel's tanks for loading was in line with their professional practice. The surveyors made the right professional decision in rejecting the nominated ship's tanks on the grounds that they were not cargoworthy.

36 Pacific's other expert witness, Mr Edwin Wong Peng Soon ("Mr Edwin Wong"), a marine consultant and surveyor, explained in para 9 of his AEIC that where the general breakdown of the epoxy coating exceeds 20% of the surface area or where loose scale formation exceeds 10% of the surface area under consideration, the state of the coating is classified as poor.

37 The evidence of Pacific's experts was not effectively countered by the witnesses called by OAS. After considering all the circumstances of the case, I hold that the *Asia Star* was not cargo-worthy when she was presented to Pacific at Belawan and that Pacific was entitled to refuse to load its cargo of refined palm oil onto the vessel.

Whether OAS exercised due diligence

38 As the shipowner's absolute obligation at common law to furnish a cargo-worthy ship to the voyage charterer was modified by cl 1(a) of Part II of the Vegoilvoy charterparty, OAS is in breach of the obligation of seaworthiness only if it did not exercise due diligence to "make the tanks, holds and other spaces in which cargo is carried fit and safe for its carriage and preservation". As such, it is necessary to consider whether the requisite due diligence was exercised.

39 In para 9 of its amended defence, OAS claimed to have exercised due diligence before and at the commencement of the voyage to make the vessel seaworthy and cargo-worthy to the extent required for the purposes of the charterparty. Its expert witness, Mr Ong, stated in para 5.1 of his report that it was understandable and acceptable that as the *Asia Star* was over 25 years of age, its epoxy coating "would not be in 100% condition" and consideration should be given to the fact that the vessel needed to be adequately cleaned before loading the agreed cargo. Regardless of the vessel's age, the epoxy coating of her cargo tanks must be well maintained to be fit to carry the cargo in question. Mr Ong did not give sufficient consideration to the fact that cleaning the tanks would not solve the problem of unfitness because of the extent of the deterioration of the epoxy coating in the cargo tanks.

40 In any case, no maintenance or cleaning records were produced by OAS to show that the tanks were properly maintained. The master, Mr Cheng, claimed that he kept such records but had the temerity to add that these were for his "personal" purposes and were not sent to the shipowner because "he had many other duties". He was bold enough to testify that he found no loose scales or rust in the cargo tanks of his vessel even though the daily work report for the vessel dated 20th and 21st January 2004 noted that the crew "chipped loose scale and rust in cargo tank". Furthermore, in a fax to the ship's managers on 20 January 2004, the master claimed that his crew worked "barefoot

to mop the rusty part” of the tanks until there was “no ... rusty powder on the surface of it”. The fax also stated the crew “removed off loose scale by hand” and removed the rusty scales completely.

41 Mr Ji, the chief officer of the *Asia Star*, claimed that oral instructions had been given to monitor the state of the tanks. When asked who gave the instructions, he could give no better answer than the “technical department”. Although he claimed that the cargo tanks were inspected and the results recorded every three months, these records were not produced as evidence.

42 According to Pacific’s expert witness, Mr Edwin Wong, the state of the tank coatings on 19 January 2004 suggested that the owner of the *Asia Star* was either unaware of or had no interest in the state of corrosion and breakdown of the tank coating. More specifically, he asserted that there had been a failure to monitor the state of deterioration of the cargo tank coating or to ascertain the cause of the coating problem in order to determine the appropriate remedial action to be taken. I agree with him and hold that OAS breached cl 1(a) of Part II of the Vegoilvoy charterparty by not exercising due diligence to ensure that the *Asia Star* was fit to receive the agreed cargo of refined palm oil at Belawan for carriage to Turkey.

Whether OAS is exempted from liability for Pacific’s loss

43 OAS asserted that even if the *Asia Star* was not cargo-worthy, it was not liable to Pacific because of cl 1(b) and 15 of Part II of the Vegoilvoy charterparty. In its view, these clauses gave it the right to cancel the charterparty without any liability.

44 Clause 1(b) of Part II of the Vegoilvoy charterparty provides as follows:

It is understood that if the tank or tanks, into which the particular cargo covered by this Charter is to be placed, upon testing prove to be defective the Owner undertakes to execute the necessary repairs, provided repairs can be effected within 24 hours and at reasonable expense; otherwise, Owner has the option of cancelling this Charter in which case no responsibility shall rest with the Vessel, Owners, or Agents.

45 Clause 1(b) of the charterparty must be viewed in its proper context and not in isolation. It should be read together with cl 1(a) of the charterparty, which provides as follows:

Warranty (a) The Owner shall, before and at the commencement of the voyage, exercise due diligence to make the Vessel seaworthy, properly manned, equipped, and supplied for and during the voyage, and to make the pipes, pumps and heater coils tight, staunch, and strong, in every respect fit for the voyage, and to *make the tanks, holds, and other spaces in which cargo is carried fit and safe for its carriage and preservation*. [emphasis added]

46 In *Ford v Beech* (1848) 11 QBD 852 at 866; 116 ER 693 at 698, Parke J explained that an agreement “ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent”. If cl 1(b) of Part II of the Vegoilvoy charterparty is construed as giving the shipowner a right to cancel whenever his cargo holds are not fit to carry cargo, cl 1(a) of Part II of the charterparty, which imposes an obligation on the shipowner to exercise due diligence to ensure that the cargo tanks are fit to carry the agreed cargo, would have no room to operate. It must, without more, be assumed that the parties did not intend to include meaningless terms in the contract.

47 The importance of the obligation to ensure seaworthiness can never be overstated and any trimming of this obligation is strictly construed. In *Sleigh v Tyser* [1900] 2 QB 333 at 337–338, Bigham J made it clear that any restriction of this obligation was to be “express, pertinent and apposite”. This approach was endorsed by the Court of Appeal in *Sunlight Mercantile Pte Ltd v Ever Lucky Shipping Co Ltd* [2004] 1 SLR 171. It follows that unless the obligation to exercise due diligence under cl 1(a) of the Vegoilvoy charterparty has been fulfilled, the question of relying on cl 1(b) does not arise.

48 As I have found that OAS did not fulfil its obligation to exercise due diligence to ensure that the *Asia Star* was cargo-worthy when she was tendered at the loading port, OAS cannot avoid liability to Pacific under cl 1(b) of Part II of the Vegoilvoy charterparty.

49 The effect of cl 15 of the Vegoilvoy charterparty will next be considered. The relevant part of this clause provides as follows:

If Charterer’s representative does not accept the tanks as suitable for the cargo, the Owner shall have the right, as its option, to cancel this Charter Party without any resulting liability on the part of either party, or to again clean the tanks, subject to inspection as above.

50 The same hurdle that bars OAS from relying on cl 1(b) of the Vegoilvoy charterparty, namely its breach of cl 1(a) by failing to exercise due diligence to “make the tanks, holds and other spaces in which cargo is carried fit and safe for its carriage and preservation” stands in the way of any reliance on cl 15. Furthermore, the effect of cl 15 was affected by cl 5 of the fixture note, which provides as follows:

Vessel is to clean vessel’s tanks, lines and pumps to charterer’s surveyor’s full satisfaction.

51 It is trite that in the face of an inconsistency between the clauses of a standard form charterparty, such as the Vegoilvoy charterparty, and printed or handwritten provisions agreed upon between the parties, the latter will prevail: see *The Brabant* [1965] 2 Lloyd’s Rep 546. Clause 5 of the fixture note requires the shipowner to clean the vessel’s tanks to the charterer’s surveyor’s full satisfaction. In the present circumstances, no amount of cleaning of the tanks can rectify their fundamental defect, as so much of its epoxy coating has been worn out.

52 For the aforesaid reasons, the argument of OAS that cl 15 of the Vegoilvoy charterparty entitled it to cancel the charterparty without incurring any liability to Pacific does not have a leg to stand on.

Conclusion

53 Pacific is entitled to damages from OAS. The damages will be assessed by the Registrar.

54 Pacific is entitled to costs.

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