FEDERAL COURT OF AUSTRALIA

Thomson v STX Pan Ocean Co Ltd [2012] FCAFC 15

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| Citation: | | Thomson v STX Pan Ocean Co Ltd [2012] FCAFC 15 |
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| Appeal from: | | STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd (No 3) [2010] FCA 1374 |
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| Parties: | | **DAVID JOHN THOMSON v STX PAN OCEAN CO LTD** |
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| File number: | |  |
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| Judges: | |  |
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| Date of judgment: | | 29 February 2012 |
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| Catchwords: | | **ADMIRALTY** – contract of affreightment – voyage charterparty – payment of freight and load port demurrage due within five banking days after signing and release of bills of landing – time when charterer defaults - separate liability of director in addition to the charterer for ongoing representations as to capacity to pay  **TRADE PRACTICES** – misleading and deceptive conduct – officer of charterer made post-contractual representations that the charterer was imminently “ready, willing and able” to perform the contract when it was insolvent – delay in termination of the charterparty – logical Gould v Vaggelas inference of reliance on misleading and deceptive representation  **DAMAGES** – measure of damages –damages for loss of use of vessel to be assessed by determining what she would have earned but for the tortious conduct – plaintiff’s failure to adduce any evidence of a market or alternative charter rate during the period of contract – appropriate for question of damages remitted to primary judge to receive evidence on loss of profit caused by breach |
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| Legislation: | | *Trade Practices Act 1974* (Cth) ss 52, 75B, 82 |
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| Cases cited: | | *Admiralty Commissioners v S.S. Valeria* [1922] 2 AC 242  *Banque Commerciale S.A. (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279  *Barclay Mowlem Construction Limited v Dampier Port Authority* (2006) 33 WAR 82  *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64  *Dare v Pulham* (1982) 148 CLR 658  *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1  *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490  *Gould v Vaggelas* (1984) 157 CLR 215  *The Hebridean Coast* [1961] AC 545  *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666  *Nauru Local Government Council v NZ Seamen's Industrial Union of Workers* [1986] 1 NZLR 466  *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd (No 2)* [2010] FCA 1240  *The Argentino* (1889) 14 App Cas 519  *The Mediana* [1900] AC 113  *Water Board v Maustakas* (1988) 180 CLR 491 |
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| Date of hearing: | 25 November 2011 | |
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| Place: |  | |
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| Division: |  | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 63 | |
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| Counsel for the Appellant: | B Walker SC with L Jurth | |
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| Solicitor for the Appellant: | Worcester & Co Solicitors | |
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| Counsel for the Respondent: | B Rayment QC with P King | |
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| Solicitor for the Respondent: | Hicksons Lawyers | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1767 of 2010 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | DAVID JOHN THOMSON  Appellant |
| AND: | STX PAN OCEAN CO LTD  Respondent |

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| JUDGES: | GREENWOOD, MCKERRACHER AND REEVES JJ |
| DATE OF ORDER: | 29 FEBRUARY 2012 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be allowed in part.

2. The respondent’s damages claim be remitted to the primary judge to receive evidence on loss of profit caused by the breach.

3. The respondent pay the appellant’s costs of the appeal, to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | DAVID JOHN THOMSON  Appellant |
| AND: | STX PAN OCEAN CO LTD  Respondent |

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| : |  |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

**THE COURT:**

# INTRODUCTION

1. This appeal concerns two broad issues. The first relates to certain representations the learned primary judge found had been made in May 2010 by Mr Thomson, the appellant, to a Mr Kang, an employee of the respondent, STX Pan Ocean Co Ltd (**STX**). The second relates to the quantum of the damages the learned primary judge awarded to STX.

# FACTUAL CONTEXT

1. The factual context to this appeal is set out in detail in the reasons for decision of the learned primary judge (**the Trial Reasons**): see [2010] FCA 1240 (at [6]–[48]). It may be very briefly summarised as follows. STX is an international ship owner and charterer. Its head office is located in the Republic of South Korea. Its Australian representative, Mr Il‑Hwan Kang, was based in Melbourne, Australia. According to its website (see Trial Reasons (at [7])), Bowen Basin Coal Group Pty Ltd (**Bowen Basin**) claimed to be ‘an Australian company involved in the trading and export of Australian coal supply worldwide’. Mr David Thomson was the sole shareholder and director of Bowen Basin.
2. On 12 March 2010, Bowen Basin and STX entered into a charterparty whereby STX was to supply two voyage charters of vessels to be nominated by it. These voyage charters were for the carriage of two cargoes of coal from Kwinana, Western Australia, to ports in the People’s Republic of China.
3. Bowen Basin made a significant commercial loss on the sale of the first cargo of coal and defaulted in payment of hire and demurrage to STX on the charter for that cargo. After the second vessel had been at Kwinana ready to load its cargo for about one month, STX terminated the charterparty. That occurred on 17 May 2010. The primary focus of this appeal is the period of 11 days immediately preceding 17 May 2010. STX claimed that it delayed terminating the charterparty during this period because of representations made to it by Mr Thomson and others on behalf of Bowen Basin. STX originally brought these proceedings against both Bowen Basin and Mr Thomson. On the first day of the trial, judgment was entered against Bowen Basin for the sum of USD$2,483,296.25. STX then proceeded against Mr Thomson on the grounds he was liable directly, and as an accessory, under ss 52, 75B and 82 of the *Trade Practices Act 1974* (Cth) (**TPA**).

# THE APPEAL TO THIS COURT

1. The notice of appeal to this Court contains eight grounds. In his written submissions, Mr Thomson’s counsel grouped those grounds into three questions, as follows:
2. Did STX prove that the representations as pleaded at [28] of its points of claim were made (grounds 1–3)?
3. If those representations were made, did STX prove that it relied upon them (grounds 4 and 5)?
4. If STX did rely upon those representations, did it prove the quantum of any loss or damage which it had suffered as a consequence (grounds 6–8)?
5. There was a fourth issue relating to the costs order made by the learned primary judge, but that ground of appeal was abandoned at the hearing of this appeal. These three remaining questions will be considered in that order.

# DID STX PROVE THE REPRESENTATIONS?

## The pleading

1. At [28] of its points of claim, STX pleaded that, in his capacity as the manager of Bowen Basin, Mr Thomson had made various representations as follows:

Further or alternatively [Thomson] made certain further representations to [STX] during the purported performance of the charterparty in his capacity as manager of [Bowen Basin] intended to deceive [STX] into believing that [Bowen Basin] was ready, willing and able to perform the charterparty whereby [STX] continued to make its vessels the mv *Yong An 2* and the mv *Izola* available to [Bowen Basin] causing it further loss and damage.

1. This paragraph was supported by six particulars as follows:

(a) That the signature on the letter of indemnity dated 30 April 2010 purporting to be the signature of [STX’s] chartering brokers Sea Corporation Pty Ltd (“Sea Corp”) for and on behalf of [STX] and provided to Loyal was genuine;

(b) That on 12 April 2010 [Mr Thomson] sent an email to Sea Corp and to [STX] that the charterparty arrangements were “in hand” including as to “all costs associated” and that he reasonably expected “a successful outcome” from the venture comprised by the charterparty;

(c) That funds would become available within days and that if some delay was allowed [STX] would be paid its full freight and demurrage. Representations were made to the same effect to [STX], its agents and lawyers on several occasions throughout the performance of the charterparty;

(d) On 7 May 2010 [Mr Thomson] handed to Mr Kang of [STX] at [Bowen Basin’s] office on the Gold Coast in Queensland a cheque in the sum of A$1,000,000.00 drawn on an account held by [Beach Building and Civil Group Pty Ltd] with the Bank of China in Sydney and informed Mr Kang that the cheque was security over the weekend for the outstanding freight and demurrage;

(e) On 7 May 2010 [Mr Thomson] sent an email to Mr da Silva of Sea Corp referring to the said cheque as a cheque for US$1,000,000.00 to be presented Monday close of business in purported payment by [Bowen Basin] to [STX] of the outstanding freight and demurrage;

(f) On 7 May 2010 Chantelle Horton of [Bowen Basin] sent an email to Mr Ahn of [STX] attaching a photocopy of the said cheque in purported payment by [Bowen Basin] to the Plaintiff of the outstanding freight and demurrage, referring to the same as “payment”.

## The relevant Trial Reasons

1. The critical findings on the matters raised by [28] of the points of claim appear in [93], [96] and [97] of the Trial Reasons as follows:

93. I am also satisfied that Mr Thomson, as Bowen Basin’s managing director and alter ego, caused its other officers who dealt with STX and its agents to make representations in the period after 5 May 2010 orally and in writing to the effect that Bowen Basin was ready and willing to perform, and would soon be able to do so once finance, which was said to be imminent, had been obtained.

96. STX kept the charterparty on foot, and incurred expense, between 6 and 17 May 2010 because Mr Thomson made, and caused Bowen Basin’s officers to make, representations in that period that funds would become available so that STX would be paid. Mr Thomson had no belief in the truth of what he represented and Bowen Basin’s representations. First, he lied to Mr Kang about his own wealth. The lie was brazen: he was not very rich with about $25 million in assets and did not own five houses but had only some personal property worth about $100,000. Secondly, he arranged and signed the letter of indemnity with a view to obtaining discharge of the cargo from *Yong An 2* without production of the bill of lading. If the letter of indemnity had been used successfully, STX would have lost possession of the only possible source of its being paid, namely, its control over the coal on board *Yong An 2*. I infer that this was Mr Thomson’s purpose in signing the letter of indemnity. There was no explanation given by him for proposing to use it and no evidence of any difficulty in arranging for the presentation of the bill of lading. However, there is no evidence that he caused the letter of indemnity to be deployed. Thirdly, he caused Mr Kang to be given a worthless cheque drawn by Beach Building for $1 million as an earnest of good faith, knowing that Bowen Basin was then hopelessly insolvent.

97. Moreover, Mr Thomson continued to tell STX, personally or through Bowen Basin, during the period after 5 May that finance would be arranged, despite the obvious insolvency of Bowen Basin and its hopeless financial position. He intended STX to act on his false assertions that Bowen Basin would perform and that he could procure or support its performance through his personal wealth and the negotiations he claimed were occurring. Mr Thomson also argued that STX did not rely on the post-contractual representations as a reason for postponing its decision to terminate the charterparty. He pointed to the fact that it took STX until early June 2010 to cause the coal to be discharged from *Yong An 2*. I reject this argument.

## The contentions

1. Mr Walker SC, for Mr Thomson, submitted that particulars (a) and (b) of [28] were expressly rejected by the learned primary judge (at [89] and [96]; and [88] respectively of the Trial Reasons). He also submitted that particulars (d), (e) and (f), which all related to the cheque for $1 million that was given to Mr Kang, were disposed of by the learned primary judge in his findings (at [35]). It followed, so Mr Walker submitted, that the representations pleaded in [28] were essentially reduced to a reliance upon particular (c).
2. On this basis, Mr Walker submitted that the representation pleaded in [28] was nonsensical and internally contradictory because it was expressed in the present tense ‘was’ ready, willing and able, whereas particular (c) was expressed in the future conditional tense ‘would become available’ and ‘would be paid’. Mr Walker submitted the evidence of Mr Kang was to the effect that Mr Jenkins, an officer of Bowen Basin, said that payment was contingent upon suitable financial arrangements being made in the near future. He submitted this evidence contradicted the pleaded representation that there was a present ability to pay. It followed, so Mr Walker submitted, that STX had not proved the representation pleaded in [28] of its points of claim.
3. Mr Rayment QC, for STX, submitted that Mr Walker had taken the pleading in [28] too literally. He submitted the general thrust of the pleading was that Mr Thomson had represented that Bowen Basin was ready, willing and imminently able to make payment. He submitted the learned primary judge had accurately characterised the representation, and particularly the word ‘able’, in the expression ‘ready, willing and able’ (at [93] of the Trial Reasons) where his Honour described it as being: ‘to the effect that Bowen Basin was ready and willing to perform, **and would soon be able to do so once finance, which was said to be imminent, had been obtained**’ (emphasis added). Mr Rayment submitted that Mr Kang’s evidence that Mr Thomson had made representations to him about his wealth during their dinner party discussion on 6 May 2010 was appropriately treated by the learned primary judge as providing substance to Mr Thomson’s claimed ability to meet the promise of payment. He submitted Mr Kang also gave evidence that Mr Thomson had repeatedly told him over a period of days after 6 May 2010 that payment ‘will be made’. Accordingly, he submitted that STX had proved the general thrust of the representation as pleaded in [28].

## Consideration

1. It is well-established that the main purposes of pleadings are to give notice to the other party of the case it has to meet, to avoid surprise to that party, to define the issues at trial, to thereby allow only relevant evidence to be admitted at trial and for the trial to be conducted efficiently within permissible bounds: see, eg *Dare v Pulham* (1982) 148 CLR 658 (at 664–665). However, it is also well-established that pleadings are not an end in themselves, instead they are a means to the ultimate attainment of justice between the parties to litigation: see *Banque Commerciale S.A. (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 (at 293) per Dawson J who cites Isaacs and Rich JJ in *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 (at 517). For these reasons, the courts do not, at least in the current era, take an unduly technical or restrictive approach to pleadings such that, among other things, a party is strictly bound to the literal meaning of the case it has pleaded. The introduction of case management has, in part, been responsible for this change in approach: see the observations of Martin CJ in *Barclay Mowlem Construction Limited v Dampier Port Authority* (2006) 33 WAR 82 (at [4]–[8]). Even before the widespread use of case management, the High Court reflected this approach in decisions such as *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 (at 668–669) per Stephen, Mason and Jacobs JJ and *Water Board v Maustakas* (1988) 180 CLR 491 (at 497) per Mason CJ and Wilson, Brennan and Dawson JJ.
2. With these principles in mind, we turn to consider whether STX has proved the representations as pleaded in [28]. STX has relied on the six particulars pleaded in that paragraph: see at [7] above. Dealing first with particulars (a) and (b), we agree with Mr Walker’s submissions. On a fair reading of the parts of the Trial Reasons to which Mr Walker referred, it is apparent that those particulars were expressly rejected by the learned primary judge. However, we are not willing to accept that particulars (d), (e) and (f) were dealt with by the finding at [35] of the Trial Reasons. There his Honour found that Ms Horton had told Mr Kang that ‘the cheque could not be honoured because there was no money in the account and they were still trying to arrange finance’. Notwithstanding this observation, later in the Trial Reasons (at [96]), the learned primary judge referred to the $1 million cheque issue in these terms: ‘Thirdly, he caused Mr Kang to be given a worthless cheque drawn by Beach Building for $1 million as an earnest of good faith, knowing that Bowen Basin was then hopelessly insolvent’. We consider this conclusion was open to the learned primary judge on a consideration of the whole of the evidence, particularly in the context of his earlier finding (at [96] of the Trial Reasons) that Mr Thomson had brazenly lied to Mr Kang about his personal wealth.
3. Turning then to the main plank of Mr Walker’s submission, viz particular (c). In our view, Mr Walker has taken an unduly technical and restrictive approach to STX’s pleading on this aspect. We agree with Mr Rayment that the general thrust of the representation pleaded in [28] was that Mr Thomson had deceived STX into believing that Bowen Basin was ready, willing and imminently able to pay for the charterparty. As pleaded, this was a continuing representation made from the outset of, and throughout, the 11 day period between 6 and 17 May 2010. It was made against the backdrop of Mr Thomson’s brazen lie to Mr Kang about his wealth. In this context there is no inherent contradiction in pleading that ‘I am presently ready, willing and able to pay and I will do so as soon as funds become available’. In our view, the gist of STX’s case as pleaded was that Mr Thomson deceived Mr Kang into believing he had the wealth necessary to make the payment for the charter and it was only necessary to allow him a short period of time for him to do that. The purpose of that representation as pleaded was to extend the intervening period of time for as long as he possibly could, in circumstances where he had no real intention or ability to pay.
4. Furthermore, we consider the learned primary judge was correct in concluding that STX had proved that Mr Thomson made this representation. STX called evidence from Mr Kang about the conversations he had with Mr Thomson, Mr Jenkins and Ms Horton between 6 and 14 May 2010 while he was on the Gold Coast attempting to collect the payment from Bowen Basin. That included Mr Kang’s evidence about the dinner party conversation that occurred near the outset of his visit to the Gold Coast on 6 May 2010 which set the scene for the repeated promises of payment over the succeeding 8 days. The learned primary judge made findings about what occurred at that dinner party (at [33] of the Trial Reasons) as follows:

On 6 May 2010 Mr Kang also flew from Melbourne to the Gold Coast in Queensland to discuss Bowen Basin’s defaults. Mr Kang met Mr Thomson and another person associated with Bowen Basin, Bruce Jenkins. Neither Mr Thomson nor Mr Jenkins gave evidence. I accept Mr Kang’s evidence. At dinner that night Mr Thomson told Mr Kang unequivocally that payment would be made the next day (7 May). Mr Jenkins said that their attempts to arrange funding were almost finalised and that the money would be remitted to STX’s account the next day. Mr Thomson told Mr Kang that he was very rich and had personal assets of $25 million. He said that he had established the Beach Building group 10 years before and that it had an annual turnover of more than $30 million. Mr Thomson said that he was a very successful property developer and owned five houses on the Gold Coast and in Mackay. He asserted to Mr Kang that he intended to list his company on the London Stock Exchange in the future if it could get some funding.

1. Later in the Trial Reasons, the learned primary judge found that at the time he made this statement, Mr Thomson had limited personal assets and Bowen Basin was ‘hopelessly insolvent’ (at [43]). There was therefore ample evidence upon which his Honour could conclude Mr Thomson had brazenly lied about his wealth.
2. There was also ample evidence to support his Honour’s findings that Mr Thomson, Mr Jenkins and Ms Horton had variously repeatedly stated that payment was imminent and that funds were being obtained. That included the following evidence from Mr Kang.

In his evidence-in-chief (at 32):

No, I’m asking about you personally. How many days did you wait there?---I got the instruction from head office to go to Gold Coast 5 May, Wednesday, and I went to Gold Coast Thursday, and I waiting for the payment Thursday, Friday, Monday, Tuesday, Wednesday, Thursday and Friday, until 14 May, but nothing has been made. Nothing made. Nothing payment. Only just promise. Verbally – verbally he promise, and by he – sends a message, okay, payment will be soon. But I waiting for the payment – I think it’s more than 10 days in Gold Coast. But nothing. More than seven days, you know. Thursday, Friday, Saturday – actually, no, more than 10 days.

In his cross-examination (at 35–36):

Right. That’s all right. Now, you’ve also given evidence today about the conversations that you had with Mr Thomson from 6 May through to the following Thursday or Friday, when you visited the Gold Coast. And, on a number of occasions, Mr Thomson, according to your evidence, said words to the effect that you would have payment in the next day or the next couple of days - just wait, and the payment would come through. That’s the effect of your evidence?---Yes, I met David Thomson Thursday, and Friday I have never met. I waiting for him for day and Friday. But what he said to me that is just, you know, the payment Thursday, payment will be made Friday. Friday, no, Bruce Jenkins and - he told me on Monday, definitely, you know, payment will be made. On Monday, they said Tuesday. Tuesday, yes.

…

This is what they told you, isn’t it, that they would be able to make payment the following day because they were hoping that financing arrangements would come through?---But already according to charter party, within five days, all payment should be paid. That is the, you know, obligations. And that is, you know, the common sense in the shipping industry, shipping field. One day, one day, this is never acceptable.

And (at 37–38):

I want you to limit yourself to the actual words spoken by Mr Thomson. Do you understand what I’m asking you to do?---You mean he’s trying to get some funding, right?

Yes. He said that, didn’t he?---Actually, no. Bruce Jenkins explained me. David Thomson, he just, you know, told me, “No problems. Payment will be made. I am rich. I have a very big groups. We will list the company stock exchange – London stock exchange.” So – but Bruce Jenkins explained, “They are trying to get some funding. The funding almost, you know, finalised, so the money will be remitted to your account – sole account tomorrow.” That is it. David Thomson, I don’t remember what he explained about - - -

You don’t remember David Thomson saying that?---Yes, about this financial matters.

But certainly Bruce Jenkins told you that they were trying to arrange - - -?---You’re right.

1. In relation to this evidence, it is appropriate to record that Mr Kang is of Korean descent and his command of English, whilst sufficient to convey the meaning he intended, was obviously not perfect. It is also important to note that Mr Thomson elected not to give evidence at the trial. Thus, he did not take the opportunity to deny anything that Mr Kang had said in his evidence or to show that he and the others were being truthful when they told Mr Kang that Bowen Basin was able to pay for the charter and finance was being obtained to do so.
2. We therefore consider his Honour correctly construed the general thrust of the representations pleaded in [28] and had ample evidence from which to draw the conclusions he did about the representations so pleaded. There is therefore no basis upon which this Court can, or should, interfere with those conclusions. This, all the more so, where one of the critical findings, viz that Mr Thomson had brazenly lied to Mr Kang, was quintessentially a finding as to Mr Thomson’s credit made in circumstances where he failed to give evidence to respond to that allegation.

# IF THE REPRESENTATIONS WERE MADE, DID STX PROVE IT RELIED ON THEM?

1. On this second question, Mr Thomson’s case was that, even if it were accepted that the learned primary judge properly found that Mr Thomson, together with the other two officers of Bowen Basin, had made the representations pleaded in [28] of STX’s points of claim, there was no evidence that STX, as a corporate body, had relied upon those representations in deciding not to terminate the charterparty until 17 May 2010. Mr Thomson’s case on this question was put in different ways. Mr Walker submitted that, given the circumstances, Mr Kang had little reason to believe what he had been told by Mr Thomson, and the other officers of Bowen Basin, and there was no evidence from Mr Kang that he did, in fact, believe what they told him. Mr Walker also submitted that there was no evidence that Mr Kang had communicated those representations to anyone in authority at STX. He submitted that, Mr Ahn, the charterparty manager of STX, was silent on this issue in his evidence and, in those circumstances, the learned primary judge was left to speculate about whether that communication had occurred. In support of these submissions, Mr Walker pointed to a statement in Mr Kang’s affidavit where he said:

I am further so informed and believe that despite various assurances by [Bowen Basin] to [STX] that they were hopeful of being able to do so it soon became apparent to [STX] that [Bowen Basin] had serious financial difficulties in that [Bowen Basin] had no funds to pay the outstanding amounts due to [STX] under the charter.

1. We reject these submissions. The evidence showed that Mr Kang was the Australian representative for STX located in Melbourne. He gave evidence that Mr Ahn of STX’s head office in Korea requested him to go to the Gold Coast for the express purpose of collecting the moneys owing by Bowen Basin for the charterparty. Furthermore, there was evidence that while he was on the Gold Coast he sent at least one document relating to that issue to STX’s head office for consideration. While it is true that neither Mr Kang nor Mr Ahn expressly said in their evidence that Mr Kang believed the representations made to him, or that he had communicated them to Mr Ahn or anyone else in STX, in our view, it was clearly open on the evidence for the learned primary judge to infer that this had occurred. Ultimately, there could be no other logical commercial reason why STX delayed the 11 days it did in terminating the charterparty.
2. Moreover, as Mr Rayment correctly submitted, on this aspect the learned primary judge relied upon the principles stated in *Gould v Vaggelas* (1984) 157 CLR 215 (at [98]) as follows: ‘First Mr Thomson desired to bring about the result that STX would not terminate. His conduct in making the post-contractual representations in May was a cause of STX not doing so until 17 May 2010’: *Gould v Vaggelas* (at 236) per Wilson J. In the circumstances where delay was the unchallenged purpose of Mr Thomson’s representations and STX did in fact delay in terminating the charter, we consider the learned primary judge was entitled to rely upon *Gould v Vaggelas* to draw the inference that that delay was, at least in part, induced by Mr Thomson’s representation.

# CONCLUSION ON REPRESENTATIONS ISSUES

1. For these reasons, we reject Mr Thomson’s appeal insofar as it relates to the first and second questions and, therefore, grounds 1–5 inclusive of the notice of appeal. We now turn to deal with the third question, which relates to the damages issue.

# DAMAGES

1. A major difficulty faced by the primary judge was the lack of evidence adduced by STX to support any permissible claim in damages. Indeed, STX failed to address those inadequacies despite clear warning by Mr Thomson. His Honour was left to do the best he could in those circumstances.

## Grounds of appeal

1. The grounds of appeal in relation to damages deal with two areas. The first, dealing with wasted fuel (**bunkers**), was that the primary judge erred in awarding damages of $10,000 per ship for loss of bunkers while the ships were idle when there was no specific evidence to support that conclusion. STX adduced no evidence and offered no, or no sensible or satisfactory, explanation for its failure to adduce such evidence.
2. The second and major argument, at least as developed orally, was quite simple. It was that there was, again, no evidence of any loss suffered in reliance upon the post-contractual representations. The cost of engaging the vessels had already been incurred. (Had the pre‑contractual representations been established, those costs would clearly have been recoverable. That part of STX’s case, however, failed (Trial Reasons at [72])).
3. As to the post-contractual representation, there was no evidence that if STX had not been induced to delay termination by 11 days it could or would have derived other income by deploying the vessels elsewhere in that time. Again, this unexplained absence of evidence was in circumstances where STX would be expected to be in a position to call such evidence but did not do so.

## The approach of the primary judge

1. It is necessary to examine the way in which the damages claims were developed and addressed in order to consider the grounds of appeal.
2. The primary judge having found a fraudulent misrepresentation by Mr Thomson (Trial Reasons at [92]-[98]), his Honour noted (at [99]) that had STX known of the fact that Bowen Basin was then ‘hopelessly insolvent’, it would have terminated the charterparty immediately on 6 May 2010. His Honour continued (at [99]):

I am of [the] opinion that STX is entitled to recover its loss as a result of the moneys it expended on *Yong An 2* and *Izola* in the period between noon on 6 May and the time of termination on 17 May 2010. That loss was a direct and foreseeable consequence of Mr Thomson’s fraudulent representations and his causing Bowen Basin to make the similar post-contractual representations in this period.

1. Under the heading of ‘STX’s alternative claim for damages’ in the Trial Reasons, the primary judge then considered, but rejected, an alternative claim advanced by STX for the unpaid freight and demurrage payable in accordance with the Bowen Basin charterparty in the total sum for which judgment was entered against Bowen Basin. His Honour correctly indicated (at [101]) that such computation would be a contractual measure of damages, being conceptually different to that in tort and generally for claims under s 82 TPA: *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 (at 11-13 per Mason, Wilson and Dawson JJ). His Honour emphasised (at [101]) that the appropriate measure of damage for reliance upon the fraudulent misrepresentation was similar to reliance loss, namely, calculated with the object of putting the plaintiff in the position he or she would have been in had the tort not been permitted (*Gates* at 12 and 13).
2. His Honour then again, correctly, recorded (at [102]) that STX had offered no evidence of what it could or would have done had it been aware of the alleged misrepresentations prior to entering into the charterparty or at any time before it terminated, other than to prove that it would not have entered into or proceeded with the charterparty once it had learnt of the true position. Rather, it argued that its loss was able to be measured in tort as the loss of the opportunity to earn freight, demurrage and other entitlements at the rate at which Bowen Basin had agreed to pay for these in the charterparty.
3. His Honour (at [103]) pointed to the fallacy in that argument as being demonstrated by STX’s own evidence of the charterparty that it negotiated for *Yong An 2* and *Izola*. Each of those charterparties was for a lesser daily rate of hire than the USD27,000 under the Bowen Basin charterparty. Those rates varied significantly between the two charters (USD24,000 and USD19,500). As his Honour noted in the same paragraph, there was no evidence that the rate it had struck with Bowen Basin was a market rate that it could have earned, had it not been induced to enter into or proceed further with the charterparty. Indeed, the rates that STX had struck to charter each of *Yong An 2* and *Izola* were telling evidence, his Honour said, that market rates were lower than Bowen Basin had agreed to pay and varied significantly over a short period of time. His Honour pointed out that a claim for demurrage would not be available as against Mr Thomson as he was not a party to the Bowen Basis charterparties under which demurrage was fixed.
4. The primary judge noted (at [107]) that the general rule in assessing damages in tort for loss of use of a vessel due to a collision is to determine what she would have earned had she not been incapacitated in the period for which the claim is made: *Admiralty Commissioners v S.S. Valeria* [1922] 2 AC 242 per Lord Buckmaster (at 246 and 247) with whom Lords Dunedin, Atkinson and Carson concurred. His Honour was of the opinion that a similar principle was apposite to the claim by STX. As indicated below, we agree.
5. Critically, his Honour concluded (at [108]) that if STX were allowed to recover damages from Mr Thomson calculated at the rates in the charterparty, it would recover not merely its loss that it had incurred in reliance on the representations, namely, the costs of and incurred in pursuing the two charters, but also the anticipated profit that it would have earned had Bowen Basin been able to pay. There was no evidence of a market or alternative charterer from which STX could have earned the rates under the charterparty, or indeed any other rates, during the period it was on foot. Thus, his Honour said, it was not possible to assess what STX might have earned had it not relied on the post-contractual representations because STX gave no evidence beyond the cost to it of, and relating to, fulfilling its obligations under the charterparty.
6. In the subsequent judgment (relevantly dealing with quantum), his Honour dealt with the primary damages claim (in [2] and [3]) as follows:

**DAMAGES - INTRODUCTION**

2 I found that STX was entitled to recover its loss as a result of the moneys it expended on the two ships it chartered, *Yong An 2* and *Izola*, in the period between noon on 6 May to the time of termination on 17 May 2010: *STX* [2010] FCA 1240 at [99]. I directed that on or before 16 November 2010 the parties bring in short minutes of orders as to the sum of damages and interest for which judgment should be entered in respect of that period. STX provided a calculation seeking charter hire for the two vessels and further amounts for bunkers consumed while they were at idle during the period, together with interest at the USA LIBOR rate at May 2010 of 0.28469%. I received no calculation put forward by Mr Thompson in accordance with my directions.

**DAMAGES - SUBMISSIONS**

3 During the course of argument today, the amounts of damages for hire under the two time charters have been agreed for the 11.1736 (days being the period for which I awarded damages) at the rate of USD24,000 per day for the *Yong An 2* amounting to USD268,166.40, and the *Izola* at the rate of USD19,500 per day amounting to USD217,885.20.

1. His Honour then went on to discuss the question of bunkers to which we will return under the next topic. Where his Honour indicated that ‘damages’ had been ‘agreed’ in [3], his Honour’s statement is consistent with the reference in [2] to the direction that a short minute of orders as to the sum of damages and interest for which judgment should be entered in respect of the period should be brought in.
2. Senior counsel for Mr Thomson on the appeal, Mr Walker SC, made it clear that at all times in the argument before his Honour, as well as on appeal, Mr Thomson had taken issue with computing damages by the method set out at [99] of the Trial Reasons (as repeated (at [2]) and computed (at [3]) in [2010] FCA 1374). Senior counsel for STX agreed that to the extent Mr Thomson had agreed figures, it was only as to the daily rate (and computations it affected), not as to the methodology or basis of the award of damages.
3. In argument on the appeal, senior counsel for Mr Thomson made very clear that STX could not recover the sums based on [99] of the Trial Reasons as it was already obliged to make those payments before the post-contractual representations were made.
4. In our view, this argument is correct. The pleaded pre-contractual representation failed. Thus, STX entering into obligations to charter the ships was not found to have been caused by any actionable breach on the part of Mr Thomson. The breach found against Mr Thomson was the post-contractual breach by which time liability to meet those payments had already been incurred.
5. The aggrieved claimant in such a situation will be entitled to recover any loss of profits which could reasonably be expected to have been derived but for the tort.
6. In *The Hebridean Coast* [1961] AC 545, Devlin LJ (at 562) observed that in dealing with a claim for general damages for detention during repairs, there was no difference between ships and other chattels in the principles to be applied. While the type of ship needed to be considered, that is, whether it was a trading, pleasure vessel, warship or utility vessel, it did not mean there would be different rules for different categories.
7. A detailed examination of the cases illustrating the range of possibilities of measuring damages in relation to the inability to use a potentially profit earning ship appears in McGregor H, *McGregor on Damages* (18th ed, Thomas Reuters, 2009 (at [32-023] to [32‑037]). It is clear from the discussion that ships are no different from other profit earning chattels, the use of which the innocent party has been deprived of as a result of the tortious conduct (or statutory contravention) by the tortfeasor. The range of permutations is considerable. Therefore, it illustrates that the correct measure of damage was that to which his Honour referred in the Trial Reasons at [107] but on which no evidence had been adduced by STX.
8. In *Nauru Local Government Council v NZ Seamen's Industrial Union of Workers* [1986] 1 NZLR 466, the Court of Appeal considered the principles involved in measuring damages for loss of use of a ship arising from tortious industrial action. The Court examined a number of admiralty decisions in which questions of damages in tort have arisen in relation to the loss of use of a vessel while undergoing repairs. As noted, obiter, by Richardson J (at 473) no difficulty ordinarily arises where the vessel is profit-earning because the loss of use of the vessel and of the earnings which would ordinarily be derived from its use during the period it is not available for trading purposes is ‘certainly damage which directly and naturally flows from a tortious act depriving the owner of its use’ (*The Argentino* (1889) 14 App Cas 519).
9. In *S.S. Valeria*, referred to by the primary judge (at [107]), the vessel had been used as an ordinary trading vessel. It was held that the measure of damage was the amount of freight which, but for the accident, the ship would have earned during the period of detention plus working expenses.
10. However, at present there is little utility in speculating as to the purpose to which these two ships may have been put and the financial impact of such activity as STX, remarkably, led no evidence whatsoever in relation to those topics.
11. In our view, Mr Thomson has made good his argument on this point. The question then is whether or not STX should have another opportunity to adduce evidence and argument in support of a claim in damages to be computed in the correct manner as identified by the primary judge (at [102] of the Trial Reasons). We will return to that question after considering the question of bunkers.

## Bunkers

1. There was also no direct evidence on the actual daily rate incurred in respect of bunkers on the 11 days during which the termination of the contract was deferred. On the other hand, there was ample evidence as to the total cost of bunkers and the daily average cost for the entire period of liability by STX. That amount was very much higher than the amount of $10,000 per day each allowed by the primary judge.
2. The primary judge noted (at [4] in [2010] FCA 1374) that STX claimed that *Yong An 2* consumed bunkers at the daily rate of 2.5 metric tonnes of diesel oil at idle. Its total bunkerage expenses were USD803,807 for the nearly 72 days she was on hire. That cost included bunkers consumed during a voyage from Kwinana to Shanghai.
3. STX claimed that *Izola* consumed bunkers worth USD182,180.59, including for the voyage she made to Kwinana, over the nearly 44 days she was on hire. STX’s calculation for bunkers consumed by *Izola* for the 11.736 days included fuel oil at the rate of 1 metric tonne per day at $415.90 and diesel oil at the rate of 2.5 metric tonnes per day at $930.02.
4. STX claimed that, for the period of just over 11 days, the bunkers consumed by *Yong An 2* at idle should be allowed at about USD21,000, and for *Izola* at about USD30,000. By comparison, 11 days of the average cost per day for the whole 72 days, using the total bunkerage costs in evidence for each of the two vessels, would have produced, for *Yong An 2*, in the order of USD67,000 per day, and for *Izola*, in the order of USD45,000 per day.
5. Once again, his Honour noted (at [5]) that (surprisingly again) there was no evidence as to how STX arrived at the figures which it sought in its calculation. Nor was there any evidence to explain why *Izola* would be likely to consume almost 50% more bunkers at idle than *Yong An 2* during the same period of approximately 11 days.
6. Notwithstanding this, his Honour rejected the argument that STX was entitled (at best) to nominal damages only in the absence of evidence of bunker use in the 11 day period. He noted (at [7]) that ‘the assessment of damages can sometimes of necessity involve what is guesswork rather than estimation’. His Honour observed that ‘[w]here precise evidence is not available, a court must do the best it can, and uncertainty as to contingencies is not a reason to refuse to assess damages’. His Honour cited *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 per Mason CJ and Dawson J (at 83), per Deane J (at 119-120), per Toohey J (at 138).
7. His Honour was, quite correctly, satisfied in all the circumstances that as a matter of common sense, each of the vessels had to consume some amount of bunkers while they sat at idle.
8. STX had adduced evidence of its overall expenses and substantiated them. His Honour noted (at [8]) that one possibility open was for those damages to be assessed by adopting simply an average of the total bunkerage costs for the whole of the period for which each vessel was on hire and then applying that average to the 11 days for which damages were to be recovered. The other and clearly preferable possibility was that some lesser rate should be adopted so as to recognise that less bunkers were likely to have been consumed while the ships were at idle.
9. His Honour concluded (at [9]):

I am of opinion that it is appropriate to award a sum for what is an obvious and actual loss incurred by STX in maintaining the two vessels at idle in port in performing the charter party. It is likely that each vessel consumed substantially less at idle than she would have while steaming at sea fully laden or in ballast. The expense for which STX is entitled to damages was induced by the fraudulent representation that I found Mr Thompson had made. In addition, the nature of the fraud was calculated to induce STX to incur loss of this kind. Doing the best I can, I will allow bunkerage, for *Yong An 2* while she was at idle in port, at the rate of USD10,000 for the period in question. I will allow the same rate in respect of *Izola*, making a total of $20,000 for the bunkerage of the two vessels. ...

1. As senior counsel for the appellant put it on oral argument in the appeal, the question on appeal was whether, accepting the principles to which his Honour referred to, his Honour nevertheless applied ‘too broad a brush’ in this instance.
2. Our impression, having regard to the very substantial discount adopted by his Honour for an average daily rate, taken together with the acknowledged fact that fuel was being used while the ships lay idle during the delayed termination period, is that the finding reached by his Honour was open. It was arrived at in a manner which accorded with the principles reflected in the cases to which his Honour referred. We would not, therefore, interfere with the damages conclusion on bunkers.
3. All that said, this may be quite incidental. If the matter is to be remitted and if STX is able to prove loss of income for the 11 day period, the bunkers claim will fall away as the net income derived would have to take into account the cost incurred in deriving that income. In other words, if the vessels were put to use they would not be using bunkers at the ‘idle’ rate. That takes us to the next issue.

## Should the matter be remitted?

1. The final and difficult question is whether or not STX should have yet another opportunity to prove its loss on the method favoured by his Honour (at [107]) of the Trial Reasons, rather than the method at [99]. Senior counsel for Mr Thomson firmly submitted that STX had already had sufficient opportunity below and referred the Court, in particular, to a passage of argument before his Honour on 26 November 2010 as well as earlier amendments STX was forced to make in its claim despite warnings from Mr Thomson that the claim could fail.
2. Senior counsel for STX, on the other hand, argued that it was very clear that substantial damage had been sustained by STX as a result of the serious fraud carried out by Mr Thomson. Inherent in such an argument must be the submission that the errors and omissions in STX failing to adduce evidence on this central issue, when such evidence one way or another must surely have been available, were errors and omissions, in respect of which Mr Thomson might be compensated in costs but should not be visited upon STX itself.
3. Although the considerations are finely balanced, we would favour the latter position. His Honour has already correctly made the point in oral exchanges and in written reasons that the damages case was not at all well considered but, in our view, that deficiency is now appropriately reflected in costs orders rather than in depriving STX of its opportunity to prove its loss in accordance with the correct method referred to by the primary judge at [107] of the Trial Reasons.
4. Accordingly, we would give Mr Thomson the costs of the appeal but remit the question of damages to the primary judge so that STX has a final opportunity to adduce evidence on the topic referred to by the primary judge at [107]. The following orders are made:
5. The appeal be allowed in part.
6. The respondent’s damages claim be remitted to the primary judge to receive evidence on loss of profit caused by the breach.
7. The respondent pay the appellant’s costs of the appeal, to be taxed if not agreed.

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| I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Greenwood, McKerracher and Reeves. |

Associate:

Dated: 29 February 2012