IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 36

Civil Appeal No 12 of 2019

Between

BWG

… *Appellant*

And

BWF

… *Respondent*

Originating Summons No 1086 of 2018

Between

BWF

… *Plaintiff*

And

BWG

… *Defendant*

JUDGMENT

[Companies] — [Winding up] — [Disputed debt] — [Arbitration agreement] — [Standard of review] — [Abuse of process]
[Abuse of Process] — [Inconsistent positions]

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v
BWF

[2020] SGCA 36

Court of Appeal — Civil Appeal No 12 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Steven Chong JA and Quentin Loh J
26 November 2019

16 April 2020 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 This appeal was heard together with Civil Appeal No 174 of 2018. Both appeals involved the same legal issue: what is the standard of review when a dispute that is subject to an arbitration arises in relation to a debt which forms the basis of a winding-up application? This court's decision on this issue is set out in full in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33 ("*VTB Bank*"). In short, we held that when a court is faced with either a disputed debt or a cross-claim that is subject to an arbitration agreement, the *prima facie* standard of review should apply, such that the winding-up proceedings will be stayed or dismissed so long as (a) there is a valid arbitration agreement between the parties; and (b) the dispute falls within the scope of that arbitration agreement, provided that the dispute is not

being raised by the debtor in abuse of the court's process (*VTB Bank* at [56]). We also held that the doctrine of abuse of process is an appropriate measure to check against possible abuses of the *prima facie* standard. We stressed that in determining whether there has been an abuse of process, the court must be wary not to engage in the merits of the parties' dispute, as the court is not the proper forum to adjudicate the dispute between the parties which is subject to arbitration (*VTB Bank* at [100]).

2 In transactions involving the sale of commodities, back-to-back contracts or a string of contracts are commonplace. Quite often, the physical supplier or the original seller might not know the identity of the ultimate receiver or buyer. Between these two parties there would typically be a chain of intermediaries whose sole interest is to earn some commission or a modest price differential. If the transaction goes smoothly, everyone down the line will be paid. Serious difficulties will, however, be encountered in the event of a default by one of the parties in the string of contracts. Parties who are intermediaries would by definition be both sellers and buyers albeit to different parties and would quite often find themselves "between the devil and the deep blue sea". *Vis-à-vis* their buyer, they could adopt one position while *vis-à-vis* their seller, they may well adopt a different and somewhat inconsistent position.

3 This was precisely the quandary faced by the respondent in the present case. It is difficult for an intermediary such as the respondent to anticipate how the litigation involving separate parties would eventually pan out. In the meantime, such an intermediary would be expected to take steps to best protect their own interest and in the process, may find themselves adopting inconsistent positions as against different parties in the chain.

4 This appeal thus raises an interesting question as to whether the enforcement of a settlement agreement, in separate proceedings against a third party, which is premised on claims mirroring those faced by the debtor in a winding-up context, constitutes an adoption of inconsistent positions as against the creditor such as to amount to an abuse of process. The ultimate purpose of this inquiry is to determine whether the court should restrain the commencement of a winding-up application against the debtor.

5 This judgment will also examine the scope and nature of the abuse of process doctrine when it is invoked to prevent a defendant from raising an inconsistent defence. This is particularly germane when there are competing policy imperatives in play. Should a court prevent a defendant from raising the defence of illegality on the basis of abuse of process if the effect of doing so would enable the claimant to enforce an illegal claim? In our view, as abuse of process is a discretionary doctrine, its application must necessarily be premised on a proper balancing exercise to prevent the greater risk of injustice.

Facts

Contracts

6 There was a string of contracts involving X, the appellant, and the respondent, which concerned the sale and purchase of the *same* cargo of crude oil ("the Cargo"). The first contract was between X and the appellant, with X as the seller and the appellant as the buyer ("the X-appellant contract"). The second contract was between the appellant and the respondent, with the respondent as the buyer (the appellant-respondent contract"). As it turned out, there was another contract downstream between the respondent as the seller and X as the buyer ("the respondent-X contract"). Thus, in this string of contracts, X was both the ultimate seller and the ultimate buyer of the Cargo.

7 The timelines for payment under the three contracts bear highlighting as they have a material bearing on the true purpose behind the string of contracts. First, the appellant would pay X, by way of a letter of credit, within 30 days upon tender of a notice of readiness ("the NOR") at the discharge port. Then, X would pay the respondent within 89 days of the tender of the NOR. Lastly, the respondent was obliged to pay the appellant within 90 days of the tender of the NOR. Under these timelines, X was to pay the respondent *before* the respondent was due to pay the appellant, despite the fact that the respondent was due to receive the Cargo from the appellant prior to its purported delivery to X.

8 We also draw attention to the different prices of the Cargo under the various contracts in the chain. In the X-appellant contract, the Cargo was sold for US$29,945,600. In the appellant-respondent contract, the respondent was obliged to pay the appellant a sum of US$30,245,600 while in the respondent-X contract, X was obliged to pay the respondent a sum of US$30,253,600. Therefore, under this string of contracts, the respondent would make a modest gain of US$8,000 while the appellant stood to gain around US$300,000.

9 Based on the above timelines, the respondent was due to pay the appellant by 11 July 2018. However, the respondent did not make payment by this date because its position was that it was obliged to pay the appellant only upon being paid by X. There is no dispute that X failed to pay the respondent by 10 July 2018, as required under the respondent-X contract.

Negotiations

10 The respondent's failure to pay the appellant by 11 July 2018 was preceded and followed by a number of discussions involving representatives of the respondent, the appellant and X.

11 On 2 July 2018, Shi (an oil trader with X) and two senior employees of X (Muda and Machida) requested to meet Anh, the Deputy Director (Head of Training) of the respondent, who was partially involved in arranging the deal with the respondent and X. Anh was informed by Shi that X would not be able to make payment to the respondent for the Cargo by 10 July 2018.

12 Anh agreed to meet X's representatives on 3 July 2018. The meeting was attended by Anh, Thanh (the respondent's finance manager), Machida and X's Chief Operation Officer, Jun. There appears to have been some discussion on an "alternative" payment plan by X to the respondent. A second meeting also took place on 3 July 2018, but this time involving Chew, a trader in the appellant's Singapore office, with Machida and Jun.

13 On 4 July 2018, a further meeting took place between Anh and Chew. It appears that it was during this meeting that the respondent first became aware that the appellant had initially bought the Cargo from X, and that the appellant had procured its bank, UBS, to issue a letter of credit to X. In other words, it was during this meeting that the respondent found out that X was both the ultimate buyer and the ultimate seller of the Cargo. In a second meeting on 4 July 2018, the respondent's representatives again met with X's representatives together with Chew of the appellant. According to Chew, all the parties had discussed payment by way of instalments by X to the respondent. These sums would in turn be paid by the respondent to the appellant.

14 Pursuant to these discussions, on 12 July 2018, the respondent entered into a settlement agreement with X for the unpaid sum of US$30,253,600 ("the Settlement Agreement"). It is worth reiterating that the appellant was privy to the specific discussions leading up to the Settlement Agreement. In particular, Chew was present during the meeting on 4 July 2018 when representatives of

X and representatives of the respondent discussed the plan to make delayed payment by way of instalments. Indeed, as we mention below at [20], Chew would later acknowledge that he received a copy of the "payment proposal" by X on 6 July 2018.

15 In essence, the Settlement Agreement required X to pay the outstanding sum over four instalments from 10 August to 9 November 2018. The Settlement Agreement also contained an undertaking for Sit, the Chief Executive Officer of X, to execute a personal guarantee for the outstanding sums under the Settlement Agreement. Under the Settlement Agreement, the first payment fell due on 10 August 2018. X, however, only made part-payment of US$50,000 each on 17 and 30 August 2018, and thereafter failed to make payment of the remaining sums.

16 What should be emphasised is that, during these discussions, the respondent appeared to accept that it should pay the appellant, but only *after* it was paid by X under the respondent-X contract. On 3 May 2018, a WhatsApp exchange took place between Shi and Anh, and Shi informed Anh as follows:

> Shi: … pls only pay [the appellant] after you get payment from [X]
>
> Shi: [X] has issued chairman's gurantee [*sic*] to [the respondent], which may protect [the respondent] just in case

17 Thereafter, on 3 July 2018, one day before Anh's meeting with Chew, Shi again informed Anh that the respondent was to pay the appellant only after it was paid by X. The WhatsApp conversation between Anh and Shi reads as follows:

> Anh: [X]
>
> Anh: Said they want to do 6 months instalment

…

Anh: *And we pay money first to [the appellant]*

Shi: *no way*

…

Shi: *u can reject immediately*

…

Shi: let me talk to Ranggau [*ie*, another trader at X] on this

Shi: [the appellant] trader is his friend

Shi: *no way [the respondent] pay before receiving money*

[emphasis added]

18 Consistent with what he was informed of by Shi, Anh told Chew, during their discussion on 4 July 2018, that the respondent would pay the appellant if and when it received payment from X. On 5 July 2018, Chew sent Anh an e-mail asking him to "confirm that the payment shall be paid on [the] due date".

19 On 6 July 2018, Anh responded to Chew as follows:

> …
>
> Right now, [X] is delaying payment. *As you know our agreement is that [the respondent] will only pay to [the appellant] if it is paid by [X]. If [X] does not pay, [the respondent] will not pay either.*
>
> As informed …, we have received [X]'s offer per your request during Wednesday's meeting between all three parties. Please see attached. *[X] has also told us that your side is agreeable to accept rescheduled payments.*
>
> FYI, [X] has also confirmed that they can give a parent company guarantee from their listed company if their payment terms are accepted. *This is good enough for [the appellant].*
>
> As next step, please confirm [X]'s payment terms are acceptable to [the appellant]? …

> *The difficult situation is all because [X] is defaulting on its obligations to both of our companies.* We hope we can settle this matter soon and that it will not affect the relationship between our companies.
>
> [emphasis added]

20 Presumably, the reference to "*Wednesday's meeting* between all three parties" [emphasis added] was to the second meeting that took place on 4 July 2018. Chew acknowledged that Anh had e-mailed him a copy of the "payment proposal" received by the respondent from X. Significantly, the appellant did not dispute the contents of the respondent's e-mail of 6 July 2018 – specifically that the appellant had agreed to accept the rescheduled payments after payment by X to the respondent.

21 On 9 July 2018, the appellant sent a reminder to the respondent that payment was due on 11 July 2018. Having failed to receive payment by 11 July 2018, a second reminder was sent by the appellant on 12 July 2018. On 12 July 2018, Anh replied to the appellant by an e-mail which reads as follows:

> …
>
> [The respondent] will honour all its legal obligations. *However, we do not agree that we are liable to pay [the appellant] any sums at this stage. Among other things, we have not received any payment from [X].*
>
> …
>
> [emphasis added]

22 Faced with these demands for payment by the appellant, and having not received payment from X on 10 July 2018, the respondent entered into the Settlement Agreement with X on 12 July 2018.

Procedural history

23 Having failed to receive full payment of the first instalment due under the Settlement Agreement on 10 August 2018, the respondent was not in a position to make payment of the sums claimed by the appellant under the appellant-respondent contract. It is undisputed that the respondent did not make any payment under the appellant-respondent contract.

24 On 13 August 2018, the appellant served a statutory demand under s 254(2)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed) on the respondent. It is significant that the appellant's statutory demand was made *after* X failed to pay the respondent the first instalment due under the Settlement Agreement on 10 August 2018. On 20 August 2018, the respondent's solicitors responded by way of letter, disputing the claim. In the letter, the respondent's solicitors refuted the appellant's assertion of a debt, stating, among other things, that "the transaction was on a 'pay to be paid' basis". In other words, "[the respondent] would only pay [the appellant] after they received payment from [X]" [emphasis added]. The respondents also took the position that the appellant-respondent contract was "a sham and unenforceable", because it was "part of a circuitous arrangement between [X] and [the appellant]".

25 Further, the respondent's solicitors requested that the appellant withdraw the statutory demand, since the appellant-respondent contract contained the following arbitration clause:

> … ANY DISPUTE, DIFFERENCE OR CLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, INCLUDING ANY QUESTION REGARDING ITS EXISTENCE, VALIDITY OR TERMINATION, SHALL BE REFERRED TO AND FINALY RESOLVED BY ARBITRATION IN LONDON TO THE EXCLUSION OF ANY OTHER FORUM OR JURISDICTION IN ACCORDANCE WITH THE ARBITRATION ACT 1996, OR ANY STATUTORY MODIFICATION THEREOF ('THE ACT') FOR THE TIME BEING IN FORCE WHICH RULES ARE DEEMED TO BE

> INCORPORATED BY REFERENCE INTO THIS PROVISION. THE TRIBUNAL SHALL CONSIST OF 3 ARBITRATORS APPOINTED IN ACCORDANCE WITH THE ACT. THE PARTIES HEREBY AGREE TO EXCLUDE AND WAIVE ALL OF THEIR RIGHTS OF APPEAL TO THE COURTS FROM ALL AWARDS MADE BY THE TRIBUNAL TO THE INTENT THAT ANY SUCH AWARD SHALL BE FINAL AND BINDING ON THE PARTIES EXCEPT IN THE CASE OF MANIFEST ERROR. JUDGMENT UPON ANY AWARD RENDERED UNDER THE ARBITRATION MAY BE RENDERED AND ENFORCED BY ANY COURT OF COMPETENT JURISDICTION. THE PARTIES AGREE THAT ALL ARBITRATION PROCEEDINGS CONDUCTED HEREUNDER AND THE DECISION OF THE TRIBUNAL SHALL BE KEPT CONFIDENTIAL AND NOT DISCLOSED, EXCEPT TO A PARTY'S AFFILIATES, ACCOUNTS AND LAWYERS. …

26 The appellant's solicitors replied on 28 August 2018, rejecting the request. On 3 September 2018, the respondent took out HC/OS 1086/2018 to set aside the statutory demand and to restrain the appellant's pending winding-up proceedings.

The respondent's proceedings against X and Sit

27 In reaction to the appellant's proceedings against the respondent for US$30,245,600, the respondent commenced proceedings against X for non-payment of the outstanding sums under the Settlement Agreement.

28 On 30 August 2018, the respondent likewise served a statutory demand on X. X failed to pay the sums due under the Settlement Agreement. Thereafter, on 1 November 2018, the respondent commenced HC/CWU 260/2018 ("CWU 260") against X.

29 On 13 December 2018, X applied by way of HC/OS 1539/2018 ("OS 1539") for a moratorium on proceedings against it. An affidavit filed by a representative of X in support of OS 1539 revealed that X was facing significant debts of approximately US$870m. The moratorium was granted and was

subsequently extended until 30 January 2020. At the same time, X sought more time to restructure its debts for the wider corporate group of which X was part. In the meantime, CWU 260 has been stayed since 14 December 2018, pending the outcome of OS 1539.

30 Further, on 11 April 2019, the respondent successfully obtained a bankruptcy order in Hong Kong against Sit for non-payment under the personal guarantee, which was provided in connection with the Settlement Agreement. Based on the evidence before us, it is not entirely clear when formal legal proceedings against Sit were commenced (see below at [92]).

Decision below

31 Applying the *prima facie* standard of review, the High Court Judge below ("the Judge") held at [22] that the debt was disputed and such dispute fell within the arbitration agreement. For the reasons stated in *VTB Bank* ([1] *supra*), we agree with her adoption of this standard of review.

32 Further, the Judge considered that there had been no admission by the respondent as regards both the liability and quantum of the claim. The Judge went on to consider whether, apart from admission of the debt, there was any other possibility of abuse of process. In this regard, the appellant had relied on four doctrines: (a) waiver by election; (b) approbation and reprobation; (c) the lack of clean hands (in equity); and (d) abuse of process. The Judge rejected all four grounds.

33 Satisfied that there was at least a *prima facie* dispute and that the respondent had not admitted to the debt, nor had there been any abuse of process, the Judge granted the respondent an injunction to restrain the appellant from taking out winding-up proceedings.

Parties' cases on appeal

34 In this appeal, the appellant contends that the respondent had made an admission as to its liability to pay the sum due under the appellant-respondent contract. Relatedly, the appellant submits that the respondent had acted *inconsistently* by taking out proceedings against X pursuant to the Settlement Agreement as well as pursuing Sit to bankruptcy, while at the same time relying on three of its four defences ("Price Defences"). According to the appellant, adopting such inconsistent positions amounts to an abuse of process. In response, the respondent seeks to affirm the Judge's decision in applying the *prima facie* standard of review. Further, it relies on four defences to support its position that, in the event the court applies the higher triable issue standard of review, there are nonetheless triable issues.

35 We briefly describe the four defences raised by the respondent as they are relevant irrespective of the applicable standard of review.

36 First, the respondent asserts that the appellant failed to comply with cl 8.1 of the appellant-respondent contract. Under this clause, payment was to be made against the presentation of the seller's commercial invoice and the "usual shipping documents". The "usual shipping documents" are defined under cl 8.1 as "copies of non-negotiable bills of lading plus certificates of quantity, quality and origin (or equivalent documents) issued at the loading terminal". In this regard, it is common ground that no certificates of quantity, quality and origin were ever provided by the appellant to the respondent ("the non-receipt of documents defence").

37 Second, the appellant never passed title or delivered the Cargo to the respondent. Thus, the respondent contends that the appellant's claim for the price of the Cargo cannot succeed ("the title defence").

38 Third, the entire transaction involving X, the appellant and the respondent was a sham or tainted by illegality, rendering it unenforceable. In sum, stale documents that did not represent any real cargo were used to create the false impression of a genuine sale and purchase of goods, although the sale of the Cargo between X and the appellant was in truth a disguised loan. Therefore, the respondent contends that UBS was wrongfully induced to effect payment under the letter of credit upon the provision of such false documents. In particular, the respondent argues that while the letter of credit extended by UBS required X to present original bills of lading, the X-appellant contract only required X to provide "copy" documents to the appellant, and false documents were indeed used. The appellant-respondent contract was also aimed at deceiving the third-party bank, and was similarly tainted by illegality and therefore unenforceable. The fact that UBS was ultimately repaid by the appellant made no difference as both the appellant and X had structured the entire transaction with the intention of deceiving UBS into purportedly financing a sham sale transaction ("the illegality defence").

39 We refer to the above three defences – the non-receipt of documents defence, the title defence and the illegality defence – collectively as the "Price Defences". The reason why we have grouped these three defences collectively as the "Price Defences" – leaving out the fourth defence which is separately described below as the "the pay when paid defence" – is that the appellant's argument as regards the inconsistent position adopted by the respondent only pertains to the Price Defences. As explained at [56] and [57] below, this distinction has a material bearing on the outcome of the appeal.

40 Fourth, the respondent claims that it is only obliged to pay the appellant *after* it has been paid by X, as there was an "unwritten understanding" or "side agreement" to that effect. This understanding is borne out by the meetings

between the three parties as well as the exchange of correspondence. The respondent's position is that it was only an intermediary in the entire string of contracts, and it did not assume any contractual or credit risks relating to the transaction. Its role was merely to facilitate the transmission of documents and payments between the appellant and X. For this reason, the string of contracts was deliberately structured in such a manner as to provide for the respondent to receive payment from X before payment was due from the respondent to the appellant. Consistent with the respondent's limited role, it was to receive merely a token commission of US$8,000 from the transaction. From the respondent's perspective, as Shi (an employee of X) had coordinated the deal between the appellant and the respondent, Shi must have been authorised by the appellant to negotiate the terms of the appellant-respondent contract on behalf of the appellant ("the pay when paid defence").

Our decision

41 It cannot be seriously disputed that any or all of the four defences raised by the respondent would satisfy the *prima facie* standard of review. Furthermore, as the appellant's case on inconsistency is only in relation to the Price Defences, it is axiomatic that the appeal cannot succeed since the pay when paid defence, based on the evidence as set out at [13]–[21] above, certainly raises at least a *prima facie* dispute which must be referred to arbitration. In this regard, it should be emphasised that in order for the appellant to successfully rely on the abuse of process exception to displace the respondent's right to refer the dispute to arbitration, it must discharge the burden of establishing that *all* the four defences are similarly infected by abuse of process.

42 Nonetheless, for completeness, we consider whether any of the Price Defences raised by the respondent constitute an abuse of process such as to prevent the respondent from relying on those defences in the arbitration for the purpose of seeking an injunction against the appellant.

Preliminary finding on the true nature of the entire transaction

43 Before delving into the issue of whether there was an abuse of process on the part of the respondent in relation to the Price Defences, we first state our preliminary finding on the true nature of the entire transaction involving X, the appellant and the respondent. In brief, we agree with the respondent that the X-appellant contract does not appear to be a *bona fide* transaction for the sale of goods but was instead a disguised loan arrangement between the two parties.

44 The evidence shows that it was Shi, an employee of X, who had introduced the appellant to the respondent. Anh was first approached by Shi on 10 April 2018. Both of them had been introduced by Li, a senior manager of a Chinese state-owned oil trading company. It appears that all of the negotiations leading to the appellant-respondent contract as well the respondent-X contract were facilitated through Shi, *an employee of X*. This is evidenced by various WhatsApp conversations between Shi and Anh. Between 11 April 2018 and 19 April 2018, Shi sent Anh details of the intended deal between the appellant and the respondent, as well as information on a potential deal between the respondent and a sub-purchaser of the Cargo. In the circumstances, the appellant must have known that Shi was arranging the appellant-respondent contract on behalf of the appellant. These details were referred to as "deal recap drafts" and included, among other things, the volume of crude oil, the sale price, the delivery window and the payment timeline for the agreement. Initially, the plan was for the respondent to on-sell the Cargo to an entity known as "Arc".

However, the buyer was later changed to X. These conversations between Shi and Anh also reveal that Shi was in contact with the appellant. It is therefore clear that X must have known, through Shi, that it would be the eventual buyer of the Cargo from the respondent following the deal between the appellant and the respondent.

45 Apart from the fact that it was an employee of X who had facilitated the transaction between the appellant and the respondent, there were several other aspects of the transaction which appear consistent with a disguised loan arrangement.

46 For instance, there is no evidence that the appellant had ever traded with the respondent prior to this transaction. Nevertheless, the appellant appeared not to have any difficulty in transacting with the respondent to sell the Cargo valued in excess of US$30m without any form of security from the respondent. In a typical transaction, where a seller sells cargo to a buyer, it would generally withhold the bill of lading so that the buyer would not be able to take delivery and title does not pass unless either security for payment is provided or payment is received. Indeed, no explanation was provided by the appellant as to why it was prepared to deliver the Cargo of considerable value without taking any form of security from the respondent.

47 In addition, the documents used to facilitate the entire transaction appear highly suspicious. The only indication that the Cargo had been purportedly delivered to the respondent was an "update" from the vessel master forwarded to the respondent in an e-mail. The vessel master's update stated that discharging was completed on 24 April 2018 at 6.48pm. It is, however, not entirely clear from the vessel master's update whether the discharge involved

the same Cargo. It is especially significant that the vessel master's update completely omits any mention of the appellant, the respondent or X.

48 More suspiciously, the tendered NOR was addressed to two entities known as "Haiyuan" and "Petrobras" as the receiver and charterer respectively. Conspicuously, X, the appellant and the respondent were not named in the NOR. Chew's explanation was that nothing was amiss because the NOR would not have expressly identified all the cargo receivers in respect of a charter, and it was market practice for a NOR to refer only to one of the intended cargo receivers. While that may well be true, there was still no explanation for the specific involvement of Haiyuan and Petrobras in the string of contracts without any mention of *any* of the three parties in the string of contracts.

49 Finally, the material terms of the X-appellant, appellant-respondent and respondent-X contracts, when read together, are consistent with a loan arrangement. The substance of the contracts was that X would receive the funds from the appellant under the letter of credit issued by UBS with the Cargo as ostensible security for the payment. At the end of the string of transactions, the Cargo would be returned to X, and a larger sum of funds would be paid to the appellant. The amount that the appellant stood to gain was about US$300,000 in the span of 60 days, which works out to an annualised interest rate of about 6.3%.

50 Given the above, we are of the view that the transaction between X and the appellant does not appear to be a genuine transaction for the sale of goods, but appears to be a disguised loan arrangement instead. It would also appear that appellant was privy to this arrangement, it being the party dealing directly with X and procuring UBS to issue X a letter of credit on the presentation of original bills of lading, but tendering an NOR that did not reflect either the respondent

or appellant as parties delivering or receiving the Cargo. As the purported creditor in the disguised loan transaction, it is self-evident that the appellant must have known the true nature of the transaction. It also appears to us that the appellant had secured the letter of credit from UBS on a false premise.

51 What then is the impact of this assessment on the merits of this appeal? Specifically, how would these preliminary observations have a bearing on the question of abuse of process in relation to the Price Defences raised by the respondent?

Abuse of process

52 In *Jtrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159, this court cited with approval Lord Sumption's statement in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160 at [25], that "abuse of process is a concept which informs the exercise of the court's procedural powers". This court further explained that abuse of process is a concept by which the court ascertains whether the proceedings in question constitute an "improper use of its machinery" (at [99]). In *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [22] (albeit in the context of O 18 r 19(1)(*d*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC")), this court also observed that abuse of process imports considerations of public policy and the interests of justice, and signifies that the process of the court must be used *bona fide*.

53 We also highlight that abuse of process is ultimately exercised at the court's discretion, which depends on all the interests and circumstances of the case. As this court observed in *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 at [38] and [44] (albeit in the context of a particular type of abuse of process known as the "*Henderson* rule", *ie*, that a

litigant may not make a case in litigation which might have been, but was not, made in previous litigation, as doing so may amount to an abuse of process):

> … [T]he court will exercise its *discretion in such a way as to strike a balance* between allowing a litigant with a genuine claim to have his day in court on the one hand and ensuring that the litigation process would not be unduly oppressive to the defendant on the other. The court *will also be mindful of the considerations which led a claimant to act as he did* … [emphasis added]

54 The learned authors of *Singapore Civil Procedure 2020*, vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th Ed, 2020) made an observation at para 18/19/14 (in the context of O 18 r 19(1)(*d*) of the ROC), "The categories of conduct rendering a claim … an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material". In sum, the doctrine of abuse of process has been developed to permit the courts to police their own processes and guard against abuse. This may entail balancing considerations of public policy and the interests of justice.

55 In *VTB Bank* ([1] *supra* at [97]–[99]), we explained that the doctrine of abuse of process can be applied as a control mechanism against possible abuses of a lower standard of review. We highlighted that the abuse of process doctrine coheres better with the whole law of civil procedure, including stay applications based on exclusive jurisdiction clauses (as in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 and applications under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed). We also noted that abuse of process manifests itself in a multitude of different scenarios (*VTB Bank* at [99]). A paradigm example of abuse is where a debtor had previously admitted that it owes the debt, but subsequently disputes the debt. In the absence of a clear and convincing reason for the change of position,

the court should generally refuse an application for stay of the winding-up proceedings (*VTB Bank* at [94]).

56 Another example of abuse of process might be where a debtor adopts an inconsistent position as regards a defence which it raises to dispute the debt to restrain a winding-up application. The debtor may have taken an inconsistent position in the same proceedings or in related proceedings. This is analogous to the situation where a debtor had previously admitted that it owes the debt, but subsequently disputes it. The assertion of inconsistent positions may be treated as an abuse of process in order to protect the integrity of the judicial process and to safeguard the administration of justice. Similarly to the paradigm example in *VTB Bank* mentioned above, if the debtor takes an inconsistent position in the same or related proceedings, the court may, in the absence of a clear and convincing reason for the debtor's inconsistency, deny the debtor relief as its conduct might amount to an abuse of process.

57 It would therefore be evident that in considering whether a debtor has taken inconsistent positions, the court is required to take a granular approach and consider each defence separately not for the purposes of the merits but to determine whether there was any abuse of process. Where, for instance, a debtor raises *multiple* defences, some of these might well not involve taking an inconsistent position. Raising these defences would thus not amount to abuse of the court's process. In such a situation, the debtor may still be able to obtain relief as there are some defences that would satisfy the *prima facie* standard of review.

58 In this regard, we emphasise that here a party's inconsistent positions are analysed under the doctrine of abuse of process, which as we noted at [53] above, is a discretionary jurisdiction, and may involve considerations of public

policy. Hence, by reason of *policy considerations and in exceptional circumstances*, the court may decline to hold that a party is in abuse of process *despite* the party's inconsistent conduct if there is a risk of even greater injustice in barring that party from taking such an inconsistent position.

Parties' submissions on the abuse of process

59 We now turn to the issue of whether the respondent had acted inconsistently such that it would be an abuse of the court's process for it to invoke the *prima facie* standard of review to restrain the winding up application.

60 Briefly summarised, the appellant contends that the respondent had acted inconsistently in bringing winding-up proceedings against X and bankruptcy proceedings against Sit on the one hand, and advancing the Price Defences against the appellant on the other, such that the respondent's conduct amounted to an abuse of process. In particular, the respondent denies that it received delivery and/or good title to the Cargo and claims that its contract with the appellant is unenforceable for illegality, but it also sought the Court's assistance in a winding-up application (*ie*, CWU 260) for a default of payment against its downstream buyer, X, for the same Cargo, and brought bankruptcy proceedings against Sit for the same sum. In this regard, the appellant submits that it was clearly within the respondent's knowledge, at the very latest by August 2018 (*ie*, before it commenced the winding-up proceedings against X and bankruptcy proceedings against Sit) whether it had actually received delivery of the Cargo.

61 According to the respondent, there is no inconsistency between bringing claims against X and Sit pursuant to the Settlement Agreement and personal guarantee respectively and resisting the appellant's claim for the price of the Cargo. This is because the claims against X and Sit under the Settlement

Agreement and Sit's personal guarantee respectively are separate from the underlying claim giving rise to it (*ie*, under the respondent-X contract). In addition, the respondent submits that the appellant's allegation that it had acted inconsistently failed to take into account the respondent's position all along that it was nothing more than an intermediary in the entire transaction. This point was also made by Mr Tan Chuan Bing Kendall, counsel for the respondent, who explained that steps were taken against X and Sit so that the respondent would receive payment from X or Sit and be in a position to discharge its liability to the appellant.

Has the respondent adopted inconsistent positions?

Applicable principles on settlement agreements

62 In determining whether the respondent's claims against X and Sit are inconsistent with the Price Defences raised against the appellant, it is relevant to have regard to the general principles relating to a settlement agreement or compromise, in particular the relationship between the validity of the underlying claim and the validity of the settlement.

63 In *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR(R) 798 at [26], this court endorsed the following passage from the decision of the Privy Council in *Jayawickreme and another v Amarasuriya (since deceased)* [1918] AC 869 at 873:

> It is plain from these passages that the decision of the learned District Judge was based upon the view that the compromise could not be supported, because the alleged trust which the female plaintiff threatened to enforce by action was not a valid trust enforceable at law, nor a *justa causa debendi*. He thus permitted himself to be led astray by the form of the pleading and the issue from determining whether the alleged compromise which it was sought by the suit before him to enforce was valid into that of determining whether the threatened suit alleged to have been compromised could have

> succeeded if prosecuted to its end — a wholly different and irrelevant question. *The legal validity or invalidity of the claim the female plaintiff threatened to enforce by action is entirely beside the point if she, however mistakenly bona fide, believed in its validity.* [emphasis added]

64 Hence, a settlement agreement may be valid even if the underlying claim (which was compromised) is invalid, so long as the plaintiff *bona fide* believed in the validity of the underlying claim. As stated in *Foskett on Compromise* (David Foskett gen ed) (Sweet & Maxwell, 8th Ed, 2015) ("*Foskett on Compromise*") at para 2-19:

> … It would seem that provided a claimant believes that he has a right to make the claim he asserts, even if he has little confidence in its ultimate success, a compromise of it is valid. *If, on the other hand, he makes a claim which he knows to be unfounded and derives an advantage from the compromise of the claim, his conduct will be considered fraudulent and the compromise liable to be set aside*. [emphasis added]

65 The same principle applies in cases where the compromised underlying claim is invalid for reasons of *illegality*. In the English Court of Appeal case of *Binder v Alachouzos* [1972] 2 QB 151 ("*Binder*"), the defendant had borrowed £65,000 from the plaintiff and the plaintiff's associates. The defendant refused to repay the debt on grounds that the sums claimed were in respect of unlawful moneylending transactions and were therefore irrecoverable. Prior to commencement of the trial, parties reached a compromise agreement by which the defendant agreed to pay the plaintiff a settlement sum of £86,565. As Lord Denning held (at 158), a *bona fide* agreement of compromise, with fair and reasonable terms, is binding and enforceable, and will not be tainted by the illegality of the underlying transaction. The compromise agreement was held to be *bona fide* because there was a genuine dispute as to whether the plaintiff was an unlawful moneylender. Lord Denning acknowledged that there were two competing considerations – preventing evasion of the Moneylenders Act on the

one hand, and enforcing *bona fide* compromise agreements on the other. With respect to the former consideration, it was noted that the Moneylenders Acts were for the protection of borrowers, and the court would not allow a moneylender to use a compromise as a means of getting around the Moneylenders Acts. However, if parties could never compromise in such a situation, then every case would have to go to court for final determination and consideration, which could not be right. Hence, it was held that as long as the compromise contained reasonable terms and was entered into in good faith, it should be enforced. Lord Roskill agreed, and further noted that the plaintiff had provided valuable consideration in the form of a promise not to pursue the dispute over the factual issue of whether the transactions were unlawful moneylending transactions; the compromise was therefore enforceable (at 160).

66 *Binder* was recently upheld and applied in *FPH Law (a firm) v Martyn Robert Brown (T/A Integrum Law)* [2018] EWCA Civ 1629 ("*FPH Law*") at [46]. The Court of Appeal in *FPH Law* noted that an example of a compromise which lacked *bona fides* is where one party *knows* that the underlying transaction is invalid, and yet negotiates the compromise (which assumes the contrary) (at [40]).

67 One rationale for this proposition is that there is a lack of consideration in such a situation. Where it is known to the party (who forbears to pursue his claim in the settlement agreement) that his claim is in fact baseless, such as where it would be void for illegality, then there is no consideration for the compromise, and the settlement agreement may be liable to be set aside: *Hyams v Coombes* (1912) 28 TLR 413 and *Burrell & Son v Leven* (1926) 42 TLR 407, affirmed in *Poteliakhoff v Teakle* [1938] 2 KB 816 at 822. Similarly, in *Foskett on Compromise* at para 4–74, it is stated that where the compromise is of a dispute on a contract which is indisputably illegal, the compromise itself is

illegal and unenforceable. This is because the consideration for the compromise (the forbearance to sue on an illegal contract) is illegal, as it is clear that the claim is unfounded.

68 Another rationale is grounded in public policy and prevention of abuse. As stated in *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 33nd Ed, 2018) ("*Chitty*"), at para 4-051:

> A compromise of a claim which is legally invalid and which is either known by the party asserting it to be invalid or not believed by that party to be valid is not contractually binding. This rule can be explained either on the ground that merely making or performing a promise to give up a worthless claim cannot constitute consideration for the counter-promise, ***or (preferably) on grounds of public policy***. As Tindal CJ said in *Wade v Simeon* [(1846) 2 CB 548, 564]: "It is almost *contra bonos mores* and certainly contrary to all the principles of natural justice that a man should ***institute proceedings against another*** when he is ***conscious that he has no good cause of action***". [emphasis added in bold italics]

69 The case of *Binder* ([65] *supra*) was discussed in *Chitty* at para 16–040, in its discussion on compromises of illegal contracts. Therein, it is asserted that the norm is that the compromise, like the illegal underlying contract, is not enforceable:

> There is a manifestly obvious public policy in favour of encouragement and enforcement of compromises of disputes which the parties themselves have agreed to … However, ***to enforce compromises of illegal contracts would have the effect of undermining the public policy underlying the illegality doctrine***: it would be paradoxical, to say the least, to permit a party to enforce the compromise of an illegal contract but not the illegal contract itself. Whether the compromise of an illegal transaction is itself enforceable depends on the question of whether the courts must give effect to the broad social policy underlying the illegality despite any private arrangement between the parties. ***Normally this will mean that the compromise, like the illegal contract, is not enforceable.*** An interesting problem on the compromise of an allegedly illegal contract arose in *Binder* … The Court of Appeal upheld the compromise, but it did so on the grounds that ***the***

> ***compromise was of a dispute of fact whether the contract was in actual fact an illegal moneylending contract. This was not a case where a clearly illegal contract was compromised***, assuming *arguendo* that such a contract could be compromised. …
>
> [emphasis added in bold italics]

70 In the present case, there is no evidence that the respondent did not genuinely believe in the validity of its claim against X *at the time it entered into* the Settlement Agreement on 12 July 2018. Nor was it suggested by the appellant that the respondent entered into the Settlement Agreement in order to distance itself from the underlying transaction. In the circumstances, it appears to us, certainly at this stage, that there is no reason to believe that Settlement Agreement was not validly *entered into*.

71 However, the crux of the issue here is not the *validity* of the Settlement Agreement *per se* but its subsequent *enforcement*. We appreciate, of course, that the Settlement Agreement is distinct from the contract that gave rise to the underlying claim which was thereafter compromised. We are also cognisant that the Settlement Agreement may be valid notwithstanding deficiencies in the underlying claim, so long as the respondent *bona fide* believed in the validity of the claim at the time it was entered into. We are, however, not concerned with those issues of validity. Instead, the question is whether, in raising the Price Defences against the appellant's claim under the appellant-respondent contract, the respondent has acted inconsistently *vis-à-vis* its *enforcement* of the Settlement Agreement against X and if so, whether such inconsistent conduct amounts to an abuse of process. Put differently, is it permissible for the respondent to, on the one hand, enforce the Settlement Agreement against X while, on the other hand, *in these proceedings*, maintain that: (a) the underlying appellant-respondent contract is illegal and unenforceable; (b) that no Cargo

was ever delivered; and (c) that the requisite documents had not been delivered from the appellant to the respondent?

72 This distinction is critical because it appears that while the Settlement Agreement was validly entered into at the time it was concluded, by the time of its enforcement against X and Sit, the respondent might have been aware that the underlying respondent-X contract and/or the appellant-respondent contract were both arguably sham contracts. The crucial question is thus whether enforcing a Settlement Agreement, which the respondent believed was validly entered into, is an abuse of process because at the time of enforcement, it had reason to believe that the underlying transaction was somehow tainted by some illegality.

Title defence

73 We preface our analysis by expressing our view on *when* the respondent first became aware that no Cargo was actually delivered from the appellant to the respondent. The earliest *possible* date that the respondent could have found out that the Cargo was not actually delivered was 30 April 2018, when the vessel master's update was forwarded via e-mail to the respondent. In our view, however, it is clear that the respondent did not suspect that anything was amiss from the vessel update alone, given that it continued to negotiate with representatives of X and the appellant up until July 2018 in an attempt to secure payment from X so that it could make payment under the appellant-respondent contract. We accept the respondent's claim that it had found out about the non-delivery of Cargo around August 2018, in light of the respondent's solicitors' letter to Clyde & Co LLP, the appellant's English solicitors, dated 8 August 2018, which states:

> No Cargo was ever delivered in accordance with the terms of the [appellant-respondent contract]. Indeed, [the respondent has] recently come to believe that no such Cargo was ever intended to be delivered under the Contract.
>
> It has recently come to [the respondent's] attention that, unbeknownst to them, the transaction giving rise to the purported Contract (under which [the respondent was] interposed between [the appellant] and [X]) was part of a deliberate circle-out arrangement between [the appellant] and [X]. …

74 Further, on 2 November 2018, Li filed an affidavit on behalf of the respondent stating that Haiyuan – which was addressed as the "Receiver" of the Cargo on the NOR – had purchased the Cargo from Petrobras. This is consistent with the respondent's claim that it had found out around August 2018 that no Cargo was delivered under the appellant-respondent contract.

75 Despite knowing that no Cargo had actually been delivered, on 1 November 2018, the respondent proceeded to commence winding-up proceedings against X under the Settlement Agreement. A bankruptcy order was then obtained against Sit on 11 April 2019 in Hong Kong, in respect of the unpaid sum due from X, albeit *under the Settlement Agreement* but not under the respondent-X contract. In taking out proceedings against X and Sit, counsel for the appellant, Mr Nish Kumar Shetty, claims that the respondent had acted inconsistently in that it sought to recover the outstanding sums under the Settlement Agreement, which was identical to what was purportedly owed under the respondent-X contract, *ie*, US$30,253,600, but denies in these proceedings that it ever received the Cargo from the appellant.

76 However, this argument plainly ignores the undeniable fact that the proceedings against X and Sit were under the Settlement Agreement, and not based on the underlying agreement (*ie*, the respondent-X contract). In this regard, although the Settlement Agreement was undeniably premised on the

underlying agreement, it is in law a separate cause of action. The respondent was therefore not strictly relying on the respondent-X contract as a basis of the debt owed by X when the respondent commenced proceedings against X and Sit. Under the Settlement Agreement, there was no question of any cargo due for delivery or passing of title to the Cargo. We are therefore not satisfied that there was any such inconsistency in relation to the title defence as alleged by the appellant.

Non-receipt of documents defence

77 Under cl 8.1 of the appellant-respondent contract, payment was to be made against the seller's presentation of the seller's commercial invoice and the "usual shipping documents". There is no dispute that the appellant did not comply with cl 8.1. However, the appellant claimed that, as between the appellant and the respondent, and as between the respondent and X, the very same documents were involved. Thus, if the respondent claims in these proceedings that it had never received the documents from the appellant, then it follows that it could not have passed on those same documents to X.

78 While the appellant is not wrong to highlight this point, in our view, it does not follow that the respondent had acted inconsistently in this regard. In enforcing the Settlement Agreement against X, the respondent did not have to, and indeed did not, take any position on the appellant's compliance with cl 8.1 (*ie*, whether it had received the requisite documents from the appellant). This is because the respondent's own non-compliance under cl 8.1 (*ie*, the respondent's failure to deliver the requisite documents to X) would at best be a defence that X could have raised against the respondent's claim. It would also have been open to X to waive strict compliance with cl 8.1 of the respondent-X contract to require the respondent to produce the requisite documents. The respondent

could therefore legitimately maintain a claim, and compromise it, against X despite the fact that it had never delivered the requisite documents under cl 8.1 to X. We should add that this was precisely the quandary which we had highlighted at [3] above. When the respondent commenced the proceedings against X and/or Sit, it was not aware (and could not have been aware) of what position X and/or Sit would adopt in response to the respondent's claims. The fact that X and/or Sit did not *subsequently* take steps to raise these defences which the respondent was entitled to raise *vis-à-vis* the appellant cannot be used to somehow preclude the respondent from raising them as against the appellant.

79 Seen in this light, therefore, it is not inconsistent for the respondent to seek to enforce the Settlement Agreement against X, while at the same time accepting that it had not fully complied with the terms of cl 8.1 – that would be a dispute that could be compromised by the Settlement Agreement. To put the point in a different way, in enforcing the Settlement Agreement, the respondent never represented that it had delivered the requisite documents under cl 8.1 to X. That position is not inconsistent with its position here – that it never received the requisite documents from the appellant. The difference is simply that the respondent here is seeking to enforce strict compliance with the terms of cl 8.1 as against the appellant in accordance with its strict contractual rights under the appellant-respondent contract. The mere fact that X might well have waived strict compliance of the documents *vis-à-vis* the respondent does not mean that the respondent is somehow precluded from insisting on strict compliance *vis-à-vis* the appellant.

Illegality defence

80 We have already expressed our preliminary view on the true nature of the transaction, *ie*, that it does not appear to be a genuine transaction for the sale

of goods but seems to be a disguised loan arrangement instead, and that the appellant was privy to this arrangement, having procured a letter of credit from UBS on the basis of a genuine transaction for the sale of cargo (see [43]–[50] above). We should also make clear that we express *no conclusive views* on whether there was any illegal or fraudulent conduct, or whether the transaction was *in fact* tainted by illegality. We need not come to any firm landing on this point as this is a matter properly reserved for the arbitration. This raises the further question of whether the appellant should be entitled to invoke the doctrine of abuse of process to prevent the respondent from raising the illegality defence.

81 We first consider whether the respondent had, in fact, acted inconsistently by raising the illegality defence as against the appellant despite enforcing the Settlement Agreement against X, and pursuing Sit to bankruptcy. In this regard, the appellant's submission on appeal, despite not asserting on affidavit that the respondent knew of the illegality at the time it entered into the Settlement Agreement, is that the respondent should have known of the illegality by April 2018, when it was given the opportunity to inspect certain shipping documents received then.

82 In our judgment, the respondent appears to have acted inconsistently *vis-à-vis* Sit by pursuing him to bankruptcy, and against X under the Settlement Agreement. We explain by setting out the key events and what the respondent knew of the illegality at each stage.

83 On 4 July 2018, Anh found out about the circuitous nature of the transaction, with the appellant having paid X by procuring a letter of credit from a bank. Anh does not appear to have known at this time from whom the letter of credit had been obtained. Nor was he aware of the terms of the letter of credit.

In other words, at this point, there is no evidence that respondent knew that the appellant-respondent contract was illegal in the sense that the appellant and X had structured the entire transaction with the intention of *deceiving UBS* into purportedly financing a sham sale transaction on 4 July 2018.

84 At the time Anh filed his 1st affidavit, on 3 September 2018, he asserted that Li had informed him of her belief that the entire transaction was conducted using "copies" borrowed from a genuine sale from an unrelated transaction. There is, however, nothing in Anh's 1st affidavit which shows that the respondent *actually knew for certain* that the documents were "copies" from an unrelated transaction. Instead, the respondent's position, certainly at this stage, was that Anh's "strong belief … could be proven correct through further investigations and/or disclosure in the course of [future] arbitration proceedings".

85 On 8 November 2018, when the respondent filed Anh's 5th affidavit, Anh claimed that since the filing of his 1st affidavit, the respondent had conducted further investigations into the transaction. Having conducted some investigations, Anh formed the following preliminary view on the nature of the transaction:

> 18. … *[I]t appears that the transaction documents, supposedly relating to the Cargo on board the Vessel, were unlawfully procured and utilised by the [appellant] and [X] in the Transaction, without any authorisation by the actual parties who had transacted in that physical cargo.*
>
> 19. [The respondent] has verified that the actual end-buyer of the Cargo at the material time, at Dongjiakou, was indeed [Haiyuan] … and its PRC affiliate known as Haike … . The [respondent] has checked to confirm with Haiyuan/Haike (collectively, "End-buyers").
>
> 20. …
>
> > f. The End-Buyers [of the real Cargo] believe that the transactional documents in connection with their purchase of the Cargo from Petrobras (including copies of the bills of lading), were taken without their approval and that unauthorised copies of these documents were made. These copies were then utilised by the [appellant] and/or [X] in the Transaction, creating the false impression of a physical transaction involving the Cargo under the Transaction. [emphasis added]

86 The respondent also knew by this time that the appellant did not comply with the terms of the letter of credit issued by UBS. As further stated in Anh's 5th affidavit:

> The letter of credit issued by the [the appellant's] bankers in [X's] favour in connection with the [the appellant's] purported "purchase" of the Cargo from [X] contemplates the presentation of original (not copy) bills of lading. In other words, the [appellant's] bank had issued the letter of credit on the basis that original bills of lading would be presented under the letter of credit, which the bank would then hold on pledge to secure the financing it had extended to the [appellant]. [emphasis in original omitted]

87 By this stage, when Anh's 5th affidavit was filed, the respondent (through Anh) certainly knew that X and the appellant were using copy documents from the Haiyuan-Petrobras transaction. The respondent also knew that the purpose of the transaction was so that X could obtain financing from the appellant. The illegality described in Anh's 5th affidavit, however, pertains

to the appellant's unlawful *acquisition* of the transactional documents. There was no specific averment that the appellant had *deceived* the bank using these documents.

88 On 26 November 2018 in its written submissions to the Judge, the respondent argued that the transaction might have been entered into with the unlawful intention of deceiving the bank:

> … [T]hrough its investigations [the respondent] has thus far managed to uncover the following features of the Transaction … :
>
> (a) The transaction had been preordained by [X] and [the appellant] to result in the outcome that no actual physical cargo would ever change hands …
>
> …
>
> (e) It has come to light that [X] had "sold" the Cargo to [the appellant] under a secured payment arrangement, whereby [the appellant] was first to establish a letter of credit favouring [X]. …
>
> …
>
> (g) To operate the Transaction, [X] had procured by means still unknown the set of "transaction documents" that were lifted from the Petrobras-Haiyuan trade, without the authorisation of the true owners. These misappropriated documents were, instrinsically, already stale as they did not relate to and could not be referable to any real performance of in particular the [appellant-respondent contract].
>
> (h) To operate the Transaction, [X] were [*sic*] to tender these false documents for payment under the letter of credit that [the appellant] had established, purportedly to "pay" for the Cargo. …

89 Bearing in mind the above events, we turn to address the state of the respondent's knowledge at the time of the proceedings it brought against X and Sit.

90 As a preliminary matter, we disagree with the appellant's submission that the respondent knew of the illegality by April 2018. More specifically, the respondent's illegality defence relates to the appellant deceiving UBS into purportedly financing a sham sale transaction on the basis that there was a genuine sale of cargo (see above at [38]). While the respondent may have *seen* the shipping documents in April 2018, it is common ground that it did not know of the existence of UBS until, at the very earliest, *after* the meeting on 4 July 2018 when it found out about the circuitous nature of the transaction. Furthermore, the appellant did not accept, throughout these proceedings, that it had deceived UBS into financing the transaction. In the circumstances, the respondent could not possibly have known that the appellant had deceived UBS into financing a sham transaction by April 2018.

91 In respect of X, the respondent commenced winding up proceedings against it on 1 November 2018 under the Settlement Agreement. At this time, the respondent may have suspected, but it certainly did not yet *know* that the appellant had deceived UBS in order to obtain the letter of credit.

92 As for Sit, the first step the respondent took against him was on 12 September 2018, when the respondent served a statutory demand. While there is no evidence before us on when court proceedings were first commenced against Sit, it appears that Sit had filed an affirmation in the Hong Kong proceedings on 4 February 2019 (*Re Sit Kwong Lam* [2019] HKCU 1407 at [43]), and that the bankruptcy order against Sit was obtained on 11 April 2019. By this time, it would appear that the respondent's conduct in continuing to proceed against Sit was, on its face, *seemingly inconsistent with its belief that the transaction might be illegal*. The respondent's submissions before the Judge on the illegality defence would also suggest that it believed that the appellant had deceived UBS in order to obtain the letter of credit.

93 However, for the reasons set out below, we explain that, even *if* the respondent's actions against Sit were inconsistent with the illegality defence, it would nonetheless be inappropriate to prevent the respondent from relying on the illegality defence on the basis of the abuse of process doctrine. In this regard, we reiterate our holding above at [53] that the doctrine of abuse of process is ultimately a discretionary one. In exercising its abuse of process jurisdiction, the court must balance the competing factors and determine which position carries the greater risk of injustice. In our judgment, the following factors are germane to this balancing exercise.

94 First, the evidence shows that the respondent was not the typical litigant seeking to profit from an illegal transaction after mounting inconsistent positions. Our preliminary view is that the respondent was itself a victim of the deception practised on UBS. There is no contrary evidence showing that the respondent engineered or even *knew* of the true nature of the transaction when it was first contemplated. Nor did the appellant contend that the respondent knew of the facts giving rise to the illegality at the time the respondent entered into the transaction. Furthermore, as an intermediary, the respondent stood to gain only a modest commission of US$8,000 in respect of cargo valued in excess of US$30m.

95 Second, at the time the appellant served the statutory demand on the respondent on 13 August 2018, X had failed to make payment under the Settlement Agreement. The respondent thus found itself between a "rock and a hard place". It had no real choice but to take all reasonable defences to resist the appellant's claim while seeking to recover from X in order to pay the appellant. The respondent did not have direct knowledge of the illegality, but relied on information provided to it by third parties and, on the basis of the information supplied, adopted a certain position *vis-à-vis* the appellant. This information has

not been tested by cross-examination, nor has it been accepted by the appellant. While the respondent may have believed that the transaction was illegal, the specific allegations contained in Anh's affidavit were ultimately made in order to ventilate the entire dispute at arbitration and discover the true nature of the transaction. Indeed, the thrust of the respondent's entire case was that the appellant should not be allowed to escape the examination of the merits of its case by abusing the court's winding-up processes.

96 We do, however, accept that in the respondent's quest to protect its own interest, it should not have pursued Sit with a view to obtaining a bankruptcy order, or X under the Settlement Agreement. Nonetheless, when it commenced proceedings against X and Sit, the respondent would certainly not have known what defences X and Sit might have raised. As it turned out, Sit chose not to contest the bankruptcy application, presumably because X (and consequently Sit) was facing debts of approximately US$870m. This was, however, not something the respondent could have reasonably anticipated. During the hearing of the appeal, we expressed our concern that respondent could gain a windfall in excess of US$30m if it had indeed recovered the outstanding sums due from X and/or Sit, but successfully resisted the appellant's claims under the appellant-respondent contract by raising the illegality defence in the arbitration proceedings. On the evidence in this case, however, this does not appear to us to be a likely outcome, given the respondent's *repeated* confirmations that it would pay the appellant upon receiving payment from X. After all, under the string of contracts, the respondent was due to pay the appellant one day after receiving payment from X. Further, there is also sufficient evidence to suggest that the respondent was of the distinct understanding that it was obliged to pay the appellant *only after* it had been paid by X, with Shi informing Anh on at least two occasions that the respondent was not required to pay the appellant *until* it was paid by X. Furthermore, Anh's e-mail to Chew dated 6 July 2018

(see [19] above) made it abundantly clear that the respondent's reason for entering into the Settlement Agreement was so that it could be paid by X, *in order to pay the appellant*. It bears emphasis that the *appellant knew* that this was the respondent's intention and did not dispute or deny the respondent's understanding. We should also state that it was acknowledged by Mr Tan Chuan Bing Kendall at the hearing that the respondent pursued X and Sit in order to pay the appellant (see above at [61]). In short, there is simply no evidence that the respondent was seeking to obtain a windfall when it adopted seemingly inconsistent positions *vis-à-vis* the appellant, X, and Sit. Indeed, the evidence is to the contrary.

97 Lastly, and crucially, if the appellant's argument were taken to its logical conclusion, and the illegality defence were disallowed, the appellant would be free to enforce its claim which is potentially based on an illegal contract. Although the respondent was the plaintiff below (as the party seeking injunctive relief), the party seeking to enforce the appellant-respondent contract is ultimately the appellant. In other words, in seeking to prevent the respondent from obtaining an injunction, *the appellant is attempting to enforce the potentially illegal appellant-respondent contract, despite being privy to the alleged fraud on UBS*. If the illegality defence had been the respondent's only defence and the respondent is denied from raising it, the consequence would be that the appellant would be free to enforce a potentially illegal contract without the illegality defence being explored at all. The fact that the respondent is able to raise other defences does not, in our view, alter the analysis.

98 Thus, in deciding whether the respondent should be permitted to rely on the illegality defence, the court is faced with a clear clash between two policy imperatives: on the one hand, there is a policy to prevent a party from relying on inconsistent positions (on the application of the abuse of process doctrine);

and on the other hand, there is the principle that the court cannot and will not lend its aid to enforce an illegal contract or a fraudulent dealing. The latter principle originates from Lord Manfield CJ's decision in *Holmann v Johnson* (1775) 1 Cowp 341 at 343:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* ***No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.*** If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff… [emphasis added in bold italics]

99 In our judgment, given the four factors described at [94]–[97] above, it is clear that the risk of injustice would be indubitably greater should the respondent be barred from raising the illegality defence. Even if we were satisfied that there might have been inconsistent conduct displayed by the respondent, the exceptional circumstances of this case must be considered. On a consideration of all the circumstances, we hold that the respondent should not be precluded from taking inconsistent positions and relying on the illegality defence, as there is a risk of an even greater injustice otherwise.

Doctrines of approbation and reprobation and waiver by election

100 Although we have clarified above that inconsistent positions are dealt with under the doctrine of abuse of process, the parties made extensive submissions on the doctrines of approbation and reprobation and of waiver by

election. We believe it will be useful to express some views on their scope and applicability.

101 At a general level, these doctrines prohibit a party from raising a new position that is inconsistent with some prior position. However, the facts of this appeal are unique and give rise to a further question: do these doctrines apply when seemingly inconsistent positions are taken in *different* proceedings against *different* parties in respect of *different* contracts? In the specific context of this appeal, is the respondent precluded from raising the Price Defences as against the appellant despite having allegedly adopted an inconsistent position against X and Sit under a different albeit related contract, *ie*, the Settlement Agreement?

Approbation and reprobation

102 The foundation of the doctrine of approbation and reprobation is that the person against whom it is applied has accepted a benefit from the matter he reprobates (*Evans v Bartlam* [1937] AC 473 per Lord Russell of Killowen at 483). The doctrine of approbation and reprobation has also been referred to as a principle of equity that a person "who accepts a benefit under an instrument must adopt it in its entirety giving full effect to its provisions and, if necessary, renouncing any other rights which are inconsistent with it" (Piers Feltham, Daniel Hochberg & Tom Leech, *Spencer Bower: Estoppel by Representation* (LexisNexis UK, 4th Ed, 2004) ("*Estoppel by Representation*") at para XIII.1.10). We endorse Belinda Ang Saw Ean J's description of the doctrine in *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, Intervener*) [2006] 1 SLR(R) 358 ("*Treasure Valley*") at [31]:

> The doctrine of approbation and reprobation precludes a person who has *exercised a right* from *exercising another right which is alternative to and inconsistent with the right he has exercised.* It

> entails, for instance, that a person 'having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit': see *Evans v Bartlam* [1937] AC 473 at 483 and *Halsbury's Laws of Australia* vol 12 (Butterworths, 1995) at para 190-35 where the doctrine of approbation and reprobation is conveniently summarised as follows:
>
> > A person may not "approbate and reprobate", meaning that a person, *having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile* once he or she has taken some benefit from the chosen course.
>
> [emphasis added]

103 A wider form of the doctrine has been applied in the United Kingdom to encompass situations where parties assert inconsistent positions against the same party in different proceedings. In *Express Newspapers Plc v News (UK) Ltd and others* [1990] 1 WLR 1320 ("*Express Newspapers*"), a plaintiff brought an action for breach of copyright. The plaintiff newspaper had published an article, based on an exclusive interview, and the defendant later published a report of the same story in its newspaper. Sometime later the reverse occurred. The defendant published a story, based also on an exclusive interview, and the plaintiff published a similar story thereafter. Consequently, the defendant brought a counterclaim to the plaintiff's action – the counterclaim was in form the mirror image of the plaintiff's claim. The plaintiff later obtained summary judgment on its claim against the defendant. The defendant in response sought summary judgment on its counterclaim, but the plaintiff objected. The court, after considering the plaintiff's defence, took the view that there was some merit in it (at 1329C):

> … [A]part from the mirror-image aspect of this case, I would have given the plaintiff leave to defend the counterclaim so as to enable them to lead evidence of press custom relating to the reproduction of press articles with a view to establishing a defence based on implied licence …

104 Nonetheless, the court noted that the plaintiff could not adopt inconsistent attitudes. The plaintiff had obtained summary judgment in relation to the first incident on facts, which in the court's view, were "legally indistinguishable from the facts" of the defendant's counterclaim (at 1329D). Consequently, if the defences put forward by the plaintiff in relation to the defendant's counterclaim were good defences, they were equally good defences to the plaintiff's claim against the defendant. The court went on to observe (at 1329F–H):

> … There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.
>
> To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principle is one of general application and if, as I think, justice so requires, there is no reason why it should not be applied in the present case. …

105 The court held that for the plaintiff to claim that there was an implied licence when it copied the defendant's article was a "wholly inconsistent position" (at 1330A). The plaintiff was not entitled to put forward two inconsistent cases, and summary judgment was thus granted on the defendant's counterclaim.

106 The wider principle as described in *Express Newspapers* has become an established feature of English and Scots law. In England, *Express Newspapers* was affirmed and applied by the English Court of Appeal in *Union Music Ltd and another v Watson and another* [2002] EWCA Civ 680. Robert Walker LJ (as he then was) observed that *Express Newspapers* was a "decision on the unusual, and fairly extreme, facts of the case, but it embodies a general

principle". He went on to note that the principle was "so general and so hard to argue with as a general proposition that it needs careful handling" (at [28]). In *Redding Park Development Company Limited v Falkirk Council* [2011] CSOH 202 at [54], the Outer House of the Scottish Court of Session accepted that while the doctrine of approbation and reprobation was initially developed in the field of trusts, wills and succession, it now applies more widely to the context of inconsistent positions taken across proceedings. Most recently, the English High Court decision of *Twinsectra Ltd, Haysport Properties Ltd v Lloyds Bank plc* [2018] EWHC 672 (Ch) ("*Twinsectra*") at [87] affirmed the principle.

107 The appellant relies on two cases in which inconsistent positions were asserted against different parties in different proceedings. The first is *First National Bank Plc v Walker* [2001] 1 FLR 505 ("*First National Bank*"). The issue there was whether the wife had precluded herself from relying on the defence of undue influence against the bank's claim for possession. In her claim for ancillary relief in matrimonial proceedings against the husband, the wife proceeded on the basis that the bank's charge over the property was valid, and had sworn affidavits to that effect. The husband was later ordered to convey his interest in the property to the wife. Sir Andrew Morritt VC reasoned that it was not acceptable to pursue a claim for ancillary relief on the footing that the mortgage was valid and to subsequently defend a claim for possession by the bank on the footing that it is voidable, especially since the bank will seldom know of the course of events in the matrimonial proceedings (at [56]). He did not think that the label to be attached to the wife's conduct, whether estoppel, approbation and reprobation, abuse of process, affirmation or release was of any importance, though on the facts, he was the view that all of them applied (at [55]).

108 Rix LJ, who agreed with the judgment of Morrit VC, held that it would be "inequitable" for the wife to maintain her defence of undue influence against the bank in the face of the order of conveyance obtained, in circumstances where she and her solicitors knew enough about her right to avoid the bank's charge on the ground of undue influence (at [79]). He also based his decision explicitly on the doctrine of approbation and reprobation (at [82]):

> *In my judgment [the wife] could not in good conscience maintain both those positions.* Either she had to return to the court seised of the matrimonial proceedings and inform it that there was a change of circumstances, as she now understood them, or she had to give up her defence in the possession action based on her husband's undue influence. When, however, she did neither but proceeded pursuant to the property transfer order to take a transfer of her husband's interest in the matrimonial home under the conveyance of 6 September 1995 … she had, in my judgment*, finally elected*, if she had not done so already, to go down the route of absolving her husband of any wrong of undue influence. … *In these circumstances her attempt to persevere in her defence of undue influence was that what at any rate at one time would have been called a case of approbation and reprobation.* … [emphasis added]

109 Crucially, in *First National Bank*, the wife had obtained an *actual benefit* in the form of an order of conveyance in the ancillary matrimonial proceedings, at least partly on the basis that the bank charge's over the property was valid. Before the property conveyance order was finalised, the wife also had the option of going before the matrimonial court to inform it of the "change in circumstances". Furthermore, the inconsistent conduct pertained to the same property and was in relation to the same charge. We therefore agree with Rix LJ's analysis that it was inequitable in the circumstances for the wife to have maintained both positions, despite the fact that the positions were in relation to different parties and took place in different proceedings.

110 The appellant also relies on *Oakwell Engineering Ltd v Energy Power Systems Ltd* [2003] SGHC 241 ("*Oakwell*"). In *Oakwell*, the defendants had

acquired certain rights in a joint venture project under a settlement agreement with the plaintiff. These rights were then sold to a third party, the VBC Group, under an agreement dated 10 August 2000 ("the 10 August 2000 Agreement"). Subsequently, the defendants commenced arbitration proceedings against the VBC Group. In the proceedings before the court, the defendants argued that the settlement agreement had been frustrated in law. Lai Kew Chai J observed as follows (at [101]):

> … [T]he defendants claimed that they 'purchased' all rights, entitlements and interest in the entire Project from the plaintiffs with payment to be made in terms of the Settlement Agreement. In these proceedings, they claimed the Settlement Agreement had been frustrated in law. But it was the self-same 'rights, entitlements and interest' which the defendants had sold to the VBC Group first under the MOA and later by the 10 August 2000 Agreement. Under the 10 August 2000 Agreement the defendants, during the trial of this action, was still claiming in the Arbitration against the VBC Group for sums allegedly owing to it under the 10 August 2000 Agreement. *Frustration in law of the Settlement Agreement must similarly discharge the 10 August Agreement and it is clear that the defendants are not permitted to approbate and reprobate.*

111 It does not appear to us that the court in *Oakwell* was, strictly speaking, applying the doctrine of approbation and reprobation, in the sense described by Ang J in *Treasure Valley* at [31], to deny the defendant's claim that the settlement agreement had been frustrated. This may be observed from the fact that the court did not preclude the defendant from raising its argument based on frustration. Instead, applying the test in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, the court went on to consider whether there was something "radically different about the [defendant's] obligation" as a result of the change of tariffs imposed by the Government of India. Ultimately, the court found that there was nothing radically different about the defendant's obligations under the settlement agreement after the change in tariffs (at [106]),

and dismissed the defendant's reliance on frustration on the merits and not on the ground that the defendant had approbated and reprobated.

112 In any event, in *Oakwell*, the defendant was "still claiming" in the arbitration against the VBC Group for sums owed to it under the 10 August 2000 Agreement when the case was before Lai J. As such, it does not appear that the defendant had obtained an *actual benefit* from its proceedings against the VBC Group such as to apply the doctrine of approbation and reprobation in its strict sense. It is also unclear whether the wider doctrine in *Express Newspapers* ([103] *supra*) would have applied to preclude the defendant from asserting that the settlement agreement was frustrated. We note that even in *Express Newspapers*, the plaintiff had obtained an actual benefit in the form of a summary judgment against the defendant.

113 We note one additional case – the decision of *Twinsectra* ([106] *supra*). Its significance is that, like the present case, it involved one party taking a position in subsequent proceedings against Party A, which was inconsistent with a prior position taken against Party B in a different set of proceedings. The court decided that such inconsistent conduct should not be permitted.

114 The claim in *Twinsectra* concerned the validity of charges held by Lloyds Bank plc ("the Bank"). Twinsectra Ltd ("Twinsectra"), which had granted the security, claimed that the charges were executed without its authority. The Bank claimed that it was entitled to summary judgment because of the position that Twinsectra had taken in previous proceedings.

115 The previous proceedings related to Twinsectra's claim against one of its former directors, Mr Ackerman, for a breach of fiduciary duty which caused Twinsectra to grant the Charges without properly considering its interests.

Twinsectra had succeeded in the claim against Mr Ackerman and obtained judgment against him. In the earlier proceedings, Mr Ackerman was required to pay Twinsectra £5m, this representing Twinsectra's remaining liability to the Bank arising under the Charges. Mr Ackerman was thereafter declared a bankrupt, and the £5m was not paid by Mr Ackerman to Twinsectra (at [21]).

116 The court found in favour of the Bank, and concluded that Twinsectra could not be permitted to assert the invalidity of the Charges on the basis of, *inter alia*, the approbation and reprobation doctrine. The court held that having a common identity of parties in the former and present set of proceedings was not a necessary element to the application of the doctrine of approbation and reprobation. The court held (at [86]) that the public policy considerations against abusive and improper conduct remain engaged, notwithstanding the fact that the case involved a non-party to the proceedings against Mr Ackerman (*ie*, the Bank). The court noted that "here, the abuse alleged involves a claimant's invitation to a court to grant a remedy which is mutually inconsistent with one granted, at the request of the same claimant, by another court on an earlier occasion" (at [93]).

117 On the facts, the court held that the doctrine of approbation and reprobation applied squarely to *Twinsectra*. In its claim against Mr Ackerman, Twinsectra had alleged that Mr Ackerman had caused it to grant the Charges, as a result of which it incurred a liability of £5m to the Bank. Twinsectra thereafter obtained judgment against Mr Ackerman, constituting the requisite "benefit". Twinsectra was therefore precluded from pursuing an inconsistent case against the Bank (at [96(xi)]).

118 Based on our survey of the above authorities, it is clear that the operation of the doctrine of approbation and reprobation does extend to inconsistent

positions asserted against different parties in different proceedings, as long as the party has received an actual benefit as a result of an earlier inconsistent position. This is illustrated by cases such as *Express Newspapers* and *First National Bank*, where the doctrine was applied because the parties who sought to advance inconsistent positions had already secured actual benefits from their prior positions.

119 In the present case, and as noted above, there is an apparent inconsistency in the respondent's position in pursuing proceedings against Sit to judgment on the one hand, and its illegality defence here on the other. In our view, the judgment which the respondent has obtained against Sit in bankruptcy proceedings is a "benefit". Cases show that the "benefit" that triggers the doctrine of approbation and reprobation is constituted by a judgment (*Evans v Bartlam* [1937] AC 473 at 483; *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142, at [252] and [257]) or an arbitral award (*Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd* [1926] 1 KB 348 at [47]; *European Grain and Shipping Ltd v Johnston* [1983] 3 All ER 898) rendered to the successful party, without further specifying that the resulting judgment debt has to be satisfied in order for the requisite benefit to be conferred. This was equally the case in *Twinsectra* where the judgment obtained against the director was considered to be a benefit notwithstanding its non-satisfaction (*Twinsectra* at [21]). Notably, as held in *Durtnell & Sons Ltd v Kaduna Ltd* [2003] EWHC 517 (TCC) at [47], the requisite "benefit" is made out by "an entitlement to payment".

120 We, however, acknowledge that the proceedings against Sit and X were never *intended* to benefit or enrich the respondent. Instead, any benefit potentially arising from those proceedings was always intended to be paid to the *appellant* to discharge the respondent's purported liability under the appellant-respondent contract, consistent with the respondent's pay when paid defence.

For the purposes of ascertaining benefit with respect to the doctrine of the approbation and reprobation, such an intention not to *retain* the benefit and instead to pass it on to the appellant does not detract from the fact that a benefit (in the form of judgment against Sit) has nonetheless been obtained. That being said, despite the benefit having been obtained by the respondent, we think it would be inappropriate to apply the doctrine of approbation to bar the respondent from raising the illegality defence, given the circumstances of this case as explained at [94]–[97] above (in particular, the respondent's clear and declared intention not to retain the benefit).

Waiver by election

121 Like the doctrine of approbation and reprobation, the doctrine of waiver by election is typically engaged when a party in an action or related action adopts an inconsistent position as against the same counterparty and in relation to the same claim or contract.

122 In *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317, this court set out the general principles of waiver by election (at [54]):

> … In the true sense of the word, however, waiver means a voluntary or intentional relinquishment of a known right, claim or privilege: Sean Wilen QC and Karim Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ("*Wilken and Ghaly*") at para 3.14. On this definition, the only form of waiver that befits that label is waiver by election. This doctrine concerns a situation where *a party has a choice between two inconsistent rights*. If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election: see *The Kanchenjunga* at 397–398, which was approved by this court in

> *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33]. [emphasis added]

123 The authors of *Estoppel by Representation* explain that election may take place in the conduct of litigation (at para XIII.2.37):

> In the course of litigation it frequently happens that a party is confronted with the necessity of making an immediate choice between two possible courses of action which are mutually exclusive. Whenever this occurs, the principle of election comes into play. *If by words or by conduct or inaction, one party represents to the other party his or her intention to adopt one of the two alternative and inconsistent proceedings or positions, that party is precluded from resorting afterwards to the course which he has waived or abandoned.* … [emphasis added]

124 The appellant cited two decisions in support of its argument of waiver by election. In *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 3 SLR(R) 386 ("*Lee Siong Kee*"), the respondent counterclaimed against the appellant for the sum of S$360,000. This court held that the respondent was not entitled to recover the sum of S$240,000 as the respondent had averred in an earlier suit that it had paid certain beneficiaries (of an estate) the sum of S$240,000 as advance payment for the purchase of property. This court reasoned as follows (at [42]):

> … Having relied on their averment that they had paid $240,000 to the beneficiaries and obtained a declaratory judgment in that suit, [the respondent was] estopped from now putting forth an inconsistent plea that the sum was paid on [the appellant]'s account. Further, by *electing* to take the position that they had paid the sum of $240,000 to the beneficiaries, [the respondent] implicitly acknowledged that [the appellant] had paid $240,000 to the beneficiaries on behalf of [the respondent]. [emphasis added]

125 Although it is not entirely clear whether the decision was based on waiver by election or some other species of estoppel, it is apparent that the respondent had obtained an *actual benefit* having relied on an earlier averment that it had paid S$240,000 to certain beneficiaries. It is necessary to briefly set

out the background to the dispute to appreciate the nature of the benefit obtained by the respondent. At the outset, the appellant had agreed to procure the sale of certain properties (belonging to a certain estate) to the respondent by way of an agency agreement. There were 14 beneficiaries to this estate. Under the agency agreement, the respondent undertook not to interact with the beneficiaries without the appellant's consent. The appellant procured the beneficiaries to execute an agreement with the respondent ("the beneficiaries agreement"), under which the beneficiaries consented to the sale of the properties to the respondent. Sometime later, 11 beneficiaries attempted to repudiate the beneficiaries agreement (at [26]). On 11 July 1996, the respondent instituted legal proceedings against the beneficiaries, partially relying on the fact that it had paid the beneficiaries S$240,000 as advance payment of the agreed purchase price. The respondent then obtained a judgment in default of appearance against eight of the beneficiaries, declaring that it was entitled to the beneficiaries' rights, interests, benefits and entitlements in the various properties (at [11]). That judgment would have had a real benefit in that it would have allowed the respondent to apply to court for the trustees, in whose names the properties were held, to transfer the properties to the respondent. The judgment would have also operated as a shield against any competing claims against the properties. The decision could therefore be rationalised as an application of the doctrine of approbation and reprobation. In the circumstances, this court was of the view that it was inequitable or unfair for the respondent to allege in subsequent proceedings that it had paid the said sum into the *appellant's* account, as opposed to the beneficiaries. Hence, despite the fact that the inconsistent position was asserted in different proceedings, the respondent was justifiably precluded from raising the position before this court in *Lee Siong Kee*.

126 In *UAM v UAN and another* [2018] 4 SLR 1086 ("*UAM*"), Valerie Thean JC (as she then was) held that the plaintiff had asserted inconsistent ownership rights over the same property in two separate proceedings. In previous proceedings, the plaintiff had asserted that the mother only had a bare legal title to the property and held her one-fifth share of the Property on trust for him. Despite knowing this, the plaintiff took the position in the subsequent proceedings that the beneficial interest to the entire property, including the mother's share, lay with him. Thean JC held that this was "plainly inconsistent" (at [47]). Nonetheless, on the facts, the doctrine of waiver did not apply as the plaintiff did not concurrently possess two inconsistent rights to elect between at the material time (*ie*, when it filed its reply in the later suit). In the earlier suit, the plaintiff's assertion of beneficial ownership was premised on the doctrines of a purchase money resulting trust, common intention constructive trust, or proprietory estoppel (at [48]). Applying these doctrines, the court found that no proprietory right had ever accrued to the plaintiff. Accordingly, the plaintiff did not have two inconsistent rights to elect between at the material time when he filed his reply in the subsequent proceedings (at [52]). Crucially, *UAM* makes plain that inconsistency *per se* is not a sufficient reason to prevent a party from raising that position in a subsequent set of proceedings. A party seeking to stop another party from relying on an inconsistent position, using the doctrine of waiver by election, must also show that that party enjoyed the concurrent existence of two inconsistent set of legal rights. Furthermore, it must be demonstrated that the party against whom waiver is alleged had knowledge of the facts which gave rise to these two sets of rights. Finally, the party must have made an unequivocal representation in relation to the right or remedy being waived (*UAM* at [45]).

127 Based on the authorities cited to us by the parties, there does not appear to be a strict bar against the application of the doctrine of waiver by election in

relation to different proceedings against different parties in respect of different contracts. We note that in *Twinsectra* ([106] *supra* at [96(vi)]), the court had also based its decision on Twinsectra's election between inconsistent remedies and rights against Mr Ackerman, which became binding when judgment was entered against him. That being said, we do note that, unless the requirements of the doctrine of waiver by election are met, parties to litigation are normally entitled to change their case. This point is emphasised by the learned authors in *Estoppel by Representation* at paras XIII.2.40 and XIII.2.41 in the context of arguments of election taking place in the course of litigation:

> In the absence of an estoppel *per rem judicatam* there are no rules of court or principles of law which prevent a party advancing a new case which is inconsistent with a case put forward in earlier proceedings. Again, there are no rules of court or principles of law which prevents a party from asserting alternative but inconsistent cases in the same proceedings or from amending a statement of case to advance an alternative or inconsistent case with that advanced at the beginning of the proceedings. Although the CPR 1998 require a statement of case to be verified by a statement of truth, this requirement does not prevent the assertion of inconsistent claims:
>
> > "If one of the consequences of CPR Pt 22 is to exclude the possibility of pleading inconsistent factual alternatives then it will have achieved far more than the prohibition of dishonest or opportunistic claims. It will prevent even claimants in the position of an executor or liquidator from advancing alternatives claims based on incomplete but plausible evidence in circumstances where they are not able to choose decisively between the rival possibilities without access to the trial processes of disclosure and cross examination. …"
>
> *It follows that a party is free to advance a case which [is] inconsistent with one run before or to advance inconsistent cases unless there is some feature either of the earlier proceedings or of the current proceedings which engages the common law doctrine of election or election in equity or otherwise makes those proceedings an abuse of the court's process. …*
>
> [emphasis added]

While it is true that a party in a litigation is normally entitled to pursue alternative and seemingly inconsistent positions, the abuse of process

doctrine in whichever form is typically engaged when a party has secured a *benefit* from an earlier inconsistent position.

Applying the prima facie standard

128 As a result of our findings above, the respondent is entitled to rely on all the four defences to contend that there is a *prima facie* dispute that would justify restraining the winding-up application. Given that the appellant's case on inconsistency is only in respect of the Price Defences, the pay when paid defence certainly raises a *prima facie* dispute which must be referred to arbitration. As for the title defence and the non-receipt of documents defence, we are satisfied for the reasons set out in [76] and [79] above that there was no inconsistency in the first place, and therefore no abuse of process. As for the illegality defence, while we accept that there appears to be an inconsistency, we hold that the respondent should not be barred from raising the illegality defence. In our view, in light of the exceptional circumstances, there is a risk of an even greater injustice should the appellant be free to enforce a potentially illegal contract.

129 We should add that we also agree with the Judge's finding that the defences went beyond raising a *prima facie* dispute and has in fact raised *triable* issues. Given our preliminary finding that the X-appellant contract was a disguised loan arrangement and not a genuine sale of goods contract, it must be plainly triable that the appellant-respondent contract was equally a sham transaction and that no actual cargo was intended to be sold and/or delivered. Moreover, it is undisputed that the certificates of quality, quantity and origin required under cl 8.1 of the appellant-respondent contract were never furnished by the appellant and finally, given the structure of the string of contracts, in particular the timelines for payments, the prices payable under the different

contracts and the parties' clear understanding when the respondent entered into the Settlement Agreement with X, the pay when paid defence is similarly arguable.

Conclusion

130 We are therefore satisfied that there is at least a *prima facie* dispute as to the existence of the debt and the appeal is dismissed accordingly.

131 In *VTB Bank* ([1] *supra* at [111]), we held that the court would, in cases where an applicant seeks a stay or dismissal of the winding-up proceedings, grant a stay (as opposed to a *dismissal*) on the condition that the applicant is able to demonstrate legitimate concerns about the solvency of the company as a going concern and the debtor-company is unable to show triable issues. Having determined that there was no evidence to show legitimate concerns relating to the solvency of the AnAn company, we dismissed the winding-up application in its entirety. The present case involves an application for an injunction restraining the commencement of winding-up proceedings against the respondent. In this context, we are of the view that an injunction may be granted *with liberty for parties to apply* (for *eg*, to lift the injunction) where there are similar legitimate concerns about the solvency of the debtor-company. As in *VTB Bank*, there is no evidence to show that there are legitimate concerns over the solvency of the respondent. We are not aware of any other pending winding-up applications or claims against the respondent which would indicate otherwise. We therefore do not disturb the terms of the injunction granted by the Judge. We also grant order in terms for CA/SUM 125/2019, which was the respondent's application for a sealing order.

132 Taking into account the parties' respective costs schedules and the number of novel points raised in the appeal, we order the appellant to pay the respondent costs fixed at S$50,000 inclusive of disbursements.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal
Steven Chong Judge of Appeal	Quentin Loh Judge	

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