IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 288

Suit No 888 of 2014

Between

Jiacipto Jiaravanon

… *Plaintiff*

And

Simpson Marine (SEA) Pte Ltd

… *Defendant*

JUDGMENT

[Restitution] — [Failure of consideration] — [Pre-contractual deposits]

[Contract] — [Formation]

[Contract] — [Breach]

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CONCLUSION **63**

Jiacipto Jiaravanon
v
Simpson Marine (SEA) Pte Ltd

[2017] SGHC 288

High Court — Suit No 888 of 2014
Quentin Loh J
10–13, 18–19 April; 29 May 2017

22 November 2017 Judgment reserved.

Quentin Loh J:

1 In this suit, the plaintiff, Jiacipto Jiaravanon ("Cip", or "the plaintiff"), seeks to recover two payments made to the defendant, Simpson Marine (SEA) Pte Ltd ("the defendant"), in relation to the purchase of luxury yachts. The defendant denies that the plaintiff is entitled to recover the payments, and counterclaims for several sums.

The parties

2 Cip was a male Indonesian national who passed away suddenly at the early age of 40 after commencing this suit.[1] At the time of his death, he was the Vice President Commissioner of PT Charoen Pokphand Indonesia TBK which is part of the Charoen Pokphand Group Indonesia ("the CP Group").[2] The CP

1 Affidavit of Anna Oei Ai Hoea dated 20 July 2016 ("Oei's Affidavit") at paras 4–6 and Exhibit A (p 5).

2 Transcript, 10 April 2017, p 12.

Group comprises more than 200 companies, which are primarily in the agriculture business.[3] After Cip's death, Anita, his widow, obtained letters of administration in respect of this suit, and an order to carry on these proceedings as the administratrix of Cip's estate.[4]

3 The defendant is a Singapore-incorporated company in the business of dealing in luxury yachts.[5] At the material time, the defendant dealt in yachts produced by Azimut Benetti SpA ("Azimut"), a company incorporated in Italy.

The background to the dispute

4 In January 2013, Cip and Aina Taslim ("Aina"), the Head of Purchasing (Commercial Division) of the CP Group,[6] met Peter Mison ("Mison"), a yacht broker for the defendant, and discussed the possibility of Cip purchasing yachts from the defendant. At the material time, Cip was considering the purchase of (at least) one yacht each for use in Hong Kong and Southeast Asia respectively.[7]

5 On 10 April 2013, Cip signed a contract to buy an Azimut 62S yacht from the defendant ("the Azimut 62S Contract").[8] However, this contract was cancelled because Cip did not pay the deposit for this yacht.[9]

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3 Transcript, 12 April 2017, p 3.

4 Oei's Affidavit at para 6 and Exhibit A (pp 6–7 and 10); Affidavit of Evidence-in-Chief ("AEIC") of Anita dated 27 February 2017 ("Anita's AEIC") at para 4; Order of Court dated 28 July 2016.

5 AEIC of Peter John Mison dated 27 February 2017 ("Mison's AEIC") at para 3.

6 AEIC of Aina Taslim dated 27 February 2017 ("Aina's AEIC") at para 1.

7 Mison's AEIC at para 9.

8 PCB 478–482.

9 Mison's AEIC at para 17.

6 On 26 April 2013, Mison met Cip at Cip's house.[10] The parties do not fully agree on what occurred during this meeting ("the 26 April 2013 Meeting"). But it is undisputed that Cip signed the following two documents:

(a) A contract to buy an Azimut 64 yacht (hull number 68) ("the Azimut 64 #68") for €1,916,675.00 ("the Azimut 64 Contract") from the defendant.[11]

(b) An invoice ("the Deposit Invoice") for the sum of €1m ("the €1m Deposit"). The Deposit Invoice states that the €1m sum was a "holding deposit" against two boats: an Azimut 100 Grande yacht (hull number 12) ("the Azimut 100G #12") and an Azimut 100 Leonardo yacht (hull number 15) ("the Azimut 100L #15"). I shall refer to these two yachts collectively as "the Azimut 100 yachts".

7 On 29 April 2013, Cip paid a €500,000 deposit, in respect of the Azimut 64 Contract, and the €1m Deposit to the defendant. The defendant issued two receipts dated 29 and 30 April 2013 respectively in relation to these payments.[12]

8 On 30 April 2013, Mison informed Cip that Azimut had sold the Azimut 100G #12 to a Mexican buyer.[13]

9 On 8 May 2013, Cip met Paul Grange ("Grange"), Kenneth Ng ("Ng") and Giordano Pellacani ("Giordano") in Hong Kong and viewed an Azimut 100 Leonardo yacht ("the 8 May 2013 Meeting").[14] At the material time, Grange was

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10 Transcript, 13 April 2017, p 17.

11 PCB 491–495.

12 Mison's AEIC at paras 35 and 79; PCB 497–498.

13 PCB 81.

14 Mison's AEIC at para 11; PCB 127–128.

the defendant's Group Sales Manager who was responsible for sales of Azimut yachts; Ng was the defendant's Senior Yacht Broker; and Giordano was the Azimut Sales Manager for Asia.[15] The parties dispute what was agreed during this meeting.

10 On 9 May 2013, the defendant paid a sum of €1m to Azimut.[16]

11 On 18 June 2013, Cip and the defendant agreed, by an Addendum to the Azimut 64 Contract ("the Addendum"), that Cip would receive the Azimut 64 yacht (hull number 64) ("the Azimut 64 yacht") instead of the Azimut 64 #68.[17] The parties also agreed to change the specifications of the Azimut yacht; consequently, the purchase price increased to €2,017,470.00. Thereafter, the parties further agreed to refit the interior of the Azimut 64 yacht; the purchase price was therefore increased to €2,047,470.00 ("the Azimut 64 Price").

12 On or about 31 July 2013, Cip met Mison ("the 31 July 2013 Meeting"). What the parties agreed during this meeting is also disputed. But it is clear that Cip and Mison agreed that half of the €1m Deposit would be applied to the purchase price of the Azimut 64 yacht ("the Compromise Agreement").[18]

13 On 1 August 2013, the defendant issued a revised payment invoice for the Azimut 64 yacht. This reflected the Compromise Agreement: the calculation of the balance payable for the Azimut 64 yacht accounted for half of the €1m Deposit.[19] Thereafter, Cip paid the balance sum and the defendant accordingly

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15 Transcript, 19 April 2017, p 4; AEIC of Paul Jonathan Grange dated 27 February 2017 ("Grange's AEIC") at paras 1 and 11.

16 PCB 585–588.

17 PCB 500.

18 PCB 195; PCB 547–549.

19 PCB 503.

issued an invoice on 5 August 2013.[20]

14 On 16 September 2013, the Azimut 64 yacht arrived in Singapore.[21]

15 On 2 October 2013, Cip, Anita, Toh Chee Ping ("Toh", Cip's personal assistant),[22] and Ken Pun Tze Chung ("Ken", Cip's boat surveyor), met Mison at Raffles Marina to inspect the Azimut 64 yacht ("the 2 October 2013 Meeting"). Additionally, it seems that Lau Man Tung, another of Cip's assistants, and Andi Sasmita, Cip's Indonesian boat captain, were present.[23] Upon viewing the yacht, Cip discovered that the yacht's two gearbox serial numbers differed from those stated on the warranty certificate ("the First Certificate").[24] Then, an altercation between Cip and Mison ensued. The details of this altercation are disputed. Mison claimed that Cip punched him three times; the plaintiff denied this claim.

16 On 3 March 2014, with Cip's agreement, the defendant resold the Azimut 64 yacht to a third party for €1,865,510.00 ("the Resale Price" or "the Resale Proceeds").[25]

17 On 15 August 2014, Cip commenced this suit.[26]

18 On 12 December 2014, the defendant paid €1,666,837.89 to Cip. The defendant avers that this sum represents the balance of the Resale Proceeds after

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20 PCB 505.

21 PCB 272.

22 AEIC of Toh Chee Ping dated 27 February 2017 ("Toh's AEIC") at para 4.

23 Transcript, 11 April 2017, pp 135–136; PCB 589–591.

24 PCB 652–654.

25 PCB 515–520.

26 Writ of summons dated 15 August 2014.

deducting the sums claimed in its first three counterclaims (see [27(a)–27(c)] below).[27] The plaintiff does not dispute this computation.

The witnesses

19 The plaintiff called Anita, Toh and Aina as factual witnesses and Mr Sum Chee Keong ("Sum"), a yacht dealer with 45 years of experience,[28] as an expert witness.

20 The defendant called Mison, Grange, and Paul Whelan ("Whelan"), who was the defendant's General Manager for Southeast Asia at the material time,[29] as factual witnesses. The defendant also called Mr Donald Richard Arthur Lamble ("Lamble"), a marine surveyor with more than 40 years' experience in the shipping and pleasure craft business,[30] as its expert witness.

The parties' cases

The statement of claim

21 The plaintiff's case has two prongs. First, in respect of the €1m Deposit, the plaintiff's case is that the parties made two oral agreements:

(a) During the 26 April 2013 Meeting, Cip agreed to pay the €1m Deposit to the defendant as a holding deposit for the Azimut 100 yachts ("the 1st Holding Agreement"). It was an express or implied term of the 1st Holding Agreement that the defendant would return the €1m Deposit to Cip if he did not subsequently contract to purchase a yacht. Since Cip

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27 Anita's AEIC at para 26; Mison's AEIC at para 83.

28 AEIC of Sum Chee Keong dated 27 February 2017 at para 1 and p 6.

29 AEIC of Paul Thomas Whelan dated 27 February 2017 (Whelan's AEIC) at para 3.

30 AEIC of Donald Richard Arthur Lamble dated 21 February 2017 at para 1 and p 8.

did not agree to buy either of the Azimut 100 yachts, the €1m Deposit was repayable to Cip.[31]

(b) Upon making the Compromise Agreement, by which half of the €1m Deposit was applied towards the purchase of the Azimut 64 yacht, the parties also agreed that the defendant would hold the other half of the €1m Deposit ("the €500k Remainder") while Cip considered buying another yacht ("the 2nd Holding Agreement"). It was an express or implied term of the 2nd Holding Agreement that the defendant would return the €500k Remainder to Cip if he did not subsequently buy another yacht from the defendant. As Cip did not buy another yacht from the defendant, Cip is entitled to recover the €500k Remainder either in accordance with the 2nd Holding Agreement or by way of restitution.[32]

22 Secondly, in respect of the Azimut 64 yacht, the plaintiff claims that the defendant repudiated the Azimut 64 Contract by failing to hand over the Azimut 64 yacht and by selling it to a third party. The plaintiff accepted the repudiation. Therefore, there was a total failure of consideration and the plaintiff is entitled to the purchase price of €2,047,470.00 by way of restitution.[33]

23 The plaintiff thus claims a total of €2,547,470.00 (comprising the €500k Remainder and the purchase price of the Azimut 64 yacht) by way of restitution, as well as interest and costs from the defendant.[34] However, I note that the defendant has already paid some of the Resale Proceeds to Cip (see [18] above). Therefore, as Anita acknowledged, the maximum sum which I may award to

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31 Statement of claim (Amendment No 1) at paras 6, 8 and 11–12.

32 Statement of claim (Amendment No 1) at paras 13–16.

33 Statement of claim (Amendment No 1) at paras 22–28.

34 Statement of claim (Amendment No 1) at paras 29.

Cip in respect of the Azimut 64 yacht is €380,632.11 (being the difference between the Azimut 64 Price and the quantum of the Resale Proceeds already paid to the plaintiff).[35] The total maximum sum which the plaintiff may obtain for his entire claim is therefore €880,632.11.

The defence and counterclaim

24 The defendant avers that, in March 2013, Cip agreed to purchase two yachts: either of the Azimut 100 yachts, and a smaller yacht.[36]

25 In respect of the €1m Deposit, the defence is, in gist, that the €1m Deposit was paid as a non-refundable deposit. In particular, the defendant pleads as follows:

(a) First, on or about 26 April 2013, Cip agreed to pay the €1m Deposit as earnest monies for Azimut to hold the Azimut 100 yachts off the market for three weeks pending Cip's viewing and decision to purchase either yacht. There was an express agreement by incorporation of the defendant's Standard Terms and Conditions ("the T&C") that the €1m Deposit would be non-refundable, or alternatively an implied term to that effect.[37]

(b) Secondly, on or about 8 May 2013, Cip agreed with Grange that the €1m Deposit would be paid to Azimut as a non-refundable deposit to reserve the Azimut 100L #15 and another Azimut 100 Grande yacht (hull number 15) ("the Azimut 100G #15"). Moreover, the plaintiff is estopped from claiming the €500k Remainder as the defendant paid the

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35 Anita's AEIC at paras 26 and 28.

36 Defence and counterclaim (Amendment No 3) at para 5.

37 Defence and counterclaim (Amendment No 3) at paras 21, 47 and 49–50.

€1m Deposit to Azimut in reliance on Cip's representation that he was prepared to pay the €1m Deposit as a non-refundable deposit to Azimut.[38]

(c) Thirdly, on 31 July 2013, when the Compromise Agreement was made, Cip also expressly agreed that the €500k Remainder would be applied towards purchasing another Azimut yacht, which was to be larger than the Azimut 64 yacht ("a Larger Yacht"), before the end of August 2014; and that, if no such purchase was made by the end of August 2014, Azimut would forfeit the €500k Remainder. Alternatively, there was an express agreement by incorporation or an implied term to that effect.[39]

26 In respect of the Azimut 64 yacht, the defendant avers that Cip refused to accept the yacht and to participate in its handover for baseless reasons, and subsequently agreed to the sale of the Azimut 64 yacht to a third party. Further and/or alternatively, the defendant claims that the yacht was sold in accordance with the Azimut 64 Contract; and that Cip repudiated the contract by failing to take possession of the yacht, which repudiation was accepted by the defendant when it sold the yacht.[40]

27 The defendant counterclaims for the following ("the counterclaim"):[41]

(a) Expenses of S$19,619.40 for insurance and maintenance. The defendant avers that Cip did not purchase insurance as was required under the Azimut 64 Contract, which led it to incur costs ("the insurance

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38 Defence and counterclaim (Amendment No 3) at paras 28–29 and 55.

39 Defence and counterclaim (Amendment No 3) at paras 34–35 and 53.

40 Defence and counterclaim (Amendment No 3) at paras 15–18 and 62–64.

41 Defence and counterclaim (Amendment No 3) at paras 12–19 and 69–73.

costs") in purchasing the same on his behalf. The defendant also claims that Cip's failure to take possession of the Azimut 64 yacht led it to incur maintenance charges ("the maintenance costs").

(b) Damages of €186,551.00 or to be assessed, for the defendant's alleged costs in reselling the Azimut 64 yacht ("the resale costs").

(c) Damages of S$69.00, the cost of reimbursing Mison's medical expenses for injuries which Mison allegedly suffered due to Cip's alleged attack on him on 2 October 2013 ("the medical costs").

(d) Damages for the plaintiff's repudiatory breach in failing to complete the purchase of either of the Azimut 100 yachts.

The reply and defence to counterclaim

28 In reply, the plaintiff denies that there was any agreement between the parties, express or implied, that the €1m Deposit would be paid as a non-refundable holding deposit. The plaintiff further avers that Cip did not agree to buy any yacht from the defendant except for the Azimut 64 yacht.[42]

29 In defence to the counterclaim, the plaintiff denies that it is indebted to the defendant for the sums claimed. In respect of the maintenance costs, the defendant did not hand over the Azimut 64 yacht; in relation to the resale costs, there is no contractual basis for such costs and Cip did not agree to the Resale Price nor was his consent sought to the same. The plaintiff also denies being in repudiatory breach and being liable for the losses arising from the said breach.[43]

The issues

[42] Reply and defence to counterclaim (Amendment No 3) at para 1C.

[43] Reply and defence to counterclaim (Amendment No 3) at paras 2–4 and 5.

30 The parties' cases are joined over three broad issues:

(a) Whether the plaintiff is entitled to recover the €500k Remainder ("the Deposit Issue");

(b) Whether the plaintiff is entitled to recover the Azimut 64 Price ("the Azimut 64 Issue");

(c) Whether the counterclaim succeeds ("the Counterclaim Issue").

31 I will deal with these issues in turn.

The Deposit Issue

32 I first set out the parties' submissions on this issue.

The plaintiff's submissions

33 First, the plaintiff submits that the €1m Deposit was a pre-contractual deposit, and was thus *prima facie* recoverable if Cip did not enter into a contract to buy either of the Azimut 100 yachts. As Cip did not enter into any such contract, Cip had a *prima facie* right to recover the €1m Deposit.[44] Furthermore, once Azimut sold the Azimut 100G #12 to another buyer (see [8] above), "the entire basis for the payment … fell away"; Cip was entitled to a return of the €1m Deposit.[45]

34 Secondly, the plaintiff submits that Cip did not agree that the €1m Deposit would be non-refundable during the 26 April, 8 May and 31 July 2013 Meetings, and that no term to that effect should be implied into the contract.[46]

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44 Plaintiff's closing submissions at paras 49–55.

45 Plaintiff's closing submissions at paras 126 and 188; Plaintiff's reply submissions at paras 6 and 69–74.

35 Finally, since the parties made the Compromise Agreement, the plaintiff is entitled to the balance of the €1m Deposit, *ie*, the €500k Remainder.[47]

The defendant's submissions

36 First, the defendant submits that, contrary to what Anita claimed during the trial, the parties did not agree that the €1m Deposit would be offset against the purchase price of the Azimut 64 yacht if Cip did not purchase either of the Azimut 100 yachts.[48] However, as the defendant notes in its reply closing submissions,[49] the plaintiff has abandoned this claim. I therefore say no more about it.

37 Secondly, the defendant submits that the plaintiff did not plead that the €1m Deposit was a pre-contractual deposit; moreover, in any event, this claim is erroneous. The defendant argues that, on 26 April 2013, Cip agreed to buy either of the Azimut 100 yachts and that the €1m Deposit would be paid as a non-refundable deposit to reserve both of these yachts.[50] In this regard, the defendant submits that the T&C, which provided for the €1m Deposit to be paid as a non-refundable deposit, were incorporated into the parties' agreement on 26 April 2013.

38 Thirdly, the defendant submits that Cip agreed during the 8 May 2013 Meeting that the defendant should pay the €1m Deposit to Azimut as a non-refundable deposit to reserve the Azimut 100L #15 and the Azimut 100G #15.

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46 Plaintiff's closing submissions at paras 7b, 146–195; Plaintiff's reply submissions at paras 11-64.

47 Plaintiff's closing submissions at paras 167 and 206.

48 Defendant's closing submissions at paras 76–96.

49 Defendant's reply submissions at para 9.

50 Defendant's closing submissions at paras 97a and 101–113; Defendant's reply submissions at paras 29–60.

Moreover, Cip agreed during the 31 July 2013 Meeting that the €500k Remainder would have to be used to purchase a Larger Yacht, failing which it would be forfeited.[51]

39 Fourthly, the defendant submits that, alternatively, it was an implied term of the purported agreements that the €500k Deposit was non-refundable.[52]

40 Finally, the defendant submits that the €1m Deposit was a reasonable amount for a deposit. Thus, in view of all of the defendant's submissions, the plaintiff has no basis to recover the €500k Remainder.[53]

My decision

41 In relation to the Deposit Issue, four questions fall to be answered:

(a) First, what was the nature and basis of the €1m Deposit when it was paid to the defendant on 29 April 2013?

(b) Secondly, in light of the answer to question (a), was Cip entitled to recover the €1m Deposit after Azimut sold the Azimut 100G #12?

(c) Thirdly, did Cip agree during the 8 May 2013 Meeting that the €1m Deposit should be paid to Azimut as a non-refundable deposit?

(d) Fourthly, did Cip agree during the 31 July 2013 Meeting that the €500k Remainder would have to be used to buy a Larger Yacht and that it would otherwise be forfeited?

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51 Defendant's closing submissions at paras 97b–97c and 119–134.

52 Defendant's closing submissions at paras 98 and 135–139.

53 Defendant's closing submissions at paras 140–145.

The nature and basis of the €1m Deposit

42 I find that, during the 26 April 2013 meeting, Cip and the defendant orally agreed that Cip would pay the €1m Deposit to the defendant as a holding deposit to secure the two Azimut 100 yachts until 15 May 2013; and that the €1m Deposit would become the initial down payment on either yacht once Cip made his choice between the yachts ("the Holding Deposit Agreement"). This is clear beyond peradventure from the Deposit Invoice, Mison's evidence and the contemporaneous communications between the parties.

43 First, the Deposit Invoice, which Cip signed on 26 April 2013, reflects and records the Holding Deposit Agreement. It describes the €1m Deposit as follows:[54]

> Being *holding deposit* against a Azimut Leonardo 100#15 OR an Azimut Grande 100#12 as per attached quotes. *Deposit will secure both yachts until 15th May 2013* at which time *the deposit will be transferred to either yacht to become the initial down payment*. [emphasis added]

44 Secondly, Mison testified that the parties made (a) the Holding Deposit Agreement on 26 April 2013 rather than (b) the agreement that the defendant contends for, *ie*, that the €1m Deposit would be paid as a non-refundable deposit (see [37] above). His evidence in relation to (a) and (b) was as follows:

> (a) Mison said that, upon presenting the Deposit Invoice to Cip, he told Cip that the defendant was "going to hold the two Azimuts for him until 15 May". The plaintiff's counsel, Ms Anna Oei ("Ms Oei"), asked Mison if he had told Cip: "Look, the €1 million is to hold these two Azimuts", *viz*, the Azimut 100 yachts. Mison replied in the affirmative.

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54 PCB 496.

Mison also testified that he told Cip that the €1m Deposit would be used as the initial down payment on one of the Azimut 100 yachts.[55]

(b) Mison agreed that, once Azimut sold the Azimut 100G #12, Cip would have been entitled to a refund of his deposit as the factual basis of the €1m Deposit was gone.[56] This indicates that the parties did not agree that the €1m Deposit would be non-refundable in any event.

45 Thirdly, the parties' contemporaneous communications demonstrate that they did not agree that the €1m Deposit would be paid as a non-refundable deposit, as the defendant contends (see [37] above). On 4 May 2013, after being told that the Azimut 100G #12 was no longer available, Cip sent an SMS to Mison instructing him not to send the €1m Deposit to Azimut.[57] Significantly, on the same day, Mison replied stating that he would "… return it to [Cip] right away".[58] In his affidavit of evidence-in-chief ("AEIC"), Mison suggested that he did not intend this reply to mean that the €1m Deposit was refundable.[59] However, he disclaimed this suggestion during cross-examination.[60] The fact that Mison was ready to return the €1m Deposit "right away" indicates that the parties did not agree that the €1m Deposit would be non-refundable.

46 Having found that the parties made the Holding Deposit Agreement, I now clarify its scope and nature by making further findings with reference to the parties' contentions in their pleadings and submissions.

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55 Transcript, 13 April 2017, pp 21–26.

56 Transcript, 13 April 2017, pp 45–48.

57 PCB 562.

58 PCB 563.

59 Mison's AEIC at para 38.

60 Transcript, 13 April 2017, p 59.

47 First, I do not accept the plaintiff's contention that it is an express or implied term of the Holding Deposit Agreement that the €1m Deposit would be returned to the plaintiff if Cip did not contract to purchase a yacht (see [21(a)] above). As the defendant notes, the plaintiff has not pursued this point in submissions.[61] In any case, I find, in view of the Deposit Invoice and Mison's evidence (see [43]–[44] above), that there is no such express term.

48 I also find that there is no such implied term. In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"), Sundaresh Menon CJ ("Menon CJ"), in delivering the judgment of the Court of Appeal ("the CA"), laid down the following three-stage test for the implication of terms at [101]:

> (a) The first step is to ascertain how the gap in the contract arises. *Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.*
>
> (b) At the second step, *the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.*
>
> (c) Finally, the court considers the specific term to be implied. T*his must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract.* If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.
>
> [emphasis added]

In my view, the term that the plaintiff contends for does not meet the second step of the *Sembcorp Marine* test. The commercial purpose of agreements such as the Holding Deposit Agreement is plain. It is to ensure that the recipient of the deposit takes an asset off the market, while the counterparty decides whether to contract for it. In the interim, the recipient forgoes the freedom of entering

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61 Defendant's reply submissions at para 9.

into equivalent transactions with others in relation to the asset. Such deposits are generally non-refundable in that, if the party decides not to contract for the asset, and the recipient has not breached the agreement, he or she may not recover the deposit. The non-refundable nature of the deposit ensures that, in such a case, the recipient is compensated for the opportunity cost incurred in taking the asset off the market. Thus, in this light, implying the term that the plaintiff contends for would, far from giving the Holding Deposit Agreement efficacy in the business or commercial sense, flout its commercial purpose.

49 Secondly, in my view, the plaintiff's reliance on the general rule that a pre-contractual deposit is *prima facie* recoverable, if the prospective contract in anticipation of which it was made does not come into existence (see [33] above), is misplaced. For the reasons given at [58]–[60(b)] below, I agree that the €1m Deposit was a pre-contractual deposit in the sense that it was made before Cip contracted to purchase either of the Azimut 100 yachts. But I do not think that it was a pre-contractual deposit in the sense that it was paid on the basis that such a contract would subsequently come into existence; such that, if no contract was eventually made, the basis of the payment would have failed and the €1m Deposit would be recoverable. Pre-contractual deposits are generally understood in this latter sense: see Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) at para 14–06. However, not all pre-contractual deposits are of this nature. In *United Artists Singapore Theatres Pte Ltd and another v Parkway Properties Pte Ltd and another* [2003] 1 SLR(R) 791, Belinda Ang JC (as she then was), having stated the general rule, recognised this point at [76]:

> As to whether a payee is entitled to retain a pre-contract payment *depends in each case upon the construction of the document or correspondence under which that payment is made.* … [emphasis added]

In *Supercars Lorinser Pte Ltd and another v Benzline Auto Pte Ltd* [2016] SGHC 281, Aedit Abdullah JC (as he then was) observed as follows at [38]–[41]:

> 38 … But a payment in the form of a deposit, may also be paid before a contract is concluded. This would usually serve to indicate earnestness or seriousness. Such a deposit may be repayable *if the basis on which it was paid does fail* …
>
> …
>
> 40 If such payments showing seriousness are made, *and these payments cannot be construed in any way*, as for instance as a gift, *the doctrine of failure of basis applies, and these payments are recoverable as reversal of unjust enrichment or restitution.*
>
> 41 *What is the basis must be determined objectively.* …
>
> [emphasis added]

The following two principles are clear from these passages:

(a) First, what is vital in each case is to identify the precise basis on which the payment was made. Classifying the payment as a pre-contractual deposit or otherwise is not determinative in itself. The precise basis on which the payment was made must be identified so as to ascertain whether the basis has (totally) failed, in which case the payor may sue in unjust enrichment for restitution of the sum, on the ground of (total) failure of consideration (also known as failure of basis).

(b) Secondly, the basis of the payment must be identified objectively by construing the relevant documents and correspondence pursuant to which the payment was made.

50 In this case, the evidence (see [43]–[45] above) is that the €1m Deposit was paid on the following basis (and I have so found at [42] above):

(a) it would secure the Azimut 100 yachts until 15 May 2013; and

(b) thereafter, it would become the initial down payment on one of those yachts, *viz*, the yacht that Cip chose to buy.

If the €1m Deposit had secured the Azimut 100 yachts until 15 May 2013, and Cip had then decided not to purchase either yacht, Cip would not have been entitled to recover the €1m Deposit. For in that scenario, the basis upon which Cip made the €1m Deposit would not have totally failed. But in this case, the €1m Deposit did not secure the Azimut 100 yachts until 15 May 2013 for Cip to choose between them, because Azimut sold one of the two yachts on around 30 April 2013 (see [8] above). There was therefore a total failure of consideration or failure of basis. For this reason, other things being equal, Cip was entitled to recover the €1m Deposit after 30 April 2013 (see [62] below).

51 Thirdly, the defendant argues that the Deposit Invoice incorporated cll 1.7 and 4.1 of the T&C: the parties therefore expressly agreed that the €1m Deposit would not be refundable under any circumstances (see [25(a)] above). Clauses 1.7 and 4.1 state:[62]

> 1.7 "Deposit" means the initial payment for the purchase of the yacht;
>
> …
>
> 4.1 The Deposit will be due on the Contract Date. *In no circumstances will the Deposit be returned to the Buyer.*
>
> [emphasis added]

The defendant's case is that cll 1.7 and 4.1 were incorporated by notice into the Holding Deposit Agreement for the following reasons:[63]

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62 P1.

63 Defence and counterclaim (Amendment No 3) at para 50; Defendant's closing submissions at paras 103–106; Defendant's reply submissions at paras 56–60.

(a) the defendant used the word "deposit" in correspondence with Cip before Cip paid the €1m Deposit, and in the Deposit Invoice;

(b) Cip signed the Azimut 62S and Azimut 64 Contracts before paying the €1m Deposit, and those contracts incorporated the T&C; and

(c) the defendant gave Cip the quotations for the Azimut 100 yachts, which were stated to be subject to the T&C.

52 However, I do not accept this submission. In *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, Menon CJ, delivering the CA's grounds of decision, made the following observations on the incorporation of terms into contracts at [51]:

> First, the law adopts *an objective approach* towards questions of contractual formation *and the incorporation of terms*. Put another way, the question of … whether the terms of the second Contract Note had been incorporated into the Second Supply Contract *turned on ascertaining the parties' objective intentions gleaned from their correspondence and conduct in light of the relevant background as disclosed by the evidence*. The relevant background includes *the industry in which the parties are in, the character of the document which contains the terms in question as well as the course of dealings between the parties* … [emphasis added]

As authority for the final italicised proposition in the extract above, the CA cited *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2009] 4 SLR(R) 111, where Prakash J (as she then was) stated the following proposition at [24]:

> … (c) where it is a matter of inferring the contractual intention, the "*character of the document*" and the relevant part of it and whether it is "*apt to form part of the contract*" are central to deciding whether or not the inference should be drawn. [emphasis in original]

53 In my judgment, on an objective ascertainment of the parties' intentions, the parties did not intend that cll 1.7 and 4.1 should form part of the Holding Deposit Agreement, for the following reasons:

(a) First, in respect of the T&C as a whole, they are terms and conditions of sale, which requires the conclusion of a contract to purchase a specific yacht from the defendant. Thus, I do not think that the parties intended that the T&C form part of the Holding Deposit Agreement, which is not such a contract (see [58]–[60(b)] below).

(b) Secondly, in respect of cll 1.7 and 4.1 specifically, the parties could not have intended these provisions to apply to the €1m Deposit:

(i) The plaintiff notes that cl 4.1 refers to "the Deposit", which is defined in cl 1.7 as "the initial payment for the purchase of the yacht". Clauses 1.7 and 4.1 therefore could not apply to the €1m Deposit, which was not a deposit paid upon a purchase having been made.[64] The defendant replies that the Deposit Invoice indicated that the €1m Deposit would become the initial down payment for either of the Azimut 100 yachts, and that, by signing the Deposit Invoice, Cip agreed to purchase either of the said yachts.[65] However, as I explain at [58]–[60(b)] below, I do not agree with the defendant. In any case, cl 1.7 envisions the purchase of a specific yacht, given the use of the phrase "the yacht", and not a contract to purchase either of two yachts.

(ii) Moreover, cl 4.1 states that the deposit "will be due on the Contract Date", which is defined in cl 1.4 as "the date of

64 Plaintiff's closing submissions at paras 89–95.

65 Defendant's reply submissions at paras 58–59.

signing of the second signature on the Order Form of the Buyer or Seller whichever is later in time".[66] But the parties could not have intended that the €1m Deposit be due on the Contract Date, for its purpose was to hold the Azimut 100 yachts off the market while Cip decided which yacht to buy. On the Contract Date, the €1m Deposit would have been otiose because Cip would have already decided to buy a specific yacht by that date.

(iii) Furthermore, cl 4.1 provides that the Deposit will not be returned to "the Buyer" which is defined in cl 1.1 as "the legal person who accepts the Seller's written quotation for sale of the Craft or whose written order for the Craft is accepted by the Seller". The "Craft", which is a singular term, is defined in cl 1.2 as "the yacht and any other components or items which the Seller is to provide in accordance with the Contract"; and cl 1.3 defines "the Contract" to include the "Order Contract". But it is not in dispute that there was no Order Contract for either of the Azimut 100 yachts. Accordingly, the references to "the Contract", "the Craft" and "the Buyer" have no application. Ultimately, this point illustrates the more general point made at (a) above that the T&C envision the conclusion of a contract to purchase a specific yacht from the defendant.

54 Additionally, the express words of incorporation used in the Azimut 64 Contract are absent from the Deposit Invoice. The Azimut 64 Contract states:[67]

> This sale is subject to the Seller's Standard Terms and Conditions which *are hereby expressly incorporated in full and appended to this Order Contract*. In signing this Order Contract,

66 P1.

67 PCB 491–495.

> the Buyer hereby confirms and agrees that the Standard Terms & Conditions … *have been incorporated in full into this contract of sale*. … [emphasis added]

No such words are used in the Deposit Invoice.

55 For the above reasons, I find that the parties did not intend that cll 1.7 and 4.1 should be part of the Holding Deposit Agreement. I do not accept that these provisions were incorporated into that agreement.

56 Fourthly, the defendant argues that a term that the €1m Deposit "would not be refunded if [Cip] did not proceed with the purchase of either the Azimut 100L or 100G" should be implied into the Holding Deposit Agreement.[68] I disagree. I have found that a term to the opposite effect should not be implied into the Holding Deposit Agreement, for it would flout the commercial purpose of such agreements (see [48] above). But equally, I do not think that the term which the defendant proposes is necessary in the business or commercial sense. It is too broad. In particular, it does not distinguish between (1) a case where Cip chose not to purchase either yacht, of his own volition, with the €1m Deposit having served its purpose as a holding deposit and (2) a case like the present, where the primary aim of the €1m Deposit was not achieved. In my judgment, in situation (2), refunding the holding deposit is in line with commercial sense. In this regard, I note that two of the defendant's factual witnesses, Mison and Grange, conceded that, after the Azimut 100G #12 was sold, Cip was entitled to a refund of the €1m Deposit.[69] Thus, I find that the term that the defendant proposes should not be implied into the Holding Deposit Agreement because it does not satisfy the second stage of the *Sembcorp Marine* test (see [48] above).

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68 Defendant's closing submissions at paras 135–139.

69 Transcript, 13 April 2017, pp 45–48 and pp 56–57; Transcript, 19 April 2017, p 31.

57 Finally, the defendant submits that, on 26 April 2013, by signing the Deposit Invoice, Cip entered into a contract to purchase either the Azimut 100G #12 or the Azimut 100L #15 (see [37] above). I cannot accept this submission for the following reasons.

58 First, the defendant did not plead this contention. Rather, as the plaintiff points out,[70] the defendant pleaded that, on or around March 2013, Cip agreed to buy one of the Azimut 100 yachts and a smaller yacht (see [24] above).

59 Secondly, Mison's evidence does not strongly support the defendant's submission. Mison did not depose that Cip contracted to buy one of the two Azimut 100 yachts on 26 April 2013. While Mison initially made this claim during cross-examination,[71] he later retreated to the following position:[72]

> …
>
> A. I will say that he committed to buying this boat as well as another boat with the option to, how can I say it? *He was going to buy one or the other*. I can't say he was going to buy this boat. I can say he was *going to buy one or the other*.
>
> …
>
> A. … he had a choice to buy one of two boats and *he had bought -- he committed to buying one of two boats*.
>
> …
>
> A. … He decided to buy one of two boats, and so we had complete contracts on two boats and he committed to buy one of the two boats.
>
> …
>
> Q. … He had complete contracts to buy one of two boats?
>
> A. Ah, all right. All right. This would be –
>
> …

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70 Plaintiff's reply submissions at para 9.

71 Transcript, 12 April 2017, p 160.

72 Transcript, 12 April 2017, pp 161–163.

> A. I would like to correct my statement, if I can?
>
> COURT: Yes. What do you want to correct it to?
>
> A. *I would like to say he had complete quotations.*
>
> …
>
> [emphasis added]

I find this testimony telling for two reasons. First, Mison drew a distinction between buying one of two boats, and committing to buying one of two boats (in the third italicised sentence in the extract above). Secondly, Mison could not maintain that there were complete contracts to buy one or two boats. He could only state that Cip had "complete quotations" for the Azimut 100 yachts.

60 Thirdly, on an objective ascertainment of the parties' intentions, I do not think they entered into a contract to purchase either of the Azimut 100 yachts on 26 April 2013. I find that, when the Holding Deposit Agreement was signed, the parties envisioned and intended that they would subsequently enter into a contract of sale for a specific yacht, one of the Azimut 100 yachts. The parties contemplated that that further contract would govern their rights and duties as buyer and seller, not the agreement on 26 April 2013. In my judgment, the latter agreement is best construed as, in part, an agreement to agree, *ie*, an agreement to enter into a contract of sale for one of the Azimut 100 yachts. (To be clear, I say "in part" because the Holding Deposit Agreement was also an agreement that the Azimut 100 yachts would be held off the market for Cip to choose between them.) The following two points indicate that the agreement on 26 April 2013 was not a contract of sale:

(a) On 26 April 2013, the price of the Azimut 100 yachts had not been agreed. The defendant argues that the parties agreed on the prices as stated in the quotations to which the Deposit Invoice referred, and which Cip had received before he signed the Deposit Invoice.[73] Yet both

quotations stated: "[a]ll prices are *indicative only* and *subject to final confirmation and approval at time of contract*" [emphasis added]. Mison explained that this provision meant that the prices in the quotations were subject to final approval at the time of the Order Contract for the relevant yacht. He acknowledged that this was because, between the quotation and the Order Contract, the defendant might offer a bigger discount and the contractual specifications of the yacht might change.[74] The defendant argues that the aforementioned statement in the quotations only meant that the agreed prices therein could be varied.[75] I do not find this argument persuasive. A price which is "indicative only" and "subject to final confirmation and approval" is one that has not been agreed.

(b) The differences between the Deposit Invoice and the Azimut 64 Contract, which Cip signed on the same day, belie the defendant's case that, by signing the former document, Cip contracted to purchase either of the Azimut 100 yachts. The Azimut 64 Contract included the following statements:

> *This sale* is subject to the Seller's Standard Terms and Conditions … In signing this Order Contract, the Buyer hereby confirms and agrees that the Standard Terms & Conditions … have been incorporated in full into this *contract of sale*.
>
> …
>
> *This document is intended to create a legally binding contract; if you are unsure of any of the conditions you are advised to take appropriate legal advice.*
>
> [emphasis added]

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73 Defendant's closing submissions at para 111b; Defendant's reply submissions at paras 38–41.

74 Transcript, 13 April 2017, pp 5–6.

75 Defendant's closing submissions at para 111b.

The Deposit Invoice did not contain similar statements. This indicates that it was not intended to be a contract of sale. I also note that Cip signed every page of the Azimut 64 Contract, but not the quotations for the Azimut 100 yachts. During cross-examination, Mison even conceded that he could not say that he had given Cip the two quotations during the 26 April 2013 Meeting.[76]

61 For these reasons, I find that Cip did not contract to purchase either the Azimut 100G #12 or the Azimut 100L #15 on 26 April 2013.

The position on 30 April 2013

62 It follows from my findings above that, after Azimut sold the Azimut 100G #12, Cip was entitled to recover the €1m Deposit, for the basis upon which he had paid the €1m Deposit, *viz*, that Azimut would hold the two Azimut 100 yachts off the market for him until 15 May 2013 for him to choose between them, whereupon the €1m Deposit would become the initial down payment for the chosen yacht, had totally failed. Both Mison and Grange admitted this (see [56] above) in cross-examination, and I so find.

The 8 May 2013 Meeting

63 The defendant's case is that, during the 8 May 2013 Meeting, Cip agreed with Grange and/or represented that the €1m Deposit should be paid to Azimut as a non-refundable deposit to reserve the Azimut 100L #15 and the Azimut 100G #15 (see [25(b)] above). The defendant relies on Grange's evidence that he told Cip that the €1m Deposit would be non-refundable if Cip did not purchase either yacht, and that Cip acknowledged this position.[77]

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76 Transcript, 13 April 2017, p 23.

77 Grange's AEIC at paras 14 and 16.

64 I find that there was no such agreement or representation.

65 First, as the plaintiff emphasises,[78] the defendant has not produced any documentary evidence of the alleged agreement or representation. In particular:

(a) there is no invoice, equivalent to the Deposit Invoice, which records the alleged agreement or representation;

(b) there is no contemporaneous email or written communication to Cip stating what the parties agreed or what Cip represented (in contrast to the 31 July 2013 Meeting, where Mison sent an SMS and emails to state what the parties had agreed: see [72] below); and

(c) there is no internal correspondence evidencing Cip's alleged agreement or representation. Significantly, Grange testified that he had given the instruction for the €1m Deposit to be remitted to Azimut and that he would be "stunned" if that instruction had not been in writing.[79] But I note that the defendant did not adduce documentary evidence of any such instruction, which might have contained a record of what Cip had agreed to.

In my judgment, the lack of a written record evidencing the alleged agreement or representation is critical for two reasons. First, the defendant is a commercial party in the business of dealings in yachts. It therefore seems likely that the defendant would have recorded agreements or representations about significant sums of money in writing. The Deposit Invoice, which recorded the Holding Deposit Agreement, and the various communications that Mison sent to Cip that reflected their agreements or understandings bear this point out. Secondly, and

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78 Plaintiff's closing submissions at paras 149–152.

79 Transcript, 19 April 2017, p 43.

significantly, on 4 May 2013, Cip asked for the €1m Deposit to be returned and Mison agreed to do so (see [45] above). In the circumstances, if Cip had agreed or represented that the €1m Deposit should be paid as a non-refundable deposit barely four days later, it is highly likely that the defendant would have recorded the same in writing. But no such written record was produced. This indicates that there was no such agreement or representation.

66 Secondly, in August 2013, Cip sent several emails to Mison in which he stated that he was entitled to a refund of the €1m Deposit. I shall refer to three examples. The first is an email dated 11 August 2013:[80]

> … Now are we clear on the deposit issue otherwise, there will be no more deals other than the 64 but lawsuits to get my money back! *I will be speaking with my lawyer then about the deposit money that was given in good faith but not to be taken advantage of!* From the very beginning I have kept refusing to sign any documents or agreements on what prices I agreed or commitment of any sort about the 2nd and larger yacht before I get to go to Italy and see it for myself! Now that its is coming to HK, I can do the seeing for myself however, if the price is not right, *I have the right to decline and pull out and have my money refunded, as to what You or Paul agreed and understood from way back when I first met you and told you about our interest in the larger yacht*! … [emphasis added]

On 12 August 2013, Cip stated the following in another email to Mison:[81]

> … *I want my deposit back! And I am saying RIGHT AWAY,* otherwise I will even sue you for the interest for holding on to my money and refusing to return it despite having no right [to] be holding on to the money … [emphasis added]

On 28 August 2013, Cip sent the following email to Mison:[82]

> … However *I DO NEED MY €500k deposit back ASAP!* The funds are needed else where! … I will be getting a Ferreti or San

[80] PCB 241.

[81] PCB 245.

[82] PCB 255.

> Lorenzo so I need the €500k back immediately, *I'd [*sic*] you don't acknowledge what I have been saying about the deposit all this time and cannot settle this among ourselves, then I'll be forced to settle this in court and also sue for the lawyer fees and interest on the deposit! …* [emphasis added]

The defendant's first response to Cip's demands was on 3 September 2013, when Mison replied to a further email from Cip of 2 September 2013 to demand for the €500k Remainder yet again. The defendant responded as follows:[83]

> … I just want to let you know that I am trying to help you however I personally am not in a position to be able to refund your 10% deposit because it is beyond my control.
>
> However, I have again forwarded your request to our HK head office for them to reply to you directly. …

Later that day, Grange sent an email to Cip which stated:[84]

> … Peter has forwarded me your recent emails requesting the return of the 500,000 Euros balance of the 1 million Euros deposit that you placed with Azimut to reserve the Leonardo 100 and Grande 100 in April. …
>
> *… As agreed at the time, your deposit was forwarded in full to Azimut to reserve your choice of either the Leonardo 100-15 or Grande 100-15. I have notified Azimut of your request to have the deposit returned and I await their response.*
>
> [emphasis added]

I make two points about this chain of correspondence:

(a) In August 2013, Cip asserted several times, in strong language, that he was entitled to (the balance of) the €1m Deposit and demanded its return. Yet the defendant did not reply to these emails until 3 September 2013. Notably, Mison deposed that he forwarded the 11 August 2013 email quoted above to Grange (and Whelan) and it seems that he did the same for the 28 August 2013 email.[85] Grange also testified

83 PCB 262.

84 PCB 263.

that he was "certain that Peter [Mison] would have been relaying [Cip's] requests to me".[86] But at no time before 3 September 2013 did Grange respond to Cip to refer to the 8 May 2013 Meeting, and to what Cip had allegedly agreed or represented then. During re-examination, Grange candidly said that he was "not sure why there was no official responses".[87]

(b) Even on 3 September 2013, in his email to Cip, Grange did not state that Cip had agreed or represented during the 8 May 2013 Meeting that the €1m Deposit should be paid as a *non-refundable* deposit.

The defendant's failure to raise the alleged agreement or representation, in the face of Cip's strongly worded assertions that he was entitled to a refund of the €1m Deposit, indicates that there was no such agreement or representation.

67 Thirdly, the nature of the Compromise Agreement raises doubts as to whether Cip agreed or represented, during the 8 May 2013 Meeting, that the €1m Deposit should be sent to Azimut as a non-refundable deposit.[88] If Cip so agreed or represented, why did the defendant agree to the Compromise Agreement? During cross-examination, Grange suggested that the defendant wanted to preserve its reputation and to assist its clients.[89] But, as Ms Oei suggested, the defendant could nonetheless have told Cip that, while he was not entitled to have even half of the €1m Deposit applied to the Azimut 64 Price, it was offering that course to him anyway (as a matter of goodwill).[90] Yet, the

85 Mison's AEIC at para 72; PCB 256.

86 Transcript, 19 April 2017, p 55.

87 Transcript, 19 April 2017, p 55.

88 Plaintiff's closing submissions at paras 185–187.

89 Transcript, 19 April 2017, pp 35–37.

90 Transcript, 19 April 2017, p 37.

defendant did not make this clear at the time of the Compromise Agreement. This weakens its case on what was agreed during the 8 May 2013 Meeting.

68 Finally, I note that the defendant sent €1m to Azimut on 9 May 2013 (see [10] above). I accept that this may appear consistent with the defendant's case that Cip told Grange to do so on 8 May 2013. However, I cannot safely infer from this alone that €1m was sent to Azimut because Cip agreed or represented that €1m would be paid as a non-refundable deposit during the 8 May 2013 Meeting. In this regard, the following points are critical:

(a) It is undisputed that when a buyer purchased a new yacht through the defendant, the buyer would enter into a contract with the defendant ("Contract 1").[91] For example, the counterparties to the Azimut 64 Contract were Cip and the defendant (see [6(a)] above). The defendant would in turn enter into a contract with the yacht manufacturer, *eg*, Azimut ("Contract 2"). (By contrast, when a buyer purchased a used yacht through the defendant, there would only be one contract of sale and purchase between the buyer and the seller.[92])

(b) The terms of Contract 1 were to mirror those of Contract 2: the defendant would try to ensure that the contracts were "back-to-back".[93] However, as Grange admitted, if there was a gap between the contracts, *ie*, a difference in their terms, that would neither concern the buyer (for Contract 1) nor the seller (for Contract 2), who would be able to enforce their respective contracts against the defendant.[94]

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91 Transcript, 12 April 2017, p 120.

92 Transcript, 12 April 2017, pp 122–123.

93 Transcript, 19 April 2017, p 7.

94 Transcript, 19 April 2017, p 8.

(c) In my view, the same logic applies to what Cip allegedly agreed on 8 May 2013. The defendant relies on the fact that it sent €1m to Azimut on 9 May 2013 to contend that Cip agreed, the day before, that this sum be sent to Azimut as a non-refundable deposit. But the fact that the defendant sent €1m to Azimut is a matter between the defendant and Azimut. It does not necessarily follow that Cip agreed that the defendant should send the monies as a non-refundable deposit. It may be that there was a gap in the agreements between the parties.

(d) As noted at [65] above, the defendant has not produced any internal documents or correspondence between its Singapore and Hong Kong offices to evidence the facts and circumstances surrounding the remittance of the €1m to Azimut on 9 May 2013. The defendant has also not produced any correspondence with Azimut on this matter. This is despite the fact that Cip sent an SMS to Mison on 4 May 2013 instructing him not to send the €1m Deposit to Azimut, to which Mison replied, on the same day, stating that it would be returned to Cip "right away" (see [45] above).

(e) For the reasons given at [65]–[67] above, the evidence strongly suggests that Cip did not agree the €1m Deposit should be paid to Azimut as a non-refundable deposit.

69 Therefore, I find on balance that Cip did not agree or represent, during the 8 May 2013 Meeting, that the €1m Deposit should be paid to Azimut as a non-refundable deposit to reserve the Azimut 100L #15 and the Azimut 100G #15.

The 31 July 2013 Meeting

70 The defendant's case is that, during the 31 July 2013 Meeting, apart from entering into the Compromise Agreement, Cip agreed to use the €500k Remainder to buy a Larger Yacht before the end of August 2014, failing which the €500k Remainder would be forfeited. The defendant pleads that there was an express verbal agreement, or an agreement by incorporation or an implied term to this effect (see [25(c)] above). I shall address these contentions in turn.

71 I do not accept the defendant's claim that, during the 31 July 2013 Meeting, Cip verbally agreed to use the €500k Remainder to buy a Larger Yacht by August 2014, failing which the €500k Remainder would be forfeited.

72 First, in my judgment, putting the oral evidence to one side for the moment, the truth of what the parties agreed during the 31 July 2013 Meeting can once again be found in the contemporaneous documents. On 31 July 2013, Mison sent the following SMS to Aina:[95]

> … I met with Cip today and have worked out a compromise. Azimut will use 500,000 of the 1,000,000 towards the 64 Azimut. *Cip will use the other 500,000 to be put towards either an Azimut 76 or 100 Leonardo.* Azimut is working on the 76 and 100 so Cip can choose. [emphasis added]

Mison sent the following email to Melissa Ong, an employee of the CP Group who dealt with finances,[96] copying Cip (amongst others) on 1 August 2013:[97]

> …
>
> I had a meeting with Chip yesterday and have sorted out the final payment of amount for his Azimut 64. Attached is a revised final payment invoice.

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95 PCB 547–548.

96 Transcript, 12 April 2017, p 4.

97 PCB 195.

> This invoice shows the original 500,000 euro that was transferred as the deposit towards the 64. *You had sent a separate 1,000,000 euro as a deposit to go towards the purchase of an Azimut 100. Azimut has agreed to allow ½ of that 1,000,000 to be used to help to pay down the 64.* This is why this invoice now shows 2 x 500,000 euro been already paid as a deposit towards the 64.
>
> …
>
> *Note also that I am currently working with Chip regarding the other 500,000 euro deposit that Azimut is holding to be used to buy another bigger Azimut (possibly still a 100). …*

Later that day, Mison sent the following email to Cip:[98]

> …
>
> Paul Grange has been working hard to persuade Azimut to agree to let allow [*sic*] you to use half of your one million euro deposit to put towards your 64 and they finally agreed. He has also been pushing them to let you use the other half million to be used to buy a Magellano 76, *but until now, they have replied that they would much prefer to have you continue to move forward with the 100 Leonardo. …*
>
> …
>
> From Azimut's stand point the 76 would be a new build so they cannot offer any "very special" pricing. *The same goes for the 100 Grande. …*
>
> …
>
> So please think hard if you would like to take advantage of this opportunity to buy the 100L with a 25% discount. *And I will continue to work with Paul to see what can be done regarding either a 76 Magellano or a 100 Grande. …*
>
> [emphasis added]

I note the following points about these communications:

(a) Mison did not mention the alleged deadline of August 2014.

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98 PCB 198.

(b) Mison did not state that Cip had agreed that, if he did not buy a Larger Yacht, the €500k Remainder would be forfeited.

(c) While Mison referred to two specific yachts in his SMS, his emails indicate that Cip had not agreed to buy either of these two yachts. Importantly, the second email of 1 August 2013 suggests that Cip was also considering an Azimut 100 Grande yacht.

Thus, I find that Cip did not verbally agree, during the 31 July 2013 Meeting, to use the €500k Remainder to buy a Larger Yacht before the end of August 2014, failing which the €500k Remainder would be forfeited. I find that Cip agreed that, if he chose to purchase a Larger Yacht, the €500k Remainder would be applied to its purchase price.

73 Secondly, the reasoning at [66] above applies *mutatis mutandis* to the defendant's case on what was agreed during the 31 July 2013 Meeting. In short, in August 2013, Cip sent several emails to the defendant in which he demanded the return of the €500k Remainder; yet, the defendant did not promptly reply to Cip's demands to state that Cip had agreed, during the 31 July 2013 Meeting, that the €500k Remainder would be non-refundable. Again, when Grange replied to Cip's demands on 3 September 2013, he did not refer to the 31 July 2013 Meeting at all. Moreover, in my judgment, the reasoning at [66] above applies *a fortiori* because when Cip made his demands in August 2013, the 31 July 2013 Meeting had just been concluded. That the defendant did not raise the alleged agreement in response to Cip's demands, when it had purportedly been made just days or weeks before, indicates that there was no such agreement.

74 Thirdly, the following three considerations taken together indicate that Cip would not have made the agreement that the defendant contends for:

(a) Prior to the 31 July 2013 Meeting, the relationship between Cip and Mison had begun to deteriorate, with Cip indicating that he did not wish to have further dealings with the defendant. This is manifest in Cip's communications with Mison; in particular, Cip sent the following SMS to Mison on 7 July 2013:[99]

> *To be crystal clear, no 100 ft Yacht from you! But from your competitor!* You don't intimidate me with your ridiculous attempt to add another c… [emphasis added]

(b) From Cip's perspective, he would have had nothing to gain by agreeing that the €500k Remainder would be non-refundable.

(c) Grange, Mison's manager, described Mison as follows:[100]

> … Peter Mison is just a super nice guy. He bends over doubly backwards for his customers. *There is no end that he will not go.* So as a manager, *you have to kind of control Peter* because he will work really tirelessly for the client, *almost too much at times, and he was always trying to do the very best for Chip.*
>
> So Peter needs a firm guidance. *He needs very clear instructions because, otherwise, he will just keep going way down a path and say too much and so you have to be very, very specific.*
>
> [emphasis added]

By contrast, Cip's emails reveal that he was a forceful and savvy businessman who was keen to ensure that he was not taken advantage of by dealers. In February 2013, soon after he first met Mison, he sought Mison's help in dealing with a Ferrari dealer who he felt had taken advantage of him.[101] Thus, I find it unlikely that Cip would have made the agreement that the defendant contends for.

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99 PCB 568.

100 Transcript, 19 April 2017, pp 54–55.

101 PCB 15–17; Transcript, 12 April 2017, p 142.

75 I also find that there was no agreement by incorporation that the €500k Remainder would be used to buy a Larger Yacht by August 2014, failing which it would be forfeited. Here, the defendant presses the same argument that it raised in submitting that the €1m Deposit would not be refundable under any circumstances. I have rejected this argument at [51]–[55] above; those reasons apply here too. In my judgment, the parties did not intend to incorporate cll 1.7 and 4.1 of the T&C into what was agreed on 31 July 2013 as the T&C apply to sales of specific yachts and the parties made no such contract of sale on 31 July 2013. The parties also did not use the express words of incorporation found in the Deposit Invoice to indicate their intention to incorporate cll 1.7 and 4.1 into what they agreed during the 31 July 2013 Meeting.

76 Finally, applying the *Sembcorp Marine* test (see [48] above), I do not accept that there was an implied term to the effect that the €1m Deposit would be forfeited if it was not used to purchase a Larger Yacht by the end of August 2014.

(a) First, there is insufficient evidence for me to find that, on 31 July 2013, the parties did not contemplate the possibility that Cip would not purchase a Larger Yacht at all, and thus left a gap in their agreement to be filled by an implied term. It may well be that the parties considered this scenario, but did not provide for it because they could not agree on how the €500k Remainder would be dealt with then. If this is right, no term should be implied to fill the gap in the parties' agreement: see *Sembcorp Marine* at [95]. However, since the evidence is equivocal, I make no positive finding that this is in fact what transpired. It suffices to dispose of the defendant's argument that I do not find that the gap in the parties' agreement arose because they did not contemplate it.

(b) Secondly, the term that the defendant contends for is not necessary in the business or commercial sense. Importantly, the €500k Remainder was not a holding deposit (for (a) specific yacht(s)). Hence, the reasons given at [48] above, for why it is consistent with commercial sense that holding deposits are generally non-refundable, do not apply. Therefore, the second stage of the *Sembcorp Marine* test is not made out.

(c) Finally, in any event, I find that the term that the defendant contends for does not satisfy the officious bystander test.

77 In summary, I find that Cip did not agree, during the 31 July 2013 Meeting, that the €500k Remainder would be used to purchase a Larger Yacht and that, if it was not so applied, it would be forfeited.

Conclusion

78 On 30 April 2013, Cip was entitled to recover the €1m Deposit. It was undisputed that he agreed that half of the €1m Deposit would be applied towards the purchase price of the Azimut 64 yacht. But Cip did not agree, during the 8 May or 31 July 2013 Meetings, that the €1m Deposit or the €500k Remainder would be non-refundable in that it would be forfeited if he did not buy either the Azimut 100L #15 or the Azimut 100G #15, or a Larger Yacht. Therefore, Cip remained entitled to the €500k Remainder. Accordingly, I find that the plaintiff's claim for the €500k Remainder succeeds.

The Azimut 64 Issue

The parties' submissions

79 The plaintiff submits that the defendant repudiated the Azimut 64 Contract by failing to hand over the Azimut 64 yacht to Cip, and that Cip accepted this repudiation. In relation to the defendant's failure to hand over the Azimut 64 yacht, the plaintiff argues that Cip was entitled to reject the handover of the yacht ("the Handover") in view of the following matters:[102]

(a) the discrepancy between the serial numbers (of the gearboxes) on the Azimut 64 yacht, and those on the First Certificate ("the Serial Numbers Issue");

(b) the inspection of the hull of the Azimut 64 yacht ("the Inspection Issue");

(c) the registration of the Azimut 64 yacht ("the Registration Issue"); and

(d) the defendant's "overall neglect or omission … to perform expected or required actions" ("the Neglect Issue").

The plaintiff submits that, while each of these matters might, on their own, appear trivial, their cumulative effect resulted in the "perfect storm".[103]

80 The defendant submits that the plaintiff did not plead that it was entitled to reject the Handover, let alone for the above reasons.[104] The defendant also submits that the plaintiff was not entitled to reject the Handover in any event.[105]

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102 Plaintiff's closing submissions at paras 212–313; Plaintiff's reply submissions at paras 75–100.

103 Plaintiff's closing submissions at para 305.

My decision

81 To begin with, I find that the plaintiff did not adequately plead the point that it made in submissions, *viz*, that Cip was entitled to reject the Handover. There is no trace of these averments in the statement of claim, where the plaintiff simply pleads that the defendant repudiated the Azimut 64 Contract by failing to hand over the Azimut 64 yacht and by selling it to a third party (see [22] above). (During the trial, the plaintiff did not dispute that the defendant sold the Azimut 64 yacht with Cip's consent.) Nor is there reference in the statement of claim to the matters by reason of which the plaintiff claims that it was entitled to reject the Handover. Thus, the plaintiff has departed from its pleaded case in submitting that Cip was entitled to reject the Handover.

82 In any case, I agree with the defendant that Cip was not entitled to reject the Handover. I now examine the Serial Numbers Issue, the Inspection Issue, the Registration Issue and the Neglect Issue in turn.

The Serial Numbers Issue

83 The information in the relevant documents pertaining to the engines on the Azimut 64 yacht, which were manufactured by Caterpillar, was as follows:

(a) The First Certificate, which was issued in Italian by Compagnia Generale Trattori SpA, a Caterpillar engines dealer, indicated that the engines on the Azimut 64 yacht bore the serial numbers "JKX01505" and "JKX01496". The gearbox number in respect of "JKX01505" was "2067397", while that in respect of "JKX01496" was "2067398".[106]

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104 Defendant's closing submissions at paras 146–153; Defendant's reply submissions at para 13.

105 Defendant's closing submissions at paras 154–188.

106 PCB 652

(b) The Builder's Certificate, which was issued by Azimut, merely stated the serial numbers of the engines on the Azimut 64 yacht, and identified them as "JKX01457" and "JKX01458".[107]

On 2 October 2013, Ken, Cip's surveyor, discovered that the gearbox numbers of the engines on the Azimut 64 yacht were "2067395" and "2067396" and thus did not match the numbers on the First Certificate.[108] I also note that there was a second discrepancy, *viz*, in the serial numbers of the engines, since the Builder's Certificate and the First Certificate reflected different numbers (although the plaintiff was only concerned about the first discrepancy at the material time). I shall refer to both discrepancies collectively as "the Discrepancies".

84 I find that the plaintiff was not entitled to reject the Handover due to either or both of the Discrepancies for the following reasons.

85 First, on 14 October 2013, Whelan sent Aina and Toh an email which enclosed an earlier email from Pierpaolo Sapetti ("Sapetti"), an Azimut representative.[109] In his email, Sapetti explained the Discrepancies:

> In this case, unfortunately, due to a trivial oversight *the engines documents envelope has been exchanged with the one for another 64 we had in construction at the same time.*
>
> Please be so kind as to forward this e-mail to the Owner along with our most sincere apologies for any inconvenience caused by such a mistake.
>
> [emphasis added]

Whelan also attached the following documents to his email:[110]

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107 PCB 307.

108 PCB 653–654.

109 2DCB 279–281.

(a) A second certificate, similar to the First Certificate, but indicating that the engines on the Azimut 64 yacht bore the serial numbers "JKX01458" and "JKX01457" ("the Second Certificate"). The gearbox number in respect of "JKX01458" was "2067395", while that in respect of "JKX01457" was "2067396".

(b) A warranty certificate issued by Caterpillar in English.

In short, the Discrepancies were due to Azimut's administrative error in placing the wrong engines document envelope on the Azimut 64 yacht. By his email, Whelan gave the plaintiff an explanation of the Discrepancies from an Azimut representative and the correct warranty documents. Thus, as the plaintiff noted, the Discrepancies were "picked up early and rectified".[111] I find that, once this had been done, there was no basis for Cip to reject the Handover on the basis of the Discrepancies.

86 Secondly, even if Cip had broader concerns about the engines on the Azimut 64 yacht and whether they had been reconditioned, these would have been allayed by no later than 11 November 2013:

(a) Lamble, the defendant's expert witness, testified that when the local Caterpillar agents commission the engines on a yacht, they plug in a computer to the engines. This enables the agents to identify the engine numbers and the year of manufacture of the engines. Sum agreed.[112]

(b) The local Caterpillar agents commissioned the engines on the Azimut 64 yacht on 11 November 2013, and found them to reflect the

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110 2DCB 282–283 and 287–288.

111 Plaintiff's closing submissions at para 302.

112 Transcript, 19 April 2017, pp 88–89.

serial numbers "JKX01457" and "JKX01458", as stated on the Second Certificate.[113]

(c) Lamble and Sum agreed that, if the computer showed that the engines had the correct numbers, it would not be reasonable to reject the yacht on the ground that the engines were not correct.[114]

The Inspection Issue

87 The gist of the plaintiff's complaint here is as follows:[115]

(a) Cip instructed the defendant not to launch the Azimut 64 yacht into the water; the defendant acknowledged this instruction, but failed to comply with it;

(b) By putting the yacht into the water, the defendant impeded an inspection of the bottom of its hull. While an inspection could have been done by lifting the yacht out of the water, the defendant only first made this offer on 25 October 2013.

88 I find that Cip was not entitled to reject the Handover on this basis.

89 First, in relation to [87(a)], I find that Cip first instructed the defendant not to put the Azimut 64 yacht into the water on 26 September 2013. On that date, he sent an email to Mison stating: "PS Do not put it in the water yet!".[116] Anita deposed that, some months before the Azimut 64 yacht arrived in Singapore, she overheard a telephone conversation between Cip and Mison as

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113 3DCB 656–658.

114 Transcript, 19 April 2017, p 91.

115 Plaintiff's closing submissions at paras 251–257.

116 PCB 309.

Cip had put his mobile phone on speaker mode.[117] In that conversation, Cip instructed Mison to keep the yacht out of the water; Mison had acknowledged this instruction. However, I do not accept Anita's evidence on this point for the following reasons:

(a) During cross-examination, Mison maintained that Cip never instructed him over the telephone to keep the Azimut 64 yacht out of the water and that he had not acknowledged any such instruction.[118] I find that Mison's evidence is more plausible than Anita's. On 27 September 2013, Mison emailed Cip to explain, in effect, that it was necessary for the Azimut 64 yacht to be put into the water upon its arrival in Singapore.[119] This was because the Azimut 64 yacht was more than 40 feet long, and thus could not be transported in a trailer around Singapore. Both Sum and Lamble accepted that Mison's explanation was true.[120] In this light, I find it highly implausible that Mison would have acknowledged Cip's alleged instruction to keep the yacht out of the water.

(b) During cross-examination, Anita said that she had seen an email wherein Cip had instructed the defendant, before the Azimut 64 yacht arrived in Singapore, not to put it into the water. However, the plaintiff did not subsequently identify such an email.

(c) Although neither party brought the following extract to my attention during the trial, I note that Cip stated the following in an email

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117 Anita's AEIC at para 16.

118 Transcript, 13 April 2017, pp 121–122.

119 PCB 324.

120 Transcript, 19 April 2017, pp 76–77.

dated 21 October 2013 ("the 21 October 2013 email") to Mison and Whelan:[121]

> … *had instructed Peter to inform me as soon as he knows when the 64 is arriving. To leave the yacht in the container and rent the space at port for the container with all cost beared by myself.* I was to appear at wherever the container is immediately and arrive there within 1-2 hrs max, so I can see the yacht as it was shipped! [emphasis added]

Still, after careful consideration, I do not accept the veracity of Cip's account in this email:

(i) First, as Whelan clarified in his reply of 25 October 2013 to the 21 October 2013 email, the Azimut 64 yacht was not transported in a container to begin with as it was too large for a container.[122] I find it highly implausible that Cip would have instructed Mison to "leave the yacht in the container" without being disabused of his misapprehension right away, and without withdrawing such an instruction thereafter.

(ii) Secondly, Cip sent the 21 October 2013 email almost a month after Mison's email of 27 September 2013. Cip's emails and SMS messages reveal that he was always keen to promptly challenge the defendant's claims if he did not agree with them. I find that Cip's account of what he instructed Mison to do in his 21 October 2013 email was an afterthought.

90 Secondly, in relation to [87(b)], regardless of whether Cip gave the alleged instruction to Mison, both Sum and Lamble agreed that even though the Azimut 64 yacht had been launched into the water, the yacht could have been

121 PCB 336.

122 PCB 331–333.

lifted out of the water for the bottom of its hull to be inspected. Upon such an inspection, one could quickly determine whether the yacht was new.[123] Thus, I find that Cip's fears in this regard would have been directly addressed if he had accepted the defendant's offer, first made by Whelan on 25 October 2013, to arrange to haul the yacht out of the water so that it could be inspected.[124] The plaintiff emphasised that the offer was only first made on 25 October 2013. However, the evidence indicates that Cip first clarified why he did not want the yacht to be put in the water, *viz*, to inspect the bottom of its hull, in the 21 October 2013 email. During cross-examination, Anita accepted that this was "probably" the case.[125] Thus, I find that there was no undue delay by the defendant in making this offer (just four days after Cip clarified his concerns).

The Registration Issue

91 The plaintiff claims that, notwithstanding that the Azimut 64 Contract provided for the Azimut 64 yacht to be registered in Singapore, the defendant repeatedly sought Cip's authorisation to register the yacht in Langkawi, and even misrepresented that the contract provided for the yacht to be registered in Langkawi.[126] The defendant did this to maximise its profit: if the Azimut 64 yacht had been registered in Singapore, Goods and Services Tax ("GST") would have been payable on it; however, Cip was not obligated to pay any GST under the Azimut 64 Contract.

92 For the following reasons, I do not accept that Cip was entitled to reject the Handover on this basis:

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123 Transcript, 19 April 2017, pp 92–96.

124 PCB 331–333.

125 Transcript, 10 April 2017, p 117.

126 Plaintiff's closing submissions at paras 258–285.

(a) First, the Azimut 64 yacht was ultimately not registered in Langkawi.[127]

(b) Secondly, even though Mison did seek to convince Cip to agree to register the Azimut 64 yacht in Langkawi, he nonetheless made clear, in emails to Cip dated 9, 24 and 26 September 2013,[128] that Cip could register the yacht in Singapore instead.

(c) Thirdly, while Mison stated that the Azimut 64 Contract provided for the Azimut 64 yacht to be registered in Langkawi in his email of 24 September 2013,[129] he corrected this mistake promptly, of his own accord, in his email of 26 September 2013.[130] I accept his testimony that he made an honest mistake in misstating the contractual position.[131]

The Neglect Issue

93 Finally, the plaintiff submits that the defendant demonstrated a "poor attitude" in dealing with Cip's complaints.[132] In my judgment, even if this was true, Cip was not entitled to reject the Handover on this basis. In any case, I find that this allegation is baseless. It is clear from his communications that Cip was a demanding client. It is also plain that the defendant's representatives, especially Mison, continually sought to accede to Cip's requests and demands. Therefore, there is no merit in the plaintiff's contention.

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127 Transcript, 10 April 2017, p 106.

128 PCB 271, 287–288, 292.

129 PCB 287–288.

130 PCB 292.

131 Transcript, 18 April 2017, p 24.

132 Plaintiff's closing submissions at paras 286–298.

Conclusion

94 For completeness, I now address two points that arose during the trial but which the plaintiff did not pursue in submissions. First, Anita deposed that Mison told Cip that the Azimut 64 yacht would get a berth at One°15, a yacht club; yet no such berth was obtained.[133] However, after being brought through the correspondence, Anita agreed that Mison never guaranteed Cip a berth for the yacht at One°15.[134] Thus, this contention fell away. Secondly, the Builder's Certificate identified the defendant as the first owner of the Azimut 64 yacht.[135] However, Sum and Lamble agreed that this was standard procedure and that Cip would not have been entitled to reject the yacht on this basis.[136]

95 In conclusion, Sum accepted that, if there were suspicious circumstances pertaining to the purchase of a yacht but each of these suspicions were whittled away, the purchaser would have no reason to reject the handover of the yacht.[137] I have found that Cip was not entitled to reject the Handover on the basis of any of the matters discussed above. Thus, the plaintiff's submissions on the Azimut 64 Issue – which, as noted at [81] above, were not properly pleaded – fail I therefore find that the plaintiff's claim in respect of the Azimut 64 yacht fails.

The Counterclaim Issue

96 In its submissions, the defendant does not maintain its counterclaim for damages for the plaintiff's alleged repudiatory breach in failing to complete a purchase of either of the Azimut 100 yachts (see [27(d)] above).[138] This claim

133 Anita's AEIC at para 14.

134 Transcript, 10 April 2017, p 103.

135 PCB 307.

136 Transcript, 19 April 2017, pp 96–100.

137 Transcript, 19 April 2017, p 104.

was premised on the defendant's contention that Cip agreed to buy two yachts – either of the Azimut 100 yachts, and a smaller yacht – in March 2013 (see [24] above). I find that there was no such agreement. On 1 April 2013, Mison sent an email to Cip including quotations for several boats, including four 100-foot yachts.[139] During cross-examination, Mison accepted that, as of 9 April 2013, there were "four contenders in the 100-footer range".[140] Thus, I find that Cip did not agree in March 2013 to buy either of the Azimut 100 yachts. Accordingly, I dismiss this counterclaim. I now turn to the other counterclaims.

The parties' submissions

97 The defendant counterclaims for the insurance costs, the maintenance costs, the resale costs and the medical costs (see [27] above).[141] In respect of the first three claims, the defendant's case is that it is entitled to recover these costs under the terms of the Azimut 64 Contract. In respect of the medical costs, the defendant submits that it is entitled to them because it reimbursed Mison for the same, and Cip caused Mison to sustain these costs by assaulting him.

98 The plaintiff's response is that the defendant has failed to prove that it is entitled to the damages claimed.[142] In respect of the insurance costs, the plaintiff avers that Cip had arranged for insurance coverage; with regard to the maintenance and resale costs, the plaintiff argues that the defendant has not proved that it incurred loss. Finally, in respect of the medical costs, the plaintiff

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138 Defendant's closing submissions at para 3c.

139 1AB 186–187.

140 Transcript, 12 April 2017, p 151.

141 Defendant's closing submissions at paras 195–214; Defendant's reply submissions at paras 153–182.

142 Plaintiff's closing submissions at paras 7d and 314–380; Plaintiff's reply submissions at paras 101–122.

submits that the defendant has not proved that Cip assaulted Mison, or that Mison's alleged injuries were caused by the assault.

My decision

99 I deal with each category of costs in turn.

The insurance costs

100 As noted at [54] above, the Azimut 64 Contract provides, and I so find, that the T&C are incorporated into the contract. Clause 6.4 of the T&C states:

> **6.4** The Buyer is responsible for ensuring that *adequate insurance for the full value of Craft is in place at all times commencing from the Time of Delivery Ex Works Building Yard.* [emphasis added]

I note that this clause does not expressly state that if the Buyer does not obtain adequate insurance, the defendant may do so and thereafter recover the costs of the same from the Buyer. However, as the defendant argues,[143] the plaintiff does not dispute that the defendant would be entitled to recover the insurance costs under cl 6.4 if the defendant has proved that such expenses were incurred. I therefore proceed on the basis that cl 6.4 of the T&C entitles the defendant to recover insurance costs if it incurs such costs on the Buyer's behalf, where the Buyer has failed to obtain adequate insurance for the Craft.

101 I find that the defendant is entitled to recover the insurance costs, which amount to S$7,678.00 for the following reasons:

(a) First, I find that Cip did not fulfil his duty under cl 6.4 to ensure that adequate insurance for the Azimut 64 yacht was in place "from the Time of Delivery Ex Works Building Yard". Toh deposed that Cip paid

143 Defendant's reply submissions at para 153–154.

€8,276.40 for insurance for the yacht from its arrival in Singapore until the Azimut 64 Contract was cancelled.[144] However, during cross-examination,[145] he admitted that this statement was untrue because, as the relevant insurance policy disclosed,[146] Cip only obtained insurance for the yacht from 22 October 2013 to 21 October 2014. As noted at [14] above, the yacht arrived in Singapore on 16 September 2013. Thus, Cip did not fulfil his duty to ensure that the yacht was insured under cl 6.4 (even though Mison reminded Cip and Toh several times to do so).[147]

(b) Secondly, the defendant paid S$7,678.00 to purchase insurance for the Azimut 64 yacht from 16 September to 15 December 2013.[148] During cross-examination, Toh agreed that the defendant did so because Cip did not confirm that he had obtained the relevant insurance.[149] Mison also deposed that he had arranged for the defendant to purchase the necessary insurance on Cip's behalf.[150] Therefore, I find that the defendant incurred the insurance costs on Cip's behalf.

(c) Thirdly, I find that it was reasonable for the defendant to purchase such insurance. It was plainly sensible and prudent for the defendant to obtain insurance for the Azimut 64 yacht from its arrival in Singapore on 16 September 2013, to address the risk of any damage to the yacht that might have jeopardised the Handover. It would be difficult

144 Toh's AEIC at para 29.

145 Transcript, 11 April 2017, p 133.

146 2DCB 430–450.

147 PCB 224–227 and 257; 3DCB 580–588.

148 PCB 506–508.

149 Transcript, 11 April 2017, p 133.

150 Mison's AEIC at para 162.

for the plaintiff to argue against the need to insure the yacht upon its arrival in Singapore.

(d) Fourthly, I do not accept the plaintiff's claim that the defendant is not entitled to recover the insurance costs because the Azimut 64 yacht was not handed over.[151] The plaintiff did not identify any contractual basis for this contention; furthermore, I have found that the plaintiff was not entitled to reject the Handover.

The maintenance costs

102 Clause 5.7 of the T&C provides as follows:

> **5.7** Where the Buyer fails to take the Craft at the Handover destination when the Craft is ready for Handover for any reason whatsoever … the Seller, may at its sole option:
>
> > **5.7.1** store the Craft *until Handover is completed* and charge the Buyer for *all costs and associated costs* … of storage ….
> >
> > **5.7.2** *should the Craft have been stored as per 5.71 for 30 days or more* and *upon written notice to the Buyer, sell the Craft through private agreement or at auction at a reasonable price available at the time* taking into account that a quick sale may be necessary and, *after deducting all storage and selling expenses*, account to the Buyer for any excess over the Purchase Price. *The Buyer shall pay to the Seller any shortfall below the Purchase Price.*
>
> [emphasis added]

103 I find that the defendant is entitled to recover the maintenance costs, which amount to S$11,941.40 for the following reasons:

(a) Clause 5.7.1 is clear. The plaintiff failed to take delivery of the Azimut 64 yacht when it was ready to be handed over, and the defendant

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151 Plaintiff's closing submissions at para 338.

was thus entitled to store it and recover the storage and associated costs from the plaintiff.

(b) The defendant produced an invoice dated 20 January 2014 for the sum of S$8,985.40, and another dated 13 February 2014 for the sum of S$2,956.00.[152] By these invoices, the defendant claimed S$11,941.40 for, *inter alia*, berthing and water and electricity charges, underwater hull cleaning and boat washing. The plaintiff does not dispute, and I so find, that such charges are reasonable and fall within the scope of the phrase "all costs and associated costs … of storage" in cl 5.7.1 of the T&C.

(c) The plaintiff argues that the defendant is not entitled to the maintenance costs because they might have included a profit element; the defendant has not proved that it suffered loss of S$11,941.40.[153] I do not accept this claim. As the defendant submits, it was neither pleaded nor put to the defendant's witnesses at trial; thus, the defendant had no opportunity to introduce evidence to rebut this claim.[154] Thus, I find that it is not open to the plaintiff to make this contention in closing submissions and I reject it accordingly.

The resale costs

104 The defendant's claim for the resale costs is premised on cl 5.7.2 of the T&C (see [102] above). The defendant's case is that it is entitled to recover the resale costs of €186,551.00, as a 10% commission fee derived on the basis of the Resale Price (see [16] above), as "selling expenses".

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152 PCB 512–514.

153 Plaintiff's closing submissions at para 337.

154 Defendant's reply submissions at paras 160–164.

105 It is important to set out the defendant's pleaded claim in respect of the 10% commission fee:[155]

> 71. On 3 March 2014, the Defendant resold [the Azimut 64 yacht] to a third party purchaser at a price of €1,865,510.00. *The Defendant incurred time and costs in sourcing for the same. The Defendant reasonably estimates its costs incurred on the basis of the standard broker's fee of ten percent of the sale price, amounting to €186,551.00.* [emphasis added]

In other words, the defendant claims a 10% commission fee on the basis that such a fee reasonably reflects its time and costs in sourcing for a purchaser of the Azimut 64 yacht.

106 I find that the defendant is not entitled to recover the resale costs. In short, the defendant has not adduced sufficient and proper proof of the costs that it incurred in arranging a sale of the Azimut 64 yacht. No evidence was adduced, *eg*, regarding the hours that were spent sourcing for the third party purchaser, or of sale-related expenses such as advertising costs. Rather, the defendant's position is simply that its standard commission rate is 10% of the sale price and that this is a reasonable estimate of its "selling expenses". I cannot accept that the defendant is entitled to recover €186,551.00 as resale costs on this basis.

(a) First, a "reasonable estimate" of loss is not adequate proof of the same. It was incumbent on the defendant to prove the exact quantum of the selling expenses it incurred. It did not do this.

(b) Secondly, in any event, I do not accept that the defendant's standard commission rate is a reasonable estimate of its selling expenses. A standard commission rate would probably include a profit element. It would not accurately reflect the selling expenses that the defendant incurred in arranging for the particular sale in question.

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155 Defence and counterclaim (Amendment No 3) at para 71.

For these reasons, the defendant is not entitled to recover €186,551.00, as a 10% commission fee derived on the basis of the Resale Price, as "selling expenses" under cl 5.7.2 of the T&C. It is undisputed that Cip did not sign the defendant's standard brokerage listing agreement that provided for such a commission fee to be charged. There is therefore no contractual basis for the defendant's claim of €186,551.00. I find that the defendant is not entitled to this sum.

The medical costs

107 Mison deposed that, on 2 October 2013, Cip punched him three times during an altercation after inspecting the Azimut 64 yacht.[156] Thus, he suffered injuries and incurred fees of S$69.00 for medical treatment of the same. The key point in contention in respect of the medical costs is whether Mison was telling the truth in his account of the incident on 2 October 2013. For the following reasons, I find that he was.

108 First, Mison's account was vivid, detailed and consistent. In two emails dated 3 and 4 October 2013 respectively, he related that Cip had punched him three times;[157] it also appears from a doctor's note that he told one Dr Kevin Chua ("Dr Chua"), who examined him, that he had been punched three times.[158] The plaintiff noted one inconsistency in his account. The doctor's note indicates that he told Dr Chua that Cip's third punch landed on his shoulder; Mison also stated that he was punched in the shoulder in his AEIC. However, in his emails, he described the third punch as landing on his chest, and on his "left pectoral chest muscle". In my judgment, this is a minor inconsistency which does not detract from the general coherence of Mison's accounts.

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156 Mison's AEIC at paras 175–185.

157 2DCB 275–277.

158 3DCB 664–665.

109 Secondly, Anita and Toh deposed that Cip did not punch Mison; rather, he had only "stretched out his arms to try to stop … Mison from walking away …. [and] held his arm to stop him from going".[159] However, I preferred Mison's evidence to Anita's and Toh's evidence for the following reasons:

(a) I find that Mison was an honest witness. He made several concessions during the trial which were unfavourable to the defendant's case, including the concession that the €1m Deposit was refundable after Azimut sold the Azimut 100G #12 (see [45] and [56] above).

(b) As the defendant noted, Anita's and Toh's accounts of how the altercation between Cip and Mison unfolded were identical, word for word.[160] When questioned about this, Toh admitted that he had discussed his evidence (on this point) with Anita.[161] In light of this concession, I placed less weight on their accounts.

110 Thirdly, I find that Mison's actions after the altercation are consistent with his account for the following reasons:

(a) Mison only visited Dr Chua on 4 October 2013. He testified that he did not seek medical treatment on 3 October 2013 as he had important meetings. In view of the fact that Mison's injuries were minor, and in the absence of evidence to the contrary, I accept Mison's explanation.

(b) Mison testified that he went to the police and considered filing a police report. But he did not do so as he was concerned that he would enrage Cip further and that Cip would harm him or his family.[162] I note

159 Anita's AEIC at para 23; Toh's AEIC at para 24.

160 Defendant's closing submissions at paras 211.

161 Transcript, 11 April 2017, p 58.

that Mison mentioned this concern in his emails dated 3 and 4 October 2013.[163] It is plain from those emails that Mison's explanation in court was not an afterthought, and I accept it accordingly.

(c) In his emails dated 3 and 4 October 2013,[164] Mison stated that he did not wish to have any further contact with Cip. However, it is not in dispute that Mison went to Cip's house in March or April 2014 to visit Cip, Anita and their newborn son. During cross-examination, Mison explained that he did so because Cip had apologised profusely to him.[165] The plaintiff urged me to reject this claim on the basis that Mison did not mention such an apology in his AEIC.[166] However, when it was suggested to Anita that Mison came to her house because Cip had apologised to him, Anita said that this was "probably" the case.[167] Again, I accept the defendant's submission that the fact that Mison visited Cip's house was first raised in Anita's AEIC.[168] Thus, I find that Cip did apologise to Mison. In any case, there is a second possible reason why Mison resumed contact with Cip which, ironically, was suggested to him by Miss Oei, *viz*, "[it] was good business for [him] and [his] wife".[169] It is undisputed that Mison's wife sought to leverage off his contact with Cip, by asking Aina for a referral to companies associated with the CP

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162 Transcript, 18 April 2017, pp 10–11.

163 2DCB 275–277.

164 2DCB 275–277.

165 Transcript, 18 April 2017, p 19.

166 Plaintiff's closing submissions at paras 331–332.

167 Transcript, 11 April 2017, p 28.

168 Defendant's reply submissions at para 181c.

169 Transcript, 18 April 2017, p 19.

Group in Thailand.[170] Therefore, I find that the fact that Mison resumed contact with Cip does not cast doubt on his account of the altercation.

111 Fourthly, in view of the point just made, *viz*, that it was good business for Mison to be friendly with Cip, I accept the defendant's submission that Mison had no motive or reason to falsely accuse Cip of punching him.[171]

112 Fifthly, I accord little weight to the fact that Cip lodged a police report to state his account of the altercation.[172] It was common ground that Mison told Cip during the altercation that he was going to the police.[173] Anita deposed that Cip made the police report "as a precaution".[174]

113 Therefore, I make the following findings:

(a) I find that Cip punched Mison three times on 2 October 2013.

(b) I find that Cip's attack caused Mison to suffer light injuries, and to incur S$69.00 in medical fees (as Mison deposed).[175]

(c) The defendant produced a document which indicated that it had paid Mison S$69.00 in respect of a "Doctor bill after being punched by Chip".[176] The plaintiff did not dispute that the defendant reimbursed Mison S$69.00 for his medical expenses, and I so find.

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170 Transcript, 18 April 2017, pp 16–18.

171 Defendant's closing submissions at para 212.

172 PCB 589–591.

173 Anita's AEIC at para 24; 2DCB 277.

174 Anita's AEIC at para 24.

175 Mison's AEIC at para 184.

176 3DCB 666.

I also accept the defendant's submission that it was obligated to indemnify Mison, its agent, for his medical expenses, which were incurred in the execution of his authority: see *In re Famatina Development Corporation, Limited* [1914] 2 Ch 271 at 282.[177]

114 Importantly, it is not the plaintiff's case that, even if Cip caused Mison to incur the medical costs and the defendant reimbursed Mison for the same, there is no legal basis for the defendant to recover the medical costs from the plaintiff. Therefore, in view of all the above reasons, I find that the defendant is entitled to recover the medical costs from the plaintiff.

Conclusion

115 In summary, I find that the defendant succeeds in its counterclaims for the insurance, maintenance and medical costs. As the defendant deducted the resale costs from the sum that it paid to the plaintiff (see [18] above), and was not entitled to do so (see [106] above), I find that the defendant is liable to pay €186,551.00 for the same to the plaintiff.

Conclusion

116 For the reasons set out above, I allow the plaintiff's claim in part and award the plaintiff a total of €686,551.00 (see [78] and [115] above).

117 I also allow the defendant's counterclaims for the insurance, maintenance and medical costs. As the defendant subtracted the value of its claims for the former two categories of costs from the Resale Proceeds, I award the defendant S$69.00 in respect of the medical costs.

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177 Defendant's closing submissions at para 214.

118 I will hear the parties on interest and costs.

Quentin Loh
Judge

Anna Oei Ai Hoea and Deannie Yap (Tan, Oei & Oei LLC) for the plaintiff;
Bazul Ashhab, Lionel Chan Cong Yen and Beatrice Yeo (Oon & Bazul LLP) for the defendant.