IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 60

Suit No 283 of 2018

Between

Tractors Singapore Limited

… *Plaintiff*

And

Pacific Ocean Engineering & Trading Pte Ltd

… *Defendant*

JUDGMENT

[Contract] — [Contractual terms] — [Implied terms] — [Implied term to nominate a port of destination within a reasonable time before agreed delivery date] — [Implied term to advise on a delivery date within a reasonable time from date of contract]
[Contract] — [Discharge] — [Repudiatory breach] — [Express termination clause] — [Renunciation] — [Breach of condition]
[Contract] — [Waiver] — [Requirements for waiver by election] — [Communication of choice to affirm contract in clear and unequivocal terms]

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Tractors Singapore Ltd
v
Pacific Ocean Engineering & Trading Pte Ltd

[2020] SGHC 60

High Court — Suit No 283 of 2018
Vincent Hoong J
11, 15, 16, 17, 29, 30, 31 October, 1, 5 November 2019, 17 February 2020

26 March 2020 Judgment reserved.

Vincent Hoong J:

Introduction

1 The defendant ordered shipbuilding equipment from the plaintiff under several contracts. The terms of these contracts permitted the defendant to advise the plaintiff on a delivery date and/or a port of destination for the equipment ordered. Subsequently, the equipment which had been contracted for was never delivered. The plaintiff alleges that its failure to deliver was caused by the defendant's repudiatory breaches of implied terms of the contracts in dispute. The alleged implied terms include (a) a term requiring the defendant to advise the plaintiff on a delivery date within a reasonable time; and (b) a term requiring the defendant to nominate a port of destination within a reasonable time, that was sufficiently early to allow the plaintiff to effect delivery by the agreed delivery date. The defendant counterclaims that the plaintiff had wrongly terminated the contracts in question.

2 The key questions in this case, therefore, are whether the alleged implied terms exist, whether the defendant was in breach of these terms and whether the defendant's breach of these implied terms entitled the plaintiff to terminate the contracts. Having considered the evidence and the submissions before me, I find that the plaintiff succeeds in its claim, and I dismiss the defendant's counterclaim in its entirety. I set out the reasons for my decision below.

Facts

The parties

3 The plaintiff is a Singapore-incorporated company. Its principal business is to distribute and provide services in relation to "Caterpillar"-brand machines, engines, propulsion systems and lift trucks.[1]

4 The defendant is a Singapore-incorporated company engaged in the business of building and selling ships.[2] As part of its business strategy, the defendant would sometimes build ships without a ready buyer or charterer for them.[3] This allowed the defendant to enjoy a competitive advantage by being able to offer its ships to buyers or charterers within a shorter period of time.

Background to the dispute

5 Prior to the commencement of this suit, the defendant had been the plaintiff's customer for sixteen years. During this period, the defendant only

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1 Statement of Claim (Amendment No. 1) ("SOC (1)"), p 1, paras 1-2

2 Quah Peng Wah's Affidavit of Evidence-in-Chief ("AEIC") dated 3 September 2019 ("Quah's AEIC") at p 2, para 3

3 Notes of Evidence (1 November 2019) at p 61, lines 3-19

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purchased "off-the-shelf" equipment, *ie* standard production models, from the plaintiff.[4] The procedure followed in respect of each these orders was usually as follows:

(a) Mr Gary Koh Teck Seng ("Koh"), a sales manager employed by the plaintiff, would prepare the plaintiff's quotation for the equipment ordered on a standard template.[5] This quotation would set out the approximate period during which the plaintiff expected the defendant to take delivery, as well as the plaintiff's conditions of sale.

(b) Koh would then present the plaintiff's quotation to Mr Quah Peng Wah ("Quah Peng Wah"), the defendant's managing director.[6]

(c) Quah Peng Wah would sign the plaintiff's quotation.[7]

(d) The defendant would then issue a Purchase Order ("PO") in respect of the said quotation.[8] The PO typically provided that the delivery date was "TBA", *ie* to be advised by the defendant.[9]

6 The defendant's evidence is that it regarded the plaintiff's quotations as contracts[10] which it would confirm in writing through the issuance of POs.[11] In

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4 Quah's AEIC at p 3, para 6

5 Notes of Evidence (30 October 2019) at p 32, lines 10-19

6 Notes of Evidence (30 October 2019) at p 32, line 15-17

7 Notes of Evidence (30 October 2019) at p 37, lines 10-16

8 Notes of Evidence (30 October 2019) at p 51, line 25-28

9 Quah's AEIC at p 3, para 6

10 Notes of Evidence (1 November 2019) at p 51, lines 21-28

11 Quah's AEIC at p 3, para 6

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accordance with this method of contracting, the plaintiff and the defendant entered into the ten contracts which form the subject-matter of this suit.[12] The key terms of these contracts are as follows:

S/N	Hull Number /PO Number	PO Date	Description of Equipment	Price	Delivery Date/Port (as stated in PO)
1	Hull 1610/ PO 9968	3 January 2014	1 shipset of 3516C Main Propulsion Engine, C18 Main Generator Set, Azimuth Thruster CP Equipment, Xeropoint Hybrid Propulsion System, and Central Monitoring System	S$5,300,000	"TBA by POET" / "CIF China Major Port"[13]
2	Hull 1611/ PO 9969	3 January 2014	1 shipset of 3516C Main Propulsion Engine, C18 Main Generator Set, Azimuth Thruster CP Equipment, Xeropoint	S$5,300,000	"TBA by POET" / "CIF China Major Port"[14]

12 Plaintiff's Closing Submissions ("PCS") at pp 13-16

13 Agreed Bundle Vol 1 ("AB1") at p 107

14 AB1 at p 109

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			Hybrid Propulsion System, and Central Monitoring System		
3	Hull 1630/ PO 9992	5 August 2014	1 shipset of 4 C18 Main Generator Sets and 1 shipset of 1 C9 Emergency Generator Set	S$805,000	"March 2015 (Any change of date TBA by POET)" / "CIF China Major Port Only"[15]
4	Hull 1631/ PO 10600	5 August 2014	1 shipset of 4 C18 Main Generator Sets and 1 shipset of 1 C9 Emergency Generator Set	S$805,000	"April 2015 (Any change of date TBA by POET)" / "CIF China Major Port Only"[16]
5	PO 10601	5 August 2014	1 shipset of 2 units of Caterpillar C18 Generator Sets	S$347,000	"TBA" / "a shipyard in China"[17]
6	Hull 1539/ PO	3 July 2015	1 shipset of 2 units of Caterpillar	US$860,000	"Jan 2016 (Any change of

15 Agreed Bundle Vol 3 ("AB3") at p 1507

16 AB3 at p 1510

17 AB3 at p 1511

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	11289		3512C Main Propulsion Engines		date TBA by POET)" / "CIF China Port"[18]
7	Hull 1540/ PO 11290	3 July 2015	1 shipset of 2 units of Caterpillar 3512C Main Propulsion Engines	US$860,000	"Feb 2016 (Any change of date TBA by POET)" / "CIF China Port"[19]
8	Hull 1540/ PO 11651	25 July 2016	1 shipset (2 units) of Caterpillar C7.1 Packaged Generator Set	US$136,000	"Jan / Feb 2017 (TBA)" / "CIF China Port"[20]
9	Hull 1517/ PO 8874	26 November 2012	1 shipset (4 units) of C32 Main Generator Set Engine	S$1,008,000	"September 2013 (Any change of date TBA by POET)" / "CIF China"[21]
10	Hull 1518/ PO 8875	26 November 2012	1 shipset (4 units) of C32 Main Generator Set Engine	S$1,008,000	"October 2013" (Any change of date TBA by POET)"

18 Agreed Bundle Vol 5 ("AB5") at p 2901

19 AB5 at p 2903

20 Agreed Bundle Vol 8 ("AB8") at p 4698

21 AB1 at p 50

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					/ "CIF China"[22]

7 In order to fulfil its obligations under the contracts evidenced by POs 9968 and 9969, the plaintiff contracted with a sub-vendor, Aspin Kemp & Associates ("AKA"), to supply it with two battery-powered Xeropoint Hybrid Propulsion Systems ("the Hybrid Propulsion Systems").[23]

8 Based on the terms of all ten contracts, the defendant was required to make a 10% down-payment upon the confirmation of each order and was only obliged to pay the remaining 90% of the contract price upon delivery of the equipment ordered. It is undisputed that the defendant paid the 10% down-payment for each of the ten contracts. However, due to events which subsequently transpired, the equipment ordered was never delivered to the defendant.

The parties' cases

The plaintiff's claim

The plaintiff's case

9 The plaintiff's case is simple. In respect of the contracts evidenced by POs 9968 and 9969, the plaintiff alleges that the parties agreed, during a meeting which took place on 9 April 2016, that delivery of the equipment ordered under these contracts would take place in May 2017 and July 2017 respectively.[24] In

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22 AB1 at p 52

23 Ng Mon Foo's AEIC dated 2 September 2019 ("Ng's AEIC") at p 77

24 PCS at p 24, para 37; SOC (1) at p 3, para 10; SOC (1) at p 6, para 21

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respect of the contracts evidenced by POs 9992, 10600, 11289, 11290 and 11651, the plaintiff submits that the parties had agreed during a meeting which took place on or about 10 December 2015 that delivery of the equipment ordered under these contracts would take place by end 2016/January 2017.[25]

10 The plaintiff further contends that the contracts evidenced by POs 9968, 9969, 9992, 10600, 11289, 11290 and 11651 should each be subject to an implied term that the defendant would nominate a port of destination within a reasonable time, which had to be sufficiently early to enable the plaintiff to effect delivery of the equipment by the agreed delivery date.[26] By failing to do so, the defendant was in repudiatory breach of these seven contracts.

11 The plaintiff acknowledges that the parties did not mutually agree on a delivery date for the contract evidenced by PO 10601. However, it submits that this contract should be read subject to an implied term that the defendant would advise on a delivery date within a reasonable time from the date of contract.[27] As the defendant failed to select a delivery date and/or inform the plaintiff of the same, the defendant was also in repudiatory breach of the contract evidenced by PO 10601.

12 On 13 October 2017, the plaintiff purported to accept the defendant's repudiatory breaches and terminated the contracts evidenced by POs 9968,

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25 PCS at p 30, para 50; SOC (1) at p 9, para 31; SOC (1) at p 11, para 42; SOC (1) at p 17, para 65; SOC (1) at p 19, para 76; SOC (1) at p 21, para 81

26 PCS at p 18, para 22; SOC (1) at p 3, para 8; SOC (1) at p 6, para 19; SOC (1) at p 8, para 29; SOC (1) at p 11, para 40; SOC (1) at p 16, para 63; SOC (1) at p 19, para 74; SOC (1) at p 21, para 79

27 PCS at p 22, para 32; SOC (1) at p 13, para 50

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9969, 9992, 10600, 10601, 11289, 11290 and 11651.[28] The plaintiff now claims the remaining 90% of the price of these eight contracts, less the amounts which it has recovered in mitigation.

The defendant's case

13 The defendant argues that the two contracts evidenced by POs 9968 and 9969 were mutually terminated during a meeting between the parties on 9 April 2016.[29]

14 The defendant avers that, even if these two contracts were not mutually terminated, its conduct did not amount to a repudiatory breach because of the following facts:

(a) It had in fact nominated a port of destination.[30]

(b) It was the *plaintiff* who had first evinced an intention to "hold back" performance on both contracts.[31]

(c) Further or alternatively, the defendant was permitted, by way of an implied term or a "course of dealing", to postpone delivery for both contracts in accordance with its ship construction schedule.

(d) In any event, the plaintiff was in breach of these two contracts because (i) it had failed to provide the defendant with American Bureau

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28 AB8 at pp 4877-4895

29 Defence and Counterclaim Amendment No.3 ("Defence (3)") at p 3, para 6

30 Defendant's Closing Submissions ("DCS") at p 4, para 8

31 DCS at p 22, para 57

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of Shipping ("ABS")-approved drawings of the Hybrid Propulsion Systems; and/or (ii) it had failed to design, manufacture or procure the Hybrid Propulsion Systems in compliance with the contractual specifications.[32] Accordingly, the defendant was not obliged to take delivery of the equipment ordered under these two contracts.

15 The defendant also posits that the plaintiff, by failing to insist on timely delivery of the equipment ordered, had either waived its right to, or was estopped from insisting, on strict adherence to the agreed delivery dates for the two contracts evidenced by POs 9968 and 9969. As such, it could not discharge or terminate the two contracts without giving the defendant reasonable prior notice of the same.[33]

16 In respect of the contract evidenced by PO 10601, the defendant contends that there was no express or implied delivery date because the equipment ordered had been expressly purchased as "stock". Instead, the plaintiff was obliged to deliver the equipment to the defendant as and when the defendant required delivery.[34]

17 In relation to the contracts evidenced by POs 9992, 10600, 11289, 11290 and 11651, the defendant makes the following submissions.

(a) The delivery dates for the equipment purchased under these contracts were "TBA" or "to be advised" by the defendant, which meant

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32 Defence (3) at p 4, para 13(a)

33 Defence (3) at p 3, para 11

34 Defence (3) at p 8, para 25

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that the defendant was free to postpone the delivery dates from time to time.[35]

(b) Alternatively, the defendant was permitted, by way of an implied term or a "course of dealing", to postpone delivery in accordance with its ship construction schedule.[36]

(c) By failing to insist on timely delivery of the equipment ordered, the plaintiff had waived its right to, or was estopped from, insisting on strict adherence to the agreed delivery dates. As such, it could not discharge or terminate the contracts without giving the defendant reasonable prior notice of the same.[37]

18 Moreover, the defendant submits that even if it is found to be in repudiatory breach of the contracts evidenced by POs 9968, 9969, 9992, 10600, 10601, 11289, 11290 and 11651, the plaintiff had failed to reasonably mitigate its losses and therefore should not be entitled to its full claim.[38]

The defendant's counterclaim

The defendant's case

19 The defendant's counterclaim rests on two key contentions. Firstly, the defendant avers that by discharging and/or terminating the contracts evidenced

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35 Defence (3) at p 6, para 18; Defence (3) at p 9, para 31; Defence (3) at p 11, para 38.

36 Defence (3) at p 7, para 20; Defence (3) at p 10, para 33; Defence (3) at p 11, para 40.

37 Defence (3) at p 7, para 21; Defence (3) at p 10, para 34; Defence (3) at p 12, para 41.

38 Defence (3) at p 6, para 15; Defence (3) at p 8, para 23; Defence (3) at p 9, para 29; Defence (3) at p 10, para 36; Defence (3) at p 12, para 43.

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by POs 9968, 9969, 9992, 10600, 10601, 11289, 11290 and 11651 on 13 October 2017, the plaintiff was itself in repudiatory breach and is thus liable to refund the down-payments made by the defendant under these contracts.[39]

20 Secondly, the defendant also claims that the plaintiff is in repudiatory breach of two further contracts evidenced by POs 8874 and 8875. According to the defendant, the parties mutually agreed that delivery of (and payment for) the C32 generators ordered under these contracts could be deferred under certain circumstances.[40] However, on 7 August 2017, the plaintiff alleged that the defendant was in repudiatory breach of the contracts evidenced by POs 8874 and 8875 and unilaterally terminated them.[41] The defendant submits that the plaintiff, in so doing, was itself in repudiatory breach and is thus liable to refund the down-payments made by the defendant under these contracts.

The plaintiff's case

21 The plaintiff's defence to the counterclaim mirrors its claim against the defendant. In essence, the plaintiff alleges that it was an implied term of the contracts evidenced by POs 8874 and 8875 that the defendant had to nominate a port of destination within a reasonable time, which was sufficiently early to allow the plaintiff to effect delivery of the equipment ordered by September 2013 (for the contract evidenced by PO 8874) and October 2013 (for the contract evidenced by PO 8875), or such other time of delivery as was agreed between the plaintiff and the defendant. By failing to do so, the defendant had

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39 Defence (3) at p 14, para 52

40 Defence (3) at p 13, para 47

41 AB8 at pp 4867-4869

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committed a repudiatory breach and this entitled the plaintiff to discharge the contracts evidenced by POs 8874 and 8875.[42]

Issues to be determined

22 Therefore, the ten contracts in this case can be divided into two broad groups. The first group – comprising seven contracts brought into issue by the plaintiff's claim (POs 9968, 9969, 9992, 10600, 11289, 11290, 11651) and two contracts brought into issue by the defendant's counterclaim (POs 8874 and 8875) – consists of contracts for which there are, allegedly, mutually-agreed delivery dates. The second group consists only of the contract evidenced by PO 10601, for which it is undisputed that there is *no* mutually agreed delivery date. In my judgment, the key issues to be determined in relation to the first group of contracts – contracts evidenced by POs 9968, 9969, 9992, 10600, 11289, 11290, 11651, 8874 and 8875 – are as follows:

(a) Were the contracts subject to an implied term that the defendant would nominate a port of destination within a reasonable time, which was sufficiently early to enable the plaintiff to effect delivery of the equipment by the agreed delivery dates?

(b) If the answer to the above issue is "yes", was the defendant in breach of the said term?

(c) If the answer to the above issue is "yes", would a breach of the said term have entitled the plaintiff to terminate the contract?

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42 Reply and Defence to Counterclaim Amendment No. 2 at p 14, paras 40-42

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(d) By failing to insist on timely delivery of the equipment ordered, did the plaintiff waive its right to, or was it estopped from insisting on strict adherence to the agreed delivery dates, such that it could not discharge or terminate the contracts without giving the defendant reasonable prior notice of the same?

23 The issues to be determined in relation to the second group – the contract evidenced by PO 10601 – are as follows.

(a) Was the contract subject to an implied term that the defendant would advise the plaintiff on a delivery date within a reasonable time from the date of contract?

(b) If the answer to the above issue is "yes", was the defendant in breach of the said term?

(c) If the answer to the above issue is "yes", would a breach of the said term have entitled the plaintiff to terminate the contract?

24 Finally, if the plaintiff succeeds in establishing the defendant's liability, the issue of whether it had reasonably mitigated its losses in relation to the contracts evidenced by POs 9968, 9969, 9992, 10600, 10601, 11289, 11290 and 11651 must be determined.

25 I now deal with each of these issues in turn.

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My decision

Issues concerning the contracts evidenced by POs 9968, 9969, 9992, 10600, 11289, 11290, 11651, 8874 and 8875

Whether the contracts were subject to an implied term to nominate a port of destination within a reasonable time

26 I first address the plaintiff's contention that the contracts were subject to an implied term that the defendant would nominate a port of destination within a reasonable time. According to the plaintiff, a "reasonable time" referred to a point in time which was sufficiently early to ensure that the plaintiff could deliver the ordered equipment by the agreed delivery dates. This proposition, though uncontested by the defendant, is critical to the plaintiff's claim.

27 The law concerning the implication of terms in fact was settled by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp*") at [101]:

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> (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. This 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.

28 The three-stage test outlined above was more recently reaffirmed by the Court of Appeal in *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [66].

29 In the present case, the plaintiff's primary argument is that where a contract for the sale of goods gives the buyer the option of nominating the port of destination, it is necessary, for the efficacy of the contract, to imply a term that the buyer is obliged to nominate a port of destination within a reasonable time *before* the agreed delivery date. Otherwise, the seller would be unfairly prevented, by the buyer's actions, from effecting timely delivery of the goods contracted for.[43]

30 The plaintiff relies on two English cases in support of this argument. In the first case, *Tsakiroglou & Co Ltd v Transgrains, SA* [1958] 1 Lloyd's Rep 562 ("*Tsakiroglou*"), the sellers contracted to sell 500 tons of groundnuts to the

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[43] PCS at p 33, para 31

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buyers. Shipment was to take place in November 1956, on a "c.i.f. basis freight rate Hamburg/Rotterdam". Both the sellers and the buyers understood this to mean that the buyers had the option of choosing Hamburg or Rotterdam as the port of destination. However, the buyers only informed the sellers of its nomination on 5 November 1956, whereupon the sellers cancelled the contract. When the buyers subsequently made a claim for non-delivery, the sellers submitted that the contract was subject to an implied condition that the buyers had to nominate the port to which the goods were to be shipped, and that this nomination had to be made known to the seller a reasonable time *before* the first day of the shipment period. McNair J agreed with the sellers' submissions and held (at 572):

> … [I]t seems to me to be abundantly plain that this contract simply will not work unless the sellers are informed by the buyers as to whether or not, and how, their option is going to be exercised … It is plain that, if the nomination … is not given to [the buyers] by a day or two before Nov. 1, they cannot perform, and they are really being deprived of part of their rights.

31 In the second case, *Mansel Oil Ltd and another v Troon Storage Tankers SA (The "Ailsa Craig")* [2008] EWHC 1269 (Comm) ("*Mansel Oil (HC)*"), the defendant owners contracted to charter their vessel to the claimant charterers, and the agreed delivery date was 15 November 2007. When the owners failed to deliver the vessel by the agreed delivery date, the charterers brought a claim against them. One of the issues was whether the charterers were entitled to cancel the charterparty by reason of the owner's failure to nominate a delivery port. Clarke J held (at [49]) that:

> … [O]wners and charterers would ordinarily understand that charterers' option to select the delivery port was an option that they were *obliged* to exercise. The expectation of the parties is that the charterer *will* declare where the vessel is to be

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> delivered, not that he *may* do so. Further, the nomination is necessary in order to complete the definition of the parties' contractual obligations. [emphasis in original]

32 On the question of *when* such an obligation arose, the learned judge held (at [56]) that:

> … [I]t was for charterers to make their nomination within a reasonable time which would be such time as was (a) not so late as would mean that, because of the lateness of the nomination, the vessel could not make her cancelling; and (b) early enough to ensure that the vessel suffered no delay resulting from the absence of nomination.

33 These propositions were subsequently upheld on appeal (see *Mansel Oil Limited, Vitol S.A. v Troon Storage Tankers SA* [2009] EWCA Civ 425).

34 Having considered the authorities above, I agree with the plaintiff's submission and find that the contracts evidenced by POs 9992, 10600, 11289, 11290, 11651, 8874 and 8875 were subject to an implied term that the defendant would nominate a port of destination within a reasonable time, *ie,* a point of time which was sufficiently early to enable the plaintiff to deliver the goods ordered by September 2013 (for PO 8874), October 2013 (for PO 8875) and January 2017 (for POs 9992, 10600, 11289, 11290 and 11651). Although *Mansel Oil (HC)* did not frame the charterer's "obligation to nominate" as an implied term of the contract, I am of the view that the case is nevertheless helpful for the general proposition that a party to a contract who has been offered the option of nominating the port of destination must do so within a reasonable time in order to ensure the business efficacy of that contract. I also find that the plaintiff's formulation of the term to be implied satisfies the officious bystander test (*viz.,* the third requirement of the *Sembcorp* test outlined at [27] above).

35 The position in relation to the contracts evidenced by POs 9968 and

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9969 is slightly more complex. As a matter of logic, a term of this nature can only be implied if the parties have *in fact* agreed on a date of delivery. This is because the point of time at which the obligation to nominate arises must be defined by reference to an agreed delivery date. However, the parties have taken diametrically opposing positions regarding the existence of agreed delivery dates under POs 9968 and 9969. While the plaintiff alleges that the parties were able to agree on the delivery dates for both contracts during a meeting on 9 April 2016, the defendant argues that these dates were never agreed upon. Rather, its position is that both contracts were mutually terminated on that date, and that any subsequent allusions to delivery dates for Hulls 1610 and 1611 were made only in reference to a *proposed* revised contract which the parties never concluded.

36 I find, on a balance of probabilities, that the contracts evidenced by POs 9968 and 9969 were *not* mutually terminated on 9 April 2016. Rather, the contemporaneous evidence strongly suggests that the parties agreed on "May 2017" and "July 2017" as the delivery dates for the contracts evidenced by POs 9968 and 9969 respectively.

37 First, the defendant relies on an e-mail dated 6 April 2016 sent by one of its employees, Mr Gary Quah ("Gary Quah"), to Ho Kah Huat ("Ho"), the plaintiff's General Manager of Power Systems. The e-mail states that "[Quah Peng Wah] had given an instruction to terminate [POs 9968 and 9969] with [the plaintiff]".[44] However, I note that Ho replied to the e-mail: "We are considering our position relating to your purported termination and will revert. In the

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44 Agreed Bundle Vol 7 ("AB7") at p 4515

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meanwhile, all our rights are reserved".[45] This meant that the plaintiff was still undecided on terminating the contracts. Therefore, I am unable to see how the 6 April 2016 e-mail supports the defendant's contention that the contracts were "mutually" terminated on 9 April 2016.

38 Next, the defendant emphasises the fact that the plaintiff (a) did not follow up on the contracts by requesting the defendant to nominate a port of destination;[46] and (b) did not update the delivery dates for the two contracts in its monthly project list which it sent to the defendant on various occasions between 13 April 2016 and 13 February 2017.[47] I consider these facts to be inconclusive. Moreover, if (as the defendant alleges) the parties had mutually terminated the contracts on 9 April 2016, the terminated contracts should have been removed from the plaintiff's project list altogether.

39 To demonstrate that a delivery date was indeed agreed upon for POs 9968 and 9969, the plaintiff relies primarily on an e-mail sent by Koh to Quah Peng Wah, and copied to Ho and Chua Ee Lang (the plaintiff's Project Manager), on 13 April 2016. The relevant portion of the e-mail states:[48]

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45 AB7 at p 4514

46 DCS at p 8, para 22

47 DCS at p 8, para 21

48 AB7 at p 4513

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> Dear Raymond,
>
> Ref to our meeting on 9th April 2016, Poet brought up the following,
>
> 1. Delivery for H1610 will be in May 2017, and subsequence H1611 will be July 2017.
>
> 2. POET will like to re-contract the orders.

40 I agree with the plaintiff's submission[49] that it is unlikely that the dates "May 2017" and "July 2017" were raised only in respect of a revised contract or quotation. Otherwise, Koh would not have internally broadcasted his agreement with Quah Peng Wah on these delivery dates to Ho or to Chua Ee Lang. I accept Ho's explanation during cross-examination that the purpose of re-contracting the orders was not to negotiate the delivery dates, but to "remove the battery and the battery panel, and… to come up with a revised price".[50] The delivery dates had already been fixed at the meeting on 9 April 2016.

41 Tangentially, the defendant also contends that Ho's credibility is doubtful because he claimed to have been absent at the meeting on 9 April 2016 even though other witnesses testified that he had been present.[51] In my view, even if Ho *had* attended the meeting on 9 April 2016, his failure to state this fact was more likely due to imperfect recollection rather than an intention to deliberately conceal the truth. I found that, on the whole, Ho was candid and straightforward when giving evidence, and I saw no reason to disregard or accord less weight to the rest of his testimony since it was corroborated by documentary evidence such as the contemporaneous e-mail discussed at [37]

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49 PCS at pp 25-27, para 39

50 Notes of Evidence (17 October 2019) at p 50, lines 26-28

51 DCS at p 31, para 88

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above.

42 Having found that the parties did indeed reach an agreement on the delivery dates for the contracts evidenced by POs 9968 and 9969, I hold that both of these contracts were subject to an implied term that the defendant would nominate a port of destination within a reasonable time, *ie* a point of time which was sufficiently early to enable the plaintiff to deliver the goods ordered by May 2017 and July 2017 respectively.

Whether the defendant is in breach of the implied term to nominate a port of destination within a reasonable time

(1) Contracts evidenced by POs 9968 and 9969

43 There are four subsidiary issues that I must consider in relation to the contracts evidenced by POs 9968 and 9969. In brief, they are as follows.

(a) Did the defendant in fact nominate a port of destination for these two contracts?

(b) Was it the plaintiff which first evinced an intention to 'hold back' performance on these two contracts?

(c) Was the plaintiff in breach of these two contracts, thus relieving the defendant of its obligation to take delivery of the equipment ordered under the contracts?

(d) Was the defendant was permitted, by way of an implied term or a "course of dealing", to postpone delivery under the contracts in accordance with its ship construction schedule?

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(A) WHETHER A NOMINATION WAS MADE

44 I first deal with defendant's contention that it had nominated a port of destination, namely "Shanghai port", for the contracts evidenced by POs 9968 and 9969. Notably, this contention was not pleaded by the defendant even though it amended its pleadings several times.

45 While a party is generally bound by its pleaded case, this rule is not absolute. As explained by the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [38]–[40]:

> … the general rule is that parties are bound by their pleadings and the court is precluded from deciding on a matter that the parties themselves have decided not to put into issue. …
>
> Procedure is not an end in itself, but a means to the end of attaining a fair trial. The age of forms of action is long gone. Hence, a court is not required to adopt an overly formalistic and inflexibly rule-bound approach even in those *clear cases* that to do so might lead to an unjust result. Nevertheless, it would be improper for a court to adopt the approach that "the ends justify the means" … Even when the desire to ensure the ends of substantive justice pulls in the opposite direction from the need to maintain procedural fairness to the opposite party, "a just outcome requires that neither consideration be made clearly subordinate to the other" …
>
> ***Thus the law permits the departure from the general rule in limited circumstances, where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so***. …
>
> [emphasis in original in italics; emphasis added in bold italics]

46 This is supported by the Court of Appeal's observations in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18]:

> … It is trite law that the court may permit an unpleaded point to be raised if no injustice or irreparable prejudice (that cannot be compensated by costs) will be occasioned to the other party.

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47 Therefore, it is necessary to ascertain whether allowing the defendant to raise a previously unpleaded point, *viz.* its contention that it had nominated a port of destination for the contracts evidenced by POs 9968 and 9969, would cause injustice or irreparable prejudice to the plaintiff in this case.

48 I am satisfied that the defendant should be bound by its pleaded case. First, I note that the argument that a nomination had been made was raised rather late in the day. The contention was first brought to the court's (and the plaintiff's) attention in Quah Peng Wah's AEIC (dated 3 September 2019), where it was alleged that the plaintiff "already knew the port of delivery (Shanghai)".[52] To support this point, Quah Peng Wah relies on an e-mail sent by him to Ng Mon Foo, the plaintiff's project engineer, on 10 November 2014 stating "Shanghai port" ("10 November 2014 e-mail"). The 10 November 2014 e-mail was sent in response to Ng Mon Foo's earlier query, "Can we anticipate goods will have to ship to one of the major Chinese port such as Shanghai, Xiamen and not to small port that without proper facilities to handle heavy equipment?".[53] However, as this point was not pleaded, the plaintiff's witnesses – especially Ng Mon Foo – were not able to address it in their AEICs.[54] Ng Mon Foo's AEIC is dated 2 September 2019, *before* Quah Peng Wah's AEIC was filed.

49 Further, I am not persuaded that the defendant will face injustice or irreparable prejudice if its submission on this point is disregarded because it was not pleaded. As the plaintiff has correctly pointed out, the 10 November 2014

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52 Quah's AEIC at p 33, para 50a

53 Quah's AEIC at p 33, para 50a and Annex QPW-12

54 Notes of Evidence (16 October 2019) at p 46, lines 15-23

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e-mail was sent a year and a half *before* the delivery dates were agreed upon on 9 April 2016 (see [40] above). Moreover, Gary Quah subsequently sent the plaintiff an e-mail dated 6 April 2016 stating:[55]

> Dear Kah Huat,
>
> Our official delivery instruction of the equipment in our PO to you is clearly stated as "to be advised by POET" (refer docs attached)…
>
> …
>
> Delivery To: CIF China Major Port
>
> (Partial delivery; direct shipment from AKA and BERG factory)
>
> Delivery Date: TBA by POET
>
> Is there any further official delivery instruction given to you or agreed between the parties after the issuance of our PO to you?

This e-mail suggests that the defendant did not regard itself as having nominated a port of delivery at that particular point in time. Otherwise, "CIF China Major Port" would have been updated to "Shanghai Port".

50 Accordingly, I see no reason to depart from the general rule that parties are bound by their pleaded case. The defendant's submission on this point therefore fails.

(B) WHETHER THE PLAINTIFF 'HELD BACK' PERFORMANCE ON THE CONTRACTS

51 The defendant's next argument is that it should be absolved of liability for any alleged breaches of the contracts evidenced by POs 9968 and 9969 because it was the plaintiff which first 'held back' performance on these

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55 AB7 at p 4515

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contracts. According to the defendant, the "real reason" for the plaintiff's failure to deliver under the contracts was that the defendant was unwilling to accede to the plaintiff's proposed changes to the payment terms.[56]

52 I am unable to accept this submission. First, it was not part of the defendant's pleaded case. Second, and more importantly, the defendant has not explained how the plaintiff's conduct of 'holding back' performance is relevant to the question of the defendant's own liability. I therefore find that this submission is wholly irrelevant to the issues at hand.

(C) WHETHER THE PLAINTIFF WAS IN BREACH OF THE CONTRACTS

53 I now turn to the third subsidiary issue. The defendant alleges that it was not obliged to nominate a port of destination under the contracts evidenced by POs 9968 and 9969 because the plaintiff had breached the contracts in two material respects: first, by failing to provide the defendant with drawings of the Hybrid Propulsion Systems that were approved by the American Bureau of Shipping ("ABS"); and second, by failing to design, manufacture or procure the equipment ordered in compliance with the contractual specifications.

54 I note, as a preliminary matter, that the defendant's pleadings did not adequately explicate the connection between a breach of contract on the plaintiff's part and the defendant's contractual obligation to nominate a port of destination. At trial, the defendant amended its position. It argued that providing the defendant with ABS-approved drawings of the Hybrid Propulsion Systems was a *condition precedent* to the defendant's performance under the contracts

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[56] DCS at pp 16-18, paras 41-46; DCS at pp 20-22, paras 53-56

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evidenced by POs 9968 and 9969.[57] It also argued that its obligation to take delivery "did not even arise" because the plaintiff was "'off spec' and not in conformity with the Contract Specifications".[58]

55 I first address the issue concerning the ABS-approved drawings. In this respect, the plaintiff's key contention is that it was never contractually obliged to provide the defendant with ABS-approved drawings.

56 It is undisputed that all of the equipment ordered under POs 9968 and 9969 had to be "class approved" by ABS, *ie* the equipment supplied had to be designed and built in accordance with and under the supervision of ABS. This is evident from the plaintiff's quotations themselves. It is also undisputed that obtaining ABS' approval for the drawings of the Hybrid Propulsion System was a prerequisite to obtaining ABS class approval.[59] What is contentious is whether the ABS rules required ABS-approved drawings of the equipment to be provided to the *end customer* (in this case, the defendant).

57 To bolster its contention, the defendant relies on page 29 of the plaintiff's quotation for Hulls 1610/1611.[60] The relevant portion of the quotation states:[61]

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57 DCS at p 33, para 99

58 DCS at p 39, para 118

59 PCS at p 64, para 114

60 DCS at p 36, para 111

61 AB1 at p 95

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> Engineer/modify the XeroPoint Hybrid power system to meet the classification and operational requirements of the end client. This item specifically includes the following;
>
> 1. Provision of a Functional Design Specification (high level);
>
> 2. Provision of power, control, interface and communication one-line drawings;
>
> 3. Short circuit and coordination study;
>
> 4. Major Component List (mechanical drawings of AKA supplied components);
>
> 5. Cable list; and THD calculation

58 I find that the extract quoted above does not support the defendant's contention. Even if the items listed above had to be ABS-approved before they were provided to the defendant, there is nothing in the quotation which indicates that these items had to be sent to the defendant *prior to* delivery or as a *condition precedent* to the defendant's obligation to take delivery. The fact that the items numbered "1", "2", "4" and "5" above were *in fact* sent to the defendant before delivery[62] cannot be taken as conclusive.

59 Furthermore, the chain of correspondence between the parties supports the plaintiff's position that the defendant was only requesting ABS-approved drawings in a last-ditch attempt to delay delivery of the equipment ordered under POs 9968 and 9969. From June 2014 to April 2015, the defendant (a) neglected to provide the plaintiff with the information it required to complete the designs; (b) requested for various design changes which were outside the original scope of the plaintiff's work; and (c) persistently refused to nominate

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62 DCS at p 37, para 111

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delivery dates despite the plaintiff's repeated requests for it to do so.[63] The defendant only began to ask for ABS-approved drawings in April 2015, *more than a year* after the parties had entered into the contracts evidenced by POs 9968 and 9969.[64] There was no evidence to suggest that the plaintiff had been contractually obliged to provide the defendant with ABS-approved drawings from the outset.

60 The defendant also relies on several e-mails from the plaintiff to AKA (dated between 17 August 2015 and 29 November 2015) which state that delivery for POs 9968 and 9969 would take place only *after* the provision of the ABS-approved drawings.[65] I find that these e-mails do not assist the defendant's case for two reasons.

61 Firstly, *all* of these e-mail communications are post-contractual in nature. As the objective of interpreting a contract is to discern the parties' intentions *at the time of entering into the contract*, there is "not much assistance to be derived from the parties' subsequent conduct… Indeed, there are dangers in placing too much weight on such evidence because it can, with the benefit of hindsight, be shaped to suit each party's position" (see *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 at [74]).

62 Secondly, the latest of the e-mails relied on by the defendant is dated 29 November 2015. Thus, *even if* the parties had agreed, during this series of e-

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63 Ng's AEIC at p 21, para 46 to p 36, para 85

64 Ng's AEIC at p 36, para 86

65 DCS at p 35, para 106

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mail communications, that the delivery dates for POs 9968 and 9969 would take reference from the date on which the ABS-approved drawings were provided to the defendant, any such agreement would have been superseded by the parties' subsequent agreement on 9 April 2016 to amend the delivery dates to May 2017 and July 2017 respectively.

63 Finally, I turn to consider two other peripheral issues which, in my judgment, can be shortly disposed of:

(a) First, the defendant asserts that it insisted on the plaintiff producing ABS-approved drawings for the Hybrid Propulsion Systems because it was aware that the plaintiff was contracting with AKA for the first time.[66] In my view, the defendant's *reasons* for requesting ABS-approved drawings from the plaintiff are irrelevant to the issue of whether and when the plaintiff was *obliged* to produce these drawings to the defendant. It is therefore unnecessary for me to address this contention.

(b) Secondly, the defendant avers that AKA should not have fabricated the DC Switchboards, which were components of the Hybrid Propulsion Systems, before obtaining ABS class approval to do so.[67] However, as the defendant itself admits,[68] this issue is not critical to the question of whether the plaintiff or defendant is to succeed in its claim.

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66 DCS at pp 28-29, paras 74-79

67 DCS at pp 31-33, paras 89-97

68 DCS at p 32, para 92

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I therefore agree with plaintiff that it is not necessary for me to make a finding on this issue.

64 Having disposed of the issue concerning the ABS-approved drawings, I turn to the defendant's contention that its obligation to deliver "did not even arise" because the plaintiff was "off-spec". The defendant's main complaint in this regard is that the Hybrid Propulsion Systems procured by the plaintiff were incomplete because they lacked batteries.[69]

65 It is not disputed that the Hybrid Propulsion Systems which the plaintiff procured from AKA did, in fact, lack batteries. However, based on the evidence before me, I am satisfied that it was the *defendant* who had instructed the plaintiff to remove the batteries from the Hybrid Propulsion Systems. This is supported by several contemporaneous e-mails from plaintiff's employees confirming the defendant's instructions to remove the batteries from the Hybrid Propulsion Systems.[70] I also note that the defendant did not object to the absence of batteries in the plaintiff's final drawings of the PO 9968 and 9969 equipment when these drawings were submitted to the defendant for approval in November 2015.[71]

66 Therefore, I find that the plaintiff was not in breach of any of its obligations under the contracts evidenced by POs 9968 and 9969.

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69 DCS at p 40, para 123

70 PCS at p 71, para 128; AB5 at pp 2970, 2984, and 3157

71 PCS at p 67, para 123; Ng's AEIC at p 41; para 100; AB6 at pp 3384, 3380, and 3410

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(D) WHETHER THE DEFENDANT WAS PERMITTED TO POSTPONE DELIVERY IN ACCORDANCE WITH ITS SHIP CONSTRUCTION SCHEDULE

67 Finally, the defendant alleges that its actions did not amount to a breach because it was permitted, by way of an implied term or a "course of dealing", to postpone delivery in accordance with its ship construction schedule.

68 In support of this contention, the defendant highlights that the plaintiff was "accommodating" towards the defendant's delays in taking delivery, and that there was an "unwritten agreement, scheme, partnership, and win/win arrangement" between the plaintiff and the defendant.[72]

69 The legal requirements for implying a term in fact have been set out earlier at [27]. With respect, I am unable to see how a contractual term which would permit the defendant to postpone delivery *indefinitely*, based on its ship construction schedule, is necessary for (or even beneficial to) the efficacy of the contract. Likewise, the defendant has not satisfied me that a term to that effect has been incorporated by way of a course of dealing between the parties. At trial, both Koh and Quah Peng Wah testified that if the defendant required the delivery date for any contract to be extended, such an extension would only be allowed if the parties had *mutually agreed* to it.[73] Clearly, this meant that the defendant could not unilaterally extend the delivery dates at its own discretion – its right to do so was subject to the plaintiff's prior approval.

70 I accordingly find that, by failing to nominate a port of destination within

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72 DCS at p 41, paras 127(a)-128

73 Notes of Evidence (30 October 2019) at p 48, lines 11-24; Notes of Evidence (30 October 2019) at p 58, lines 11-59 and line 21; Notes of Evidence (1 November 2019) at p 62, lines 4-21 and p 63, lines 1-13

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a reasonable time, which was sufficiently early to allow the plaintiff to deliver the equipment ordered by the delivery date, the defendant is in breach of the contracts evidenced by POs 9968 and 9969.

(2) Contracts evidenced by POs 9992, 10600, 11289, 11290, 11651, 8874 and 8875

71 There are two subsidiary issues that I must address in relation to the contracts evidenced by POs 9992, 10600, 11289, 11290, 11651, 8874 and 8875. They are as follows:

(a) Whether the defendant was permitted, by way of an implied term or a "course of dealing", to postpone delivery under the contracts in accordance with its ship construction schedule; and

(b) Whether the inclusion of the phrase "TBA by POET" in the POs issued by the defendant meant that the defendant had an unfettered right to postpone the delivery date from time to time.

72 In respect of the first subsidiary issue, I echo my reasoning at [67]-[69] above. I find that the defendant has not discharged its burden of showing that there was any term (whether implied or incorporated by course of dealing) which allowed the defendant to unilaterally extend the delivery dates without the plaintiff's prior consent.

73 I now turn to the second subsidiary issue, which concerns the legal effect of the phrase "TBA by POET". In this regard, I find Vinodh Coomaraswamy J's remarks in *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 ("*Aero-Gate*") to be particularly instructive. The plaintiff in that case had sued the defendant for failing to meet a delivery deadline. Coomaraswamy

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J held (at [46]) that:

> … I acknowledge that the words "final date to be advised" are curious given the prior unequivocal statement that the delivery deadline would be changed to end-January 2012 … But *I am unable to accept the defendant's contention that the words "final date to be advised" thereby negate the otherwise-clear agreement between the parties as at 31 May 2011 that the deadline for delivery would be end-January 2012, ie, 31 January 2012*. At most, these words were intended to reassure the defendant that it would not unilaterally bring the delivery date forward and to indicate to the defendant a possibility that the plaintiff might at some future time agree with the defendant a further delay in the delivery deadline. The plaintiff never reached any such agreement with the defendant.
>
> [emphasis added]

74 I agree with the plaintiff that the inclusion of the phrase "TBA by POET" in the POs issued by the defendant did not negate the parties' *subsequent* unequivocal agreement that delivery for POs 9992, 10600, 11289, 11290, 11651, 8874 and 8875 would take place by January 2017. In my judgment, the phrase "TBA by POET" only indicated that the defendant had the right to elect a delivery date at some future time after the date of contract. It did not entitle the defendant to unilaterally postpone a delivery date which both parties had already agreed upon.

75 I thus find that, by failing to nominate a port of destination within a reasonable time, which was sufficiently early to allow the plaintiff to deliver the equipment ordered by the delivery date, the defendant is in breach of the contracts evidenced by POs 9992, 10600, 11289, 11290, 11651, 8874 and 8875.

Whether the plaintiff was entitled to terminate the contracts

76 When a breach of contract occurs, the innocent party is entitled to terminate the contract in the following four situations (*RDC Concrete Pte Ltd v*

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Sato Kogyo (S) Pte Ltd and another [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [113]).

(a) The first situation is where the contract clearly and unambiguously states that, in the event of a certain event or events occurring, the innocent party will be entitled to terminate the contract (*RDC Concrete* at [91]). This is known as a "Situation 1" breach;

(b) The second situation is where the contract-breaker, by his words or conduct, clearly conveys to the innocent party that it will not perform its contractual obligations *at all* (*RDC Concrete* at [93]). This is known as a "Situation 2" breach;

(c) The third situation is where the term breached is a condition of the contract, *ie* a term which the parties have designated as being so important that any breach, regardless of its actual consequences, would entitle the innocent party to terminate the contract (*RDC Concrete* at [97]). This is known as a "Situation 3(a)" breach; and

(d) The fourth situation is where the breach in question would give rise to an event which would deprive the innocent party of substantially the whole benefit which it was intended that the innocent party would obtain from the contract (*RDC Concrete* at [99]). This is known as a "Situation 3(b)" breach.

77 The plaintiff pleaded that the defendant had, through its conduct, committed a repudiatory breach by "evinc[ing] an intention to no longer be bound by" and/or "evinc[ing] an inability to comply with" the contracts evidenced by POs 9968, 9969, 9992, 10600, 11289, 11290, 11651, 8874 and

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8875. The plaintiff's pleadings did not specify whether it was relying on any of the four situations set out at [76] above. In its closing submissions, however, the plaintiff's case became clearer: it advanced the argument that the implied term requiring the defendant to nominate a port of destination within a reasonable time was a *condition* of the contract. The defendant's actions thus constituted a "Situation 3(a)" breach which entitled the plaintiff to terminate the contract.[74]

78 In support of this contention, the plaintiff relies on McNair J's holding in *Tsakiroglou* at 572 that:

> [I]t was a necessary implication that the buyers should make known to the sellers the exercise of their option as to the port of c.i.f. destination within a reasonable time before the earliest date for shipment under the contract and that the buyer's failure to notify the sellers of the exercise of such option within a reasonable time as aforesaid was a breach of condition entitling the sellers to treat the contract as determined …

79 The defendant objects to the plaintiff's analysis for two reasons. First, the defendant avers that the plaintiff's pleaded case is that the defendant committed a "Situation 2" breach. Since a party is bound by its pleaded case, the plaintiff should not be allowed to rely on its submission that the defendant committed a "Situation 3(a)" breach.[75] Second, and in any event, the addition of the words "TBA by POET" meant that the implied term to nominate a port of destination within a reasonable time could not be regarded as a condition of the contract.[76]

80 I do not think that the plaintiff's pleaded case is that the defendant had

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74 PCS at p 20, para 27

75 Defendant's Reply Submissions ("DRS") at p 4, para 12

76 DRS at p 5, para 13

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committed a "Situation 2" breach. Firstly, although "Situation 2" breaches are sometimes referred to as "repudiatory" breaches (see for example, *San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20]), I am of the view that the plaintiff intended for the term "repudiatory breach" to be interpreted in its broader sense, *ie* as a type of breach which would entitle the plaintiff to terminate the contract. In other words, the plaintiff was simply characterising the defendant's breach as one which fell within *any* of the four situations set out at [76] above.

81 Furthermore, a "Situation 2" breach entails a *complete* renunciation of the contract by the party in breach. This was elaborated upon in the following passage from *Chitty on Contracts*, vol 1 (Hugh Beale ed) (Sweet & Maxwell, 30th Ed, 2008) (at 24-018), which was cited with approval in *Econ Piling Pte Ltd v GTE Construction Pte Ltd* [2009] SGHC 213 (at [30]):

> … An *absolute refusal* by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also *a clear and unambiguous assertion by one party that he will be unable to perform* when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he *no longer intends to be bound by its provision*s …
>
> [emphasis added]

82 In my judgment, "evinc[ing] an inability to comply with" a contract cannot be equated with an "absolute refusal" by one party to perform his side of the contract. Nor can it be regarded as a "clear and unambiguous assertion" by the contract-breaker that he will be unable to perform the contract *in its totality*, or that he no longer intends to be bound by the contractual provisions. Thus, I disagree that the plaintiff's pleaded case is that the defendant had committed a

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"Situation 2" breach.

83 The defendant's second objection rests on the following passage in *Aero-Gate* ([73] *supra*) (at [54]):

> I am also satisfied that this was not a breach of a condition. I find that the varied delivery deadline was not a condition because of the words "final date to be advised" in the e-mail dated 31 May 2011. As I have said at [47] above, these words do not negate a finding that the delivery deadline was end-January 2012. But *they do indicate that the parties at the time did not view the deadline as a term so important that exceeding it by even a day would entitle the plaintiff to terminate the contract*. Those words suggest a mutual understanding at the time that there was a more than fanciful possibility of the parties agreeing to a further delay in delivery at some future time. To that extent, parties did envisage at the time a degree of flexibility in the deadline, such flexibility to be achieved by future agreement. For this reason, the stipulated delivery deadline could not have been of such importance to the parties at the time as to qualify as a condition of PO 1.
>
> [emphasis added]

84 These remarks must be understood in their proper context. In *Aero-Gate*, the words "final date to be advised" were mentioned in the *same e-mail* as the agreed delivery date. The relevant portions of the e-mail read as follows (at [46]):

> Hi Mr Tanabalan,
>
> …
>
> Please note! We will issue you with an amendment to [PO 1] *changing the delivery dates* for the 4 units for [PO 1] to *end January 2012*.
>
> …
>
> This means that partial payment will have been made for all 10 units; 6 units for [PO 2] with delivery dates of 1st November 2011 (4) and 1st January 2012 (2) and 4 units for [PO 1] *with delivery date end January 2012 (final date to be advised* but not before end January 2012)

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[emphasis in original]

85 As the words "final date to be advised" were added immediately after "delivery date end January 2012", the natural inference was that the agreed delivery date, *ie* end January 2012, was flexible in the sense that it could be varied at some future time. This was so notwithstanding the prior unequivocal statement (in the earlier portion of the e-mail) that the delivery dates had been "chang[ed]… to end January 2012".

86 In the present case, however, the words "TBA" were incorporated into the POs which had been issued *before* the parties' subsequent confirmation of the delivery dates. There was nothing in the POs or in the parties' subsequent correspondence which suggested that either party could amend the delivery dates once they had been agreed upon.

87 Thus, I find that the defendant's objections are without merit. I accept the plaintiff's submission that the implied term to nominate a port of destination was a condition of each of the contracts evidenced by POs 9968, 9969, 9992, 10600, 11289, 11290, 11651, 8874 and 8875, the breach of which would entitle the plaintiff to terminate the contract in question.

Whether the plaintiff had waived its right to or was estopped from terminating the contracts without giving the defendant reasonable notice of the same

(1) Whether the plaintiff had waived its right to terminate the contracts

88 When a repudiatory breach of contract occurs, the innocent party is given an election between terminating the contract and affirming it. If the innocent party chooses to exercise this right by *affirming* the contract, he is said to have waived his right to terminate the contract on the grounds of the same

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breach. This is the concept of waiver by election (see *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another* [2012] 1 SLR 152 at [33]; *Aero-Gate* ([73] *supra*) at [41]).

89 The test for waiver by election is well-established. There are three requirements which must be satisfied:

(a) first, the innocent party must have acted in a manner consistent only with affirming the contract, *ie* treating the contract as still alive (*Aero-Gate* at [42]; *The "Pacific Vigorous"* [2006] 3 SLR(R) 374 at [15]);

(b) second, the innocent party must have communicated his choice to affirm the contract to the party in breach in clear and unequivocal terms (*Aero-Gate* at [42]) and the conduct constituting affirmation may be express or implied (*Strait Colonies Pte Ltd v SMRT Alpha Pte Ltd* [2018] 2 SLR 441 ("*Strait Colonies*") at [42]); and

(c) third, the innocent party must have sufficient knowledge of the *facts* giving rise to its legal right to terminate the contract (*Aero-Gate* at [42]; *Strait Colonies* at [64]).

90 In the present case, the defendant has not led evidence to show that the plaintiff had communicated its choice to affirm the contract in "clear and unequivocal" terms. Even if it is true that the plaintiff was "very accommodating" or "indulgent" towards the defendant up to and even *beyond* the agreed delivery dates, as the defendant alleges,[77] I am not satisfied that such

[77] DRS at p 30, para 111

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conduct constitutes an *unequivocal* representation by the plaintiff that it had elected to affirm the contracts.

91 In this regard, I draw guidance from the Court of Appeal's remarks in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 (at [58]):

> Next, it is well established that mere silence or inaction will not normally amount to an unequivocal representation: *Fook Gee Finance Co Ltd v Liu Cho Chit* [1998] 1 SLR(R) 385 ("*Fook Gee Finance*") at [36]. However, as we also observed in *Fook Gee Finance* (at [37]), "in certain circumstances, particularly where there is a duty to speak, mere silence may amount to [such] a representation". …

The Court of Appeal then elaborated on the circumstances in which a "duty to speak" might arise (at [61]):

> … *The expression "duty to speak" does not refer to a legal duty as such, but to circumstances in which a failure to speak would lead a reasonable party to think that the other party has elected between two inconsistent rights or will forbear to enforce a particular right in the future, as the case may be.* We emphasise that this is not the subjective assessment of the other party but an objective assessment made by reference to how a reasonable person apprised of the relevant facts would view the silence in the circumstances, though unsurprisingly, the parties' relationship and the applicable law which governs it will be a critical focus of the court's assessment of whether those circumstances exist.
>
> [emphasis added]

92 It must be emphasised that cases in which a "duty to speak" arises are the exception and not the norm. Although the parties in the present case shared a longstanding business relationship, they were ultimately no more than commercial entities engaged in a series of arms-length transactions. In my assessment, there was nothing exceptional about their relationship or course of

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dealings which gave rise to a "duty to speak" on the plaintiff's part, and the defendant did not adduce any evidence to persuade me otherwise. As such, I find that the plaintiff's "accommodating" conduct alone cannot be regarded as conclusive evidence of its intention to affirm the contract.

93 The defendant also submits that the plaintiff, through e-mails dated 13 and 16 February 2017, made "clear unequivocal written and express representations" that delivery of the equipment under the contracts could be discussed as long as the defendant settled its other outstanding sums. In particular, it relies on an e-mail from Ho to Koh, dated 13 February 2017, which stated:[78]

> Dear Gary,
>
> I have already spoken to him to settle the outstanding as soon as possible which has been long overdue and after that we can discuss about the delivery of other projects which will be subject to our management approval.
>
> …

94 I agree that this e-mail suggests that the plaintiff was willing to *consider* an extension of the agreed delivery dates. However, Ho's statements in this e-mail cannot, in my view, be regarded as an unequivocal representation of the plaintiff's election to affirm the contract. Notably, Ho did not expressly commit to an extension of the existing delivery dates – he merely indicated that the plaintiff was willing to "discuss about the delivery of other projects". Moreover, Ho caveated that the outcomes of these discussions would be subject to the plaintiff's management's approval. This should have alerted the defendant to

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78 Quah's AEIC at p 38, para 56 and p 375

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the fact that the plaintiff's management had yet to make a final decision on the continuation of the relevant contracts.

95 Thus, the defendant's submission on this point fails.

(2) Whether the plaintiff was estopped from terminating the contracts

96 The defendant also submitted that the plaintiff was estopped from terminating the contracts because its conduct was equivalent to a representation that it would not enforce its strict legal rights against the defendant.

97 In order to successfully make out a defence of promissory estoppel, the defendant must prove three elements: (a) a clear and unequivocal promise by the promisor, whether by words or conduct; (b) reliance on the promise by the promisee; and (c) detriment suffered by the promisee as a result of the reliance (*Aero-Gate* ([73] *supra*) at [37]; *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182 at [83]).

98 I note that the defendant did not expressly plead estoppel, and that its submissions on this defence appear to conflate it with the legally distinct concept of waiver by election. Nevertheless, I am of the view that the defendant cannot avail itself of this defence even if its case is taken at its highest. Firstly, as stated at [90] above, I am not satisfied that the plaintiff had clearly and unequivocally represented to the defendant that it would not discharge the contracts. Secondly, even if the first element is made out, the defendant has neither particularised nor led evidence to prove the detriment which it has allegedly suffered in consequence of its reliance on the plaintiff's conduct. Accordingly, it is not necessary for me to consider this submission further.

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(3) Whether the plaintiff was required to give the defendant reasonable notice before terminating the contracts

99 Finally, I come to the defendant's contention that the plaintiff could not terminate the contracts without providing the defendant with reasonable prior notice of its intention to do so.

100 This argument rests on two limbs. First, the defendant relies on Clause 17 of the Orgalime S2000 General Conditions for the Supply of Mechanical, Electrical and Electronic Products which were incorporated into the quotations corresponding to POs 9968 and 9969.[79] This clause reads as follows:

> Unless the Purchaser's failure to accept delivery is due to any such circumstance as mentioned in Clause 39, the Supplier may by notice in writing require the Purchaser to accept delivery within a final reasonable period.
>
> If, for any reason for which the Supplier is not responsible, the Purchaser fails to accept delivery within such period, the Supplier *may by notice in writing terminate the contract in whole or in part.* …
>
> [emphasis added]

101 I note that this point does not form part of the defendant's pleadings. In any event, I agree with the plaintiff that the defendant's reliance on this clause is misplaced. This clause merely specifies an optional *mode* by which the supplier *may* choose to terminate the contract, *ie* "by notice in writing". It does not suggest that the supplier must give prior notice to the defendant before terminating the contract.

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[79] AB1 at p 68

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102 The defendant also relies on *Charles Rickards v Oppenhaim* [1950] 1 K.B. 616 ("*Charles Rickards*") for the proposition that the plaintiff was obliged to provide it with reasonable notice before terminating the contracts evidenced by POs 9968, 9969, 9992, 10600, 11289, 11290, 11651, 8874 and 8875. In that case, the defendant buyer ordered a Rolls Royce Silver Wraith chassis from the plaintiff suppliers. When the car was not delivered on the agreed delivery date, the buyer did not cancel the contract but continued to press for delivery. Eventually, the buyer gave a notice to the supplier stating that he would not accept the car unless it was delivered by 25 July 1948.

103 Denning LJ (as he then was) held (at 623) that the buyer was estopped, by its initial conduct, from terminating the contract on the grounds of the supplier's late delivery:

> If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal rights. He made, in effect, a promise not to insist on his strict legal rights. …

104 However, Denning LJ also went on to stress that if the buyer subsequently gave notice to the supplier fixing a reasonable time for delivery, thus making time of the essence once again, it would be entitled to terminate the contract if delivery was not fulfilled by the new time stipulated (at 624):

> It would be most unreasonable if the defendant, having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment he was entitled to give a reasonable notice making time of the essence of the matter. Adequate protection to the suppliers is given by the requirement that the notice should be reasonable.

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105 In my view, *Charles Rickards* only assists the defendant's case if it succeeds in proving that the plaintiff had waived its right to, or was estopped from, terminating the contract by reason of the defendant's failure to nominate a port of destination within a reasonable time. As established above, however, neither waiver nor estoppel are made out in the present case. I thus find that the plaintiff had validly exercised its right to terminate the contracts evidenced by POs 9968, 9969, 9992, 10600, 11289, 11290, 11651, 8874 and 8875.

Issues concerning the contract evidenced by PO 10601

Whether the contract was subject to an implied term that the defendant would advise the plaintiff on a delivery date within a reasonable time

106 I now turn to the issues surrounding the contract evidenced by PO 10601. The plaintiff acknowledges that the parties did not, at any point in time, agree on a delivery date for this contract. Instead, its case is that the contract was subject to an implied term that the defendant would advise the plaintiff on a delivery date within a reasonable time from the date of contract. It further submits that a "reasonable time" would have been a maximum of 2 years from the contract, based on the previous course of dealings between the plaintiff and the defendant.[80]

107 In support of this contention, the plaintiff relies on the judgment of the Supreme Court of South Australia in *Agseed Pty Ltd v Broad* (1990) BC9100416 ("*Agseed*"). In that case, the defendant ordered ryecorn from the plaintiff, and the delivery date for the ryecorn was expressed as "to be advised". Matheson J affirmed the trial judge's finding that:

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80 PCS at p 23, para 35

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> … Clearly, the defendant was in breach of his contractual arrangement with the plaintiffs by reason of his failure to take delivery of the crop within the represented or reasonable time…

108 Matheson J then cited the following passage by the High Court of Australia in *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 ("*Perri*"):

> An implication of a reasonable time when none is expressly limited is, in general, to be made unless there are indications to the contrary.

109 In response, the defendant submits that the equipment purchased under PO 10601 did not have an express or implied delivery date because it had been expressly purchased as "stock".[81]

110 I agree with the plaintiff that the contract evidenced by PO 10601 was subject to an implied term that the defendant would advise the plaintiff on a delivery date within a reasonable time. In my view, the implication of such a term meets the requirements of the three-step *Sembcorp* test for the implication of terms set out at [27] above. As the plaintiff has pointed out, the terms of the contracts were such that 90% of the contract price would only become payable upon delivery of the equipment ordered. Thus, for as long as the defendant withheld advising the plaintiff on a delivery date, the plaintiff would not have been able to deliver and therefore would not have become entitled to the remaining 90% of the contract price. In my view, this was clearly a "gap" which the plaintiff and the defendant had failed to contemplate, and which needed to be addressed in order for the contract to make commercial sense.

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[81] DCS at p 6, para 17; Defence at [25]; Quah's AEIC at p 34, para 51(c)

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111 I am also unable to accept the defendant's allegation that the equipment purchased under PO 10601 had been expressly purchased as "stock". I accept Koh's evidence that the word "stock" was not intended to mean that the plaintiff would purchase and store equipment for the defendant. Rather, it was used to signify a particular engine which had been ordered under a previous PO, but which had been transferred to a new hull and designated under a new PO with the plaintiff's agreement.[82]

112 As to the specific term to be implied, I am guided by the High Court of Australia's remarks in *Perri* ([108] *supra*): as there was no other indication to the contrary, an implication of a reasonable time is appropriate in the present case.

Whether the defendant was in breach of the contract

113 I next consider whether the defendant was in breach of the implied term to advise the plaintiff on a delivery date within a reasonable time. To address this issue, I must determine what constitutes a "reasonable" time in the present case.

114 In this regard, I refer to Olsson J's helpful pronouncement in *Agseed* ([107] *supra*):

> … [T]he limit of what is reasonable "is determined by reference to what is fair to both parties". It necessarily requires consideration both of what was in the contemplation of the parties at the time of entry into the contract and prompted their subsequent actions and also those subsequent circumstances which reasonably ought to be taken into account as a matter of fairness and equity.

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82 PCS at p 73, para 132; Notes of Evidence (30 October 2019) at p 135, lines 1-22

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115 In my judgment, what was "in the contemplation of the parties at the time of entry into the contract" may be assessed by reference to various factors, including normal industry practice and the course of dealings between the parties, if any. In the present case, however, neither party has adduced any evidence of industry custom and/or practice. Nor have they highlighted any post-contractual circumstances which ought to have been taken into consideration "as a matter of fairness and equity". Thus, I must look to the course of dealings between the plaintiff and the defendant in order to ascertain their intentions at the material time.

116 The plaintiff submits that based on past practice between the plaintiff and the defendant, the equipment that the plaintiff sold to the defendant would usually be delivered within two years (at the latest) from the conclusion of the contract.[83] The defendant did not put forward any evidence to rebut this contention. Accordingly, I am of the view that a "reasonable" time in the present case would have been a maximum of two years from the date on which PO 10601 was issued, *ie* by 5 August 2016. Given that the defendant had failed to advise the plaintiff on a delivery date for the equipment under PO 10601 by 5 August 2016, I find that the defendant was in breach of the contract evidenced by PO 10601.

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[83] Chuah Swee Choo's AEIC dated 2 September 2019 ("Chuah's AEIC") at p 6, para 15(b); Ho Kah Huat's AEIC dated 2 September 2019 ("Ho's AEIC") at p 2, para 6

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Whether the plaintiff was entitled to terminate the contract

117 Finally, I consider the issue of whether the plaintiff was entitled to terminate the contract evidenced by PO 10601 in response to the defendant's breach.

118 In its Statement of Claim, the plaintiff asserts that the defendant's failure to advise on a delivery date for the contract evidenced by PO 10601 was a repudiatory breach.[84] However, submissions on this point were lacking. As such, I directed the parties to file further submissions on whether the breach of an implied term to advise on a delivery date within a reasonable time would entitle the aggrieved party to terminate the contract.

119 As stated at [76] above, an innocent party's right to terminate the contract in the event of a breach only arises in four situations. The plaintiff submits that it was contractually entitled to terminate the contract evidenced by PO 10601 by virtue of Clause 11 of its Conditions of Sale, which had been incorporated into all of its contracts with the defendant.[85] Further or alternatively, it argues that the implied term to advise on a delivery date within a reasonable time was a condition of PO 10601,[86] and/or that a breach of the said implied term deprived the plaintiff of substantially the whole benefit of the contract.[87]

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84 SOC at p 14, para 55

85 Plaintiff's Further Written Submissions ("PFS") at p 2, para 2; AB1 at p 300

86 PFS at p 3, para 7

87 PFS at p 2, para 4

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120 I first address the plaintiff's submission regarding Clause 11 of its Conditions of Sale,[88] which states as follows:

> 11. If the buyer fails to furnish evidence of his credit worthiness or security for payment to the seller's satisfaction within sixty (60) days from the date of the seller's acceptance, *or the buyer shall make default in or commit a breach of the contract or of any other of his obligations to the seller*, or if any distress or execution shall be levied upon the buyer's property or assets, or if the buyer shall make or offer to make any arrangement or composition with creditors, or commit any act of bankruptcy, or if any petition or receiving order in bankruptcy shall be presented or made against him, or if the buyer is a limited company and any resolution or petition to wind up such company's business (other than for the purpose of amalgamation or reconstruction) shall be passed or presented, or if a receiver of such company's undertaking, property or assets or any part thereof shall be appointed, the seller shall have the right forthwith to terminate any contract then subsisting and upon written notice of such terminations being posted to the buyer's last known address any subsisting contracts shall be deemed to have been terminated without prejudice to any claim or right the seller may otherwise make or exercise.
>
> [emphasis added]

121 It is undisputed that, pursuant to Situation 1 in *RDC Concrete* ([76] *supra*), an aggrieved party can terminate a contract under specified circumstances if the contractual terms "clearly and unambiguously" entitle it to do so (see *RDC Concrete* at [91]). However, the defendant argues that since Clause 11 primarily deals with credit default and insolvency-related events, it should be construed *contra proferentem*, and be limited in its application to insolvency-related events only.[89] Furthermore, it suggests that the scope of the phrase "breach of the contract" should be restricted to breaches of *express*

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[88] AB1 at p 300

[89] Defendant's Further Submissions ("DFS") at p 1, para 3

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contractual terms.[90] Otherwise, Clause 11 would have the practical effect of "turn[ing] every provision in the Contract into a condition".[91]

122 I am unable to accept the defendant's submissions. In *Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services* [2009] 3 SLR(R) 925 ("*Fu Yuan Foodstuff*"), the Court of Appeal opined (at [31]) that "if a termination clause is *clearly* drafted, its *literal* language *ought to accurately reflect the intentions of the parties*" (emphasis in original). It went on to state (at [36]) that:

> [E]ach termination clause must be analysed by reference to the precise language utilised by the parties in the context in which they entered into the contract, bearing in mind the fact that the ultimate aim of the court is to *give effect to the intentions of the parties as embodied within the wording of the termination clause in question.*
>
> [emphasis added]

123 Therefore, the Court of Appeal held that the circumstances of *Fu Yuan Foodstuff* fell "squarely" within "Situation 1" of *RDC Concrete* because clause 3.2[92] of the disputed contract in that case "expressly stipulated" that the respondent would be entitled to terminate the contract should the appellant in that case breach any item under clause 2.7. Since the appellant had breached clause 2.7.2 of the contract, the respondent's right to terminate the contract "immediately arose" (see *Fu Yuan Foodstuff* at [28]).

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[90] DFS at p 2, para 3

[91] DFS at p 2, para 4

[92] This clause stipulated that "[The respondent] may terminate [the] Agreement without notice should the [appellant] breach any item under Clauses 1.4, 3.2 and 2.7".

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124 The Court of Appeal also distinguished the English Court of Appeal's decision in *Rice v Great Yarmouth Borough Council* [2003] TCLR 1 ("*Rice*"). In *Rice*, the issue was whether a local council was entitled to terminate two maintenance contracts with a contractor on the basis of the following contractual term:

> 23.2 If the contractor:
>
> 23.2.1 commits a breach of any of its obligations under the Contract; …
>
> … the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor's employment under the Contract by notice in writing having immediate effect.

125 Hale LJ (as she then was) (with whom Peter Gibson and May LJJ agreed) remarked that, on its face, the clause ostensibly "visit[ed] the same draconian consequences upon any breach, however small, of any obligation, however small". In her view, "the notion that this term would entitle the council to terminate a contract such as this at any time for any breach of any term fl[ew] in the face of commercial common sense". Accordingly, she affirmed the decision of the judge at first instance that Clause 23.2.1 only accorded a right to terminate in the event of a repudiatory breach, or an accumulation of breaches which, as a whole, could properly be described as repudiatory.

126 The Court of Appeal in *Fu Yuan Foodstuff* characterised *Rice* as a case where a termination clause was artificially "read down" in order to control its legal effect. It declined to adopt the reasoning in *Rice* because the contested termination clause in *Fu Yuan Foodstuff* was "consistent with the commercial reality between the parties" (at [36]).

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127 In my view, the approach in *Rice* is similarly inapplicable in the present case. In *Rice*, the contractor operated a small-scale horticultural business and was contracting with the local council for the first time. In addition, the contracts were intended to last for four years (a substantial duration) and involved a myriad of obligations of differing importance and varying frequency. By contrast, the defendant in this case is an established business entity which was involved in a longstanding commercial relationship with the plaintiff. The defendant was well-acquainted with the plaintiff's Conditions of Sale, which were annexed to all of the plaintiff's quotations. Moreover, the contract in dispute was not a long-term service contract, but a straightforward arms-length transaction for the purchase and delivery of shipbuilding equipment.

128 In light of these circumstances, I am satisfied that the literal meaning of Clause 11, which *expressly* and *unambiguously* entitles the plaintiff to terminate the contract evidenced by PO 10601 if the defendant breaches "any" of its obligations (*ie*, whether express or implied) to the plaintiff, accurately represented the parties' intentions at the time of their entry into the contract. Like *Fu Yuan Foodstuff*, the present case falls within "Situation 1" of *RDC Concrete* ([76] *supra*).

129 Additionally, the *contra proferentem* rule is only applicable in cases where there is doubt or ambiguity about the meaning of a particular contractual provision, and therefore does not assist the defendant in the present case (see *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [47]), since there is no ambiguity within Clause 11 itself.

130 I note in passing that the approach adopted in *Rice* ([124] *supra*) has been widely critiqued (see for example, Simon Whittaker, "Termination

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Clauses" in *Contract Terms* (Andrew Burrows & Edwin Peel eds) (Oxford University Press, 2007) at pp 277–283; Ewan McKendrick, *Contract Law: Text, Cases and Materials* (Oxford University Press, 5th Ed, 2012) at pp 792-793). Furthermore, recent English decisions appear to suggest that contractual terms which expressly provide for a right of termination are effective even if the events on which those rights are exercisable do not amount to repudiatory breaches (see *Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132; *Firodi Shipping Ltd v Griffon Shipping LLC* [2013] EWCA Civ 1567). Nevertheless, it is not necessary for me to discuss the legal merits of the approach in *Rice*, and I do not propose to do so here.

131 Although the analysis above is sufficient to dispose of this issue in its entirety, I will cursorily address the parties' other submissions for completeness. These relate to the questions of (a) whether the implied term to advise on a delivery date within a reasonable time is a condition under Situation 3(a) in *RDC Concrete*; and (b) whether breaching such a term would deprive the plaintiff of substantially the whole benefit of the contract, pursuant to Situation 3(b) in *RDC Concrete.*

132 Parties referred me to the English case of *Shawton Engineering Ltd v DGP International Ltd* [2006] BLR 1 ("*Shawton*"), which Coomaraswamy J discussed at length in *Aero-Gate* ([73] *supra*). The relevant portion of *Shawton* reads as follows:

> … In the present case, there were originally fixed dates for completion, but it is correctly agreed that variations had rendered those dates inoperable. *Instead, the obligation was to complete within a reasonable time.* That obligation did not depend on Shawton giving any notice. But such an obligation was not a condition such that breach of it would automatically entitle Shawton to determine the contracts. Shawton could only in law legitimately determine the contracts for delay if either

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> (a) they gave reasonable notice making time of the essence; or
>
> (b) DGP's failure to complete within a reasonable time was a fundamental breach such that the gravity of the breach had the effect of depriving Shawton of substantially the whole benefit which it was the intention of the parties that they should obtain from the contracts.
>
> *Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense.* So here, I think, where on any view DGP were performing at least in part.
>
> [emphasis added]

133 In my judgment, *Shawton* stands for the following proposition: where a party is in breach by delay, and time is not of the essence, timely performance cannot be regarded as a condition of the contract. As such, the aggrieved party can only terminate the contract if it has given reasonable notice making time of the essence, or if the breach was of such a nature as to deprive it of substantially the whole benefit of the contract (*ie,* a Situation 3(b) breach). However, it will be *intrinsically difficult* for the aggrieved party to establish a Situation 3(b) breach if the party in breach is making an effort to perform the contract.

134 The approach in *Shawton* is supported by the Ontario Superior Court of Justice's decision in *Dansway International Transport Ltd v Lesway and Sons Inc.* [2001] O.T.C 880 ("*Dansway*"). In that case, McKinnon J opined (at [50] and [55]):

> I apprehend the law to be this: where the seller believes that the buyer is not taking delivery of goods within a reasonable time, the seller must give notice requiring the buyer to take delivery before he may terminate the contract; and the time stipulated for taking delivery must itself be reasonable. …
>
> …

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> This principle of law, requiring a duty to warn before termination of a contract where time is not of the essence, is both sound and equitable. It dissuades contracting parties from acting capriciously. It recognizes and fosters the sanctity of contract and assumes the good faith of contracting parties. It encourages continuing negotiation to settle unresolved details that arise in contractual relations. Ultimately, it avoids lawsuits.

135 I agree with the defendant that the principles in *Shawton* and *Dansway* are equally applicable to the present case. The pivotal question is whether time was of the essence of the contract evidenced by PO 10601. In my view, it was not: the parties did not expressly agree on a delivery date, and the implied term merely required the defendant to advise on a delivery date within a "reasonable" time from the date of the contract.

136 Although the defendant expressly informed the plaintiff, through an e-mail dated 30 November 2015, that there was no scheduled delivery date for the equipment ordered under PO 10601,[93] the plaintiff did not attempt to fix a delivery date or notify the defendant of its intention to make time of the essence. I also find, based on the passage in *Shawton* above, that it is intrinsically difficult for the plaintiff to establish a Situation 3(b) breach since the defendant paid the 10% down-payment required under the contract[94] and expressly announced that it was prepared to discuss delivery dates with the plaintiff's Gary Quah.[95] In the circumstances, I find that the plaintiff was not entitled to terminate the contract under Situations 3(a) or 3(b) in *RDC Concrete* ([76] *supra*). Nonetheless, it succeeds on this issue because of my findings in [127]-[128] above.

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93 AB7 at p 4257

94 SOC (1) at para 51

95 AB7 at p 4257

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Whether the plaintiff reasonably mitigated its losses

137 Having established that the defendant is in repudiatory breach of the contracts brought up by the plaintiff's claim (*ie* the contracts evidenced by POs 9968, 9969, 9992, 10600, 10601, 11289, 11290 and 11651), and that the plaintiff validly exercised its right to terminate these contracts, I will now deal with the quantification of damages in the present case.

138 The plaintiff seeks damages equivalent to the expectation loss which it has suffered by virtue of the defendant's contractual breaches. It argues that this expectation loss would constitute the remainder of the prices of all eight contracts, less the amounts it has *actually* recouped in mitigation.[96]

139 The defendant's pleaded case is that the plaintiff failed to reasonably mitigate its losses arising from the breaches of the contracts in dispute. In its reply submissions, however, the defendant appeared to advance a different argument, *ie* that the plaintiff's *method* of quantifying the damages was incorrect. It averred that the proper measure of the plaintiff's expectation loss was the remainder of the prices of all eight contracts, less the resale price of *all* the equipment on reasonable resale terms.[97]

140 In my view, this argument obfuscates the issue. The critical question remains: did the plaintiff reasonably mitigate its losses? If so, the plaintiff is entitled to recover damages equivalent to the remainder of the prices of all eight contracts, less the amounts it has *actually* recouped in mitigation. If not, the

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96 PCS at p 43, para 82

97 DRS at p 11, para 35

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plaintiff's quantum of damages must be reduced by the amount of losses which it had failed to reasonably mitigate. This is clear from the Court of Appeal's judgment in *The "Asia Star"* [2010] 2 SLR 1154 (*"Asia Star"*) (at [24]):

> The basic rules relating to mitigation are well settled. First, the aggrieved party must take all reasonable steps to mitigate the loss consequent on the defaulting party's breach, and *cannot recover damages for any loss which it could have avoided but failed to avoid due to its own unreasonable action or inaction.*
>
> [emphasis added]

141 The Court of Appeal in *Asia Star* also provided guidance on the standard of reasonableness imposed on a successful claimant. It observed (at [32]) that:

> The many sub-rules, qualifications and nuances that have built up around the reasonableness inquiry may not infrequently appear to be confusing and unwieldy. Nevertheless, when one takes a step back to look at the object of this inquiry as a whole, it becomes clear that the inquiry amounts to nothing more than the common law's attempt to reflect *commercial and fact-sensitive fairness* at the remedial stage of a legal inquiry into the extent of liability on the defaulting party's part. The concept of reasonableness in the context of mitigation is a flexible one. In essence, it bars an aggrieved party from profiting or behaving unreasonably at the expense of the defaulting party, and encapsulates complex interplaying notions of responsibility and fairness. As with any principle of law that encapsulates notions of fairness, the principle of mitigation confers on the courts considerable discretion in evaluating the facts of the case at hand in order to arrive at a commercially just determination. The principle embodies a fact-centric flexibility which, whilst remaining in harmony with sound business practice, stands in vivid contrast to the strictness with which rules in other areas of contract law are applied.
>
> [emphasis in original]

142 The plaintiff has led evidence by Ho to illustrate the steps which it has taken to sell the equipment under the contracts in dispute.[98] These are as follows:

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98 Ho's AEIC at p 33, para 82

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(a) On or about 31 December 2015, the plaintiff sold part of the PO 9992 equipment, namely, one unit of C18 engine ESE 14965, for US$130,455;

(b) On or about 19 December 2017, the plaintiff sold part of the PO 9968 equipment, namely, one unit of 3516C engine ESE 14743, for US$388,000;

(c) On or about 26 March 2019, the plaintiff sold part of the PO 9968 equipment, namely, one unit of C18 engine ESE 1475, for S$127,000;

(d) On or about 13 May 2019, the plaintiff sold part of the PO 10601 equipment, namely, one unit of C18 engine ESE 14724, for US$107,000;

(e) On or about 13 August 2019, the plaintiff sold part of the PO 9969 equipment, namely, one unit of 3516CHD Caterpillar marine propulsion engine ESE 14819, for US$380,000; and

(f) On or about 17 October 2019, the plaintiff sold part of the PO 9992 equipment, namely, one unit of C18 engine ESE 14967, for US$128,000.

143 The defendant submits that the plaintiff could easily have resold *all* the equipment under the contracts in dispute, "even at 10-20% discount", and that it would have suffered no or minimal loss as a result.[99] To demonstrate that there was a ready market for such equipment, the defendant led evidence from Koh

[99] DRS at p 12, para 40

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who stated, during his examination-in-chief, that C18 and C32 generators were "very common model[s]".[100] It also argues that "the fact that the plaintiff could resell the C18, 3512 and 3516 main engines is evidence in itself that these equipment had a ready market".[101]

144 It is uncontroverted that the burden of proving that the aggrieved party has failed to fulfil its duty to mitigate falls on the defaulting party (*Asia Star* at [24]). In the present case, I am not satisfied on the evidence before me that the defendant has discharged its burden of proving that the plaintiff has failed to reasonably mitigate its losses. First, apart from a bare assertion by Quah Peng Wah that the equipment was "of wide application in the marine industry",[102] the defendant has not adduced any other evidence to show that there was a ready market for the undelivered equipment. Second, *even if* a ready market did exist, the plaintiff's inability to resell part of the undelivered equipment cannot be viewed as a conclusive indication of its failure to mitigate. As emphasised in *Asia Star*, the reasonableness of the plaintiff's mitigatory efforts must be examined by reference to the circumstances of the case *as a whole*.

145 Finally, I note in passing that the defendant has referred me to *Bulsing Ltd v Joon Seng & Co* [1972] 2 MLJ 43 ("*Bulsing*") as an example of a case where the existence of a "ready market" was in issue.[103] However, the defendant has not explained how *Bulsing* is relevant or what proposition in *Bulsing* it seeks to rely on. I am therefore unable to place any reliance on this case.

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100 Notes of Evidence (30 October 2019) at p 5, lines 1-3

101 DRS at p 12, para 44

102 Quah's AEIC at p 41, para 68

103 DRS at p 11, para 38

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146 In light of the above, I find that the plaintiff is entitled to damages equivalent to the remainder of the prices of the contracts evidenced by POs 9968, 9969, 9992, 10600, 10601, 11289, 11290 and 11651, less the amounts stated in [142] above which it has successfully recovered in mitigation.

Conclusion

147 In summary, my decision is as follows.

(a) The plaintiff succeeds in its claims relating to the contracts evidenced by POs 9968, 9969, 9992, 10600, 10601, 11289, 11290 and 11651. Accordingly, the plaintiff is entitled to a declaration that the defendant has breached these eight contracts, and to damages of S$11,174,300 and US$536,945.

(b) The defendant's counterclaim is dismissed in its entirety.

148 Judgment will therefore be entered for the plaintiff against the defendant for the sum of S$11,174,300 and US$536,945 and interest thereon under s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed). Interest under the Civil Law Act will run on the S$11,174,300 and US$536,945 from 16 March 2018, the date on which the plaintiff issued the writ in this action, to the date of this judgment at the usual rate of 5.33% per annum.

149 I will hear parties on the issue of costs at a later date. Parties are to file their submissions on costs, limited to ten pages each, within fourteen days from the date of this judgment.

Version No 1: 27 Oct 2020 (22:41 hrs)

Vincent Hoong
Judge

Kirpalani Rakesh Gopal, Teo Wei Ling (Zhang Weiling), Oen Weng Yew Timothy (Drew & Napier LLC) for the plaintiff;
Ong Sie Hou Raymond, Koh Kok Kwang, Karin Lee (CTLC Law Corporation) for the defendant.

Version No 1: 27 Oct 2020 (22:41 hrs)