IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(A) 38

Appellate Division / Civil Appeal No 10 of 2023

Between

PT. OKI Pulp & Paper Mills

… *Appellant*

And

Sunrise Industries (India) Ltd

… *Respondent*

Appellate Division / Civil Appeal No 15 of 2023

Between

Sunrise Industries (India) Ltd

… *Appellant*

And

PT. OKI Pulp & Paper Mills

… *Respondent*

In the matter of Suit No 8 of 2017

Between

Sunrise Industries (India) Ltd

… *Plaintiff*

And

(1) PT. OKI Pulp & Paper Mills
(2) Dena Bank Limited

… *Defendants*

JUDGMENT

[Courts and Jurisdiction — Appeals]
[Commercial Transactions — Sale of goods — Breach of contract]
[Commercial Transactions — Sale of goods — Performance of contract]
[Contract — Variation]
[Contract — Termination]
[Civil Procedure — Damages — Interest]

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PT OKI Pulp & Paper Mills
v
Sunrise Industries (India) Ltd and another appeal

[2023] SGHC(A) 38

Appellate Division of the High Court — Civil Appeal Nos 10 and 15 of 2023
Woo Bih Li JAD, Kannan Ramesh JAD and Andre Maniam J
13 July 2023

24 November 2023 Judgment reserved.

Kannan Ramesh JAD (delivering the judgment of the court):

Introduction

1 AD/CA 10/2023 ("AD 10") and AD/CA 15/2023 ("AD 15") are cross-appeals by PT. OKI Pulp & Paper Mills ("OKI") and Sunrise Industries (India) Ltd ("Sunrise") respectively against the decision of the High Court Judge (the "Judge") in HC/S 8/2017 ("Suit 8"). The Judge's judgment is published in *Sunrise Industries (India) Ltd v PT OKI Pulp & Paper Mills and another* [2023] SGHC 3 (the "Judgment").

Facts

The parties

2 The plaintiff in Suit 8, Sunrise, is an India-registered company in the business of manufacturing thermosets, thermoplastic-lined equipment, pipes

and fittings. The first defendant, OKI, is an Indonesia-incorporated company in the business of manufacturing pulp, paper and tissue paper. The second defendant is Dena Bank Limited ("Dena Bank"), a public bank in India.

3 Sunrise and OKI agreed that Sunrise would supply OKI certain goods and install them in a pump mill (the "Mill") in Indonesia owned by OKI. Two agreements were entered into for this purpose: (a) an agreement described as the "Purchase Contract for Delivery of a Complete Sets [*sic*] of FRP-Piping" dated 10 July 2015 (the "Supply Contract"); and (b) an agreement described as the "Purchase Contract for Supervision and Installation Work of a Complete Set of FRP-Piping" dated 10 July 2015 (the "Installation Contract"): the Judgment at [2]–[5]. The goods supplied under the Supply Contract were to be installed in the Mill pursuant to the Installation Contract. Various amendments were made to both contracts in the course of the parties' dealings which we address below.

The Supply Contract and the Bank Guarantee

4 Under the Supply Contract, Sunrise was obliged to supply OKI goods including pipes, fittings and manholes. The contract price under the Supply Contract was initially agreed at US$6,647,625. On 14 September 2015, the parties signed an amendment agreement ("Supply Contract A1"), which reduced the scope of goods that were to be supplied and increased the contract price to US$6,925,839. On 10 November 2015, the parties signed a second amendment agreement ("Supply Contract A2"), under which OKI ordered additional goods and the contract price was accordingly increased to US$8,324,132 (the Judgment at [3]). Unless otherwise stated, references in this judgment to the Supply Contract are to be understood as the Supply Contract as amended by Supply Contract A1 and Supply Contract A2, and references to

"Goods" are to be understood as the goods to be supplied under Supply Contract A1 and Supply Contract A2.

5 The contract price of the Supply Contract was to be paid by OKI in the following tranches:

(a) 10% (totalling US$832,413.20) was to be paid 15 days after the signing of each agreement and OKI's receipt of Sunrise's invoice and bank guarantee (see [6] below);

(b) 80% (totalling US$6,659,305.60) was to be paid by letter of credit procured by OKI (see [9] below); and

(c) the final 10% (totalling US$832,413.20) (the "Final 10%") under Clause 3 of the Supply Contract (amended and renumbered as Clauses 3.1 by Supply Contract A1 and Supply Contract A2) was to be paid after a "Certificate of Performance Test Acceptance" (the "Acceptance Certificate") was signed by authorised representatives of OKI and issued to Sunrise (see [83]–[84] below).

The parties do not dispute that OKI had paid the first 90% of the contract price under the Supply Contract to Sunrise.

6 Under Supply Contract A1, Sunrise was required to procure a bank guarantee for the sum of US$692,583.90, which Sunrise procured from Dena Bank on 21 September 2015 (the "Bank Guarantee"). Supply Contract A2 required the Bank Guarantee to be increased to US$832,413.20 in view of the increase in the contract price. The revised Bank Guarantee was received by OKI on 7 January 2016 (the Judgment at [7]; see also [68] below).

The Installation Contract

7 Under the Installation Contract, Sunrise was obliged to install the Goods in the Mill. The contract price under the Installation Contract was initially agreed at US$1,291,935. By an agreement dated 14 September 2015, corresponding to Supply Contract A1 ("Installation Contract A1"), the contract price was reduced to US$1,162,812. Thereafter, by another agreement dated 10 November 2015, corresponding to Supply Contract A2 ("Installation Contract A2"), the contract price was increased to US$1,441,545. Unless otherwise stated, references in this judgment to the Installation Contract are to be understood as the Installation Contract as amended by Installation Contract A1 and Installation Contract A2.

8 The contract price of the Installation Contract was to be paid by OKI in the following tranches:

(a) the first 20% (totalling US$288,309) within two months after Sunrise's supervisor commenced working continuously at the Mill;

(b) 20% (totalling US$288,309) two months after the first payment above;

(c) 30% (totalling US$432,463.50) after OKI's issuance of a "Certificate of Hand Over Test Acceptance", which was defined in Clause 1 of Annex III of the Installation Contract as a certificate confirming that the Goods met certain stipulated standards; and

(d) 30% (totalling US$432,463.50) after OKI's issuance of the Acceptance Certificate.

Performance of the Supply Contract and the letters of credit

9 At OKI's request, on or about 24 September 2015, DBS Bank Ltd issued a letter of credit for the sum of US$5,318,100 to Sunrise ("LC1") being 80% of the initial contract price of the Supply Contract. As the contract price of the Supply Contract was increased by Supply Contract A1 (see [4] above), LC1 was amended and re-issued on 16 November 2015 ("LC1 A1") to reflect the increase in price. In view of the increase in the contract price arising from Supply Contract A2, a second letter of credit (instead of a revision to LC1 A1) was issued by DBS Bank Ltd on 11 January 2016 for the sum of US$1,118,634.40 ("LC2") (the Judgment at [8]). The various letters of credit shall be collectively referred to in this judgment as the "LCs".

10 The delivery dates (*ie*, the date of arrival of the Goods at the port of discharge in Indonesia (the "Port of Discharge")) under the Supply Contract were amended by Supply Contract A1 and Supply Contract A2 (the Judgment at [9]–[10] and [24]–[25]) to 15 January 2016. We discuss this in detail below at [41]–[44]. For convenience, we shall refer to this delivery date as the "Supply Contract Delivery Deadline".

11 It is pertinent that the "latest date of shipment" (or last shipment date) in the LCs differed from that stated in the Supply Contract. On 23 December 2015, the last shipment date in LC1 A1 was amended to 29 February 2016 ("LC1 A2"), which was the same date later stated in LC2 (the Judgment at [8]). It is immediately obvious that the last shipment date stated in the LCs was well after the Supply Contract Delivery Deadline (*ie*, 15 January 2016). We discuss this at [45] below.

Performance of the Installation Contract

12 To perform its obligations under the Installation Contract, Sunrise deployed personnel to the project site (the "Project Site") at the Mill in January 2016. On or about 25 February 2016, Sunrise's General Manager for the project, Mr Pradeep Mahadeo Thorat ("Mr Pradeep"), arrived at the Project Site. Sunrise's installation works, however, stalled because of various disputes between the parties regarding, *inter alia*, provision of accommodation for Sunrise's personnel and payment by OKI of moneys under the Supply Contract. On 8 March 2016, Sunrise demobilised its installation team pending resolution of these disputes: see the Judgment at [11].

13 On 17 May 2016, Sunrise informed OKI that it would "not be interested to continue the [Installation Contract]" as it had "not received the payment as per the terms and conditions of the contract" despite repeated requests and reminders. Sunrise further stated that if OKI was interested in proceeding, it could vary the Installation Contract, make payment of the Final 10%, and make full payment under the Installation Contract pursuant to an irrevocable letter of credit (the Judgment at [106]).

14 By an e-mail dated 18 May 2016, OKI informed Sunrise that it did not wish to continue business with Sunrise. Thereafter, Sunrise did not complete the installation works. On 23 May 2016, OKI engaged PT Piping Systems Indonesia ("PT Piping") to complete the installation works. On 10 October 2016, OKI made a demand on the Bank Guarantee in the sum of US$832,413.20. The evidence of OKI's mills procurement coordinator, Mr Djung Wi Kuang, was that OKI did so in order to satisfy (in part) the amounts due to it from Sunrise for breach of the Supply Contract. Following the commencement of Suit 8, on

24 May 2017, OKI issued to Sunrise formal notices of termination of both the Supply Contract and the Installation Contract.

Procedural history and the parties' claims and counterclaims below

15 Suit 8 was commenced on 6 January 2017. On the same day, Sunrise applied *ex parte* for injunctions restraining OKI from calling on the Bank Guarantee and Dena Bank from making payment thereunder, until the determination of Suit 8. The applications were granted. On 28 April 2017, OKI filed an application to set aside the interim injunctions. OKI's application was allowed on 21 June 2018: see *Sunrise Industries (India) Ltd v PT OKI Pulp & Paper Mills and another* [2018] SGHC 145 (the "Injunction Judgment") and the Judgment at [14]. Accordingly, Dena Bank paid OKI the sum demanded on 23 May 2019.

16 Before the Judge, Sunrise contended that it had fully performed all its obligations under the Supply Contract and was therefore entitled to the full contract price thereunder. It submitted that there was no delay in the performance of the Supply Contract because the delivery dates in the Supply Contract were varied by agreement, and the delivery of the Goods on or about 24 March 2016 was "in accordance with the Supply Contract". Sunrise also argued that OKI wrongly repudiated the Installation Contract. Sunrise therefore claimed for damages in the sum of (see the Judgment at [16]–[18]):

(a) US$832,413.20 representing the amount that was paid to OKI under the Bank Guarantee;

(b) US$832,413.20 representing the Final 10% that OKI had failed to pay Sunrise;

(c) US$856,633.20 representing losses suffered as a result of OKI's wrongful repudiation of the Installation Contract; and

(d) US$600,000 representing Sunrise's loss of business resulting from OKI's repudiation of the Installation Contract.

17 OKI argued that Sunrise breached the Supply Contract by making late delivery of the Goods. OKI thus argued that it was entitled to call on the Bank Guarantee and receive and retain the sum paid thereunder to satisfy the damages payable by Sunrise for breach of the Supply Contract. OKI also alleged that it was entitled to terminate the Installation Contract on 18 May 2016 as Sunrise was in repudiatory breach. OKI counterclaimed for *inter alia* (see the Judgment at [19]–[21]):

(a) the return of US$7,491,718.80 being 90% of the price of the Supply Contract it had paid to Sunrise with interest at 12% per annum; and

(b) liquidated damages of US$144,154.50, representing 10% of the price of the Installation Contract; and

(c) damages for repudiatory breach of the Installation Contract.

18 On 11 September 2022, by HC/SUM 3368/2022 ("SUM 3368"), Sunrise sought leave to amend its Reply and Defence to Counterclaim (Amendment No 2) dated 3 September 2019 ("RDCC A2"). The application was partially allowed, with the amended pleading (the "RDCC") filed on 13 September 2022, the first day of trial. In AD 15, Sunrise appeals against the Judge's decision to disallow some of the amendments it had sought (see [31]–[32] below).

Decision below

The Supply Contract

19 The Judge found that Sunrise had breached the Supply Contract by failing to deliver the Goods by the Supply Contract Delivery Deadline. The following findings were made:

> (a) The amendment of the last shipment date in the LCs did not *ipso facto* result in a corresponding extension to the Supply Contract Delivery Deadline. Clause 5.2 of the Supply Contract prescribed a process for the variation of the delivery dates under the Supply Contract, which was not complied with. The overall picture that emerged was that OKI had agreed to the LCs being amended to allow Sunrise to receive payment thereunder and to ensure that Sunrise would ship the Goods (the Judgment at [52]–[54]).
>
> (b) Sunrise had not provided any consideration for variation of the Supply Contract Delivery Deadline. It was irrelevant in this regard that OKI did not plead an absence of consideration (the Judgment at [56]–[60]).

20 Thus, the Judge held that in accordance with Clauses 6.1 and 6.5 of Annex III of the Supply Contract, OKI was entitled to maximum liquidated damages amounting to 10% of the price of the Supply Contract (*ie*, US$832,413.20). As such, OKI was entitled to call on the Bank Guarantee to satisfy the liquidated damages (the Judgment at [78]–[80]). However, the Judge rejected OKI's claim under Clause 16.1(c) of Annex III of the Supply Contract for a full refund of the amounts paid to Sunrise under the Supply Contract (being US$7,491,718.80) and interest thereon at 12% per annum, finding that: (a) OKI

had elected not to exercise its right to terminate the Supply Contract; and (b) Clause 16.1(c) envisaged a situation where the Goods were not shipped or were non-functional (the Judgment at [81]–[84]).

21 The Judge further held that Sunrise was entitled to payment of the Final 10%. The Judge was of the view that Clause 3 of the Supply Contract (which was subsequently amended and renumbered as Clauses 3.1 in Supply Contract A1 and Supply Contract A2 (collectively, "Clause 3.1 of the Supply Contract")) did not require Sunrise to personally install the Goods at the Mill. The Judge was of the view that Sunrise would be entitled to payment of the Final 10% as long as OKI had certified that the relevant performance guarantees and conditions as defined in Clause 1 of Annex III of the Supply Contract were met, regardless of who was responsible for the works. As OKI had issued a completion certificate to PT Piping certifying that to be the case, the Judge was of the view that Clause 3.1 of the Supply Contract was satisfied and allowed Sunrise's claim for the Final 10% (the Judgment at [88]–[89]).

The Installation Contract

22 The Judge held that OKI did not breach the Installation Contract as it was not obliged to provide accommodation for Sunrise's personnel and was entitled to require payment in advance if requested to do so (the Judgment at [98]–[99]). Sunrise was in repudiatory breach of the Installation Contract by: (a) notifying OKI by e-mail on 17 May 2016 that it had no intention of abiding by the terms of the Installation Contract unless OKI agreed to, *inter alia*, make payment of the Final 10% and pay fully the sums under the Installation Contract pursuant to an irrevocable letter of credit (see [13] above); and (b) demobilising its installation team and making it clear that it would not remobilise until OKI arranged for accommodation for its personnel (the Judgment at [106]–[107]).

23 OKI was entitled to terminate the Installation Contract either: (a) pursuant to Clause 24.1 of the Installation Contract; or (b) by accepting Sunrise's repudiation of the Installation Contract. OKI validly exercised this right by its e-mail on 18 May 2016 (the Judgment at [104]–[105] and [108]). However, the Judge dismissed OKI's claim for damages for Sunrise's repudiatory breach of the Installation Contract (the Judgment at [110]–[114]) because OKI had not adduced evidence to substantiate its claim on the quantum of damages.

24 OKI was also entitled to maximum liquidated damages amounting to 10% of the contract price (in the sum of US$144,154.50) under Clauses 6.1 and 6.2 of the Installation Contract as Sunrise had not completed the installation works as of 18 May 2016 (the Judgment at [109]).

25 After setting off the US$144,154.50 due to OKI as liquidated damages under the Installation Contract against the US$832,413.20 due to Sunrise being the Final 10%, the Judge ordered OKI to pay Sunrise US$688,258.70 with pre-judgment interest at 5.33% from the date of the writ (the Judgement at [115]). The Judge further ordered costs against OKI representing 50% of Sunrise's costs and reasonable disbursements.

The parties' cases on appeal

The parties' cases in AD 10

26 In AD 10, OKI appeals against four aspects of the Judgment. Notably, this does not include the Judge's dismissal of its claims for damages for Sunrise's repudiatory breach of the Installation Contract. OKI makes the following arguments.

(a) First, the Judge erred in holding that the Final 10% was payable to Sunrise under Clause 3.1 of the Supply Contract. The plain meaning of Clause 3.1 of the Supply Contract was that the Final 10% would only be payable if OKI issued the Acceptance Certificate to Sunrise (as opposed to any other party who might have undertaken the installation works in its place). There was no basis to imply a term that the Acceptance Certificate could be issued to a party other than Sunrise. It was irrelevant that OKI had certified that the relevant performance guarantees and conditions set out in the Supply Contract were satisfied as a result of the installation works carried out by PT Piping. Furthermore, the Judge's interpretation of Clause 3.1 of the Supply Contract was not pleaded.

(b) Second, the Judge erred in holding that OKI was not entitled to terminate the Supply Contract on the basis that OKI had waived its right to do so. Sunrise did not plead that OKI had waived its right to terminate the Supply Contract. Further, OKI did not in fact waive that right. The Judge also erred in finding that the right to terminate in Clause 16.1(c) of Annex III of the Supply Contract was only exercisable where the Goods had not yet been shipped or were non-functional. Such an interpretation was not pleaded and contradicted the ordinary meaning of the provision. As OKI had validly terminated the Supply Contract, it was entitled to a refund of all sums it had paid thereunder, pursuant to Clause 16.1(c).

(c) Third, the Judge erred in: (i) awarding pre-judgment interest on Sunrise's claim as it was excluded by Clause 4.2 of Annex III of the Supply Contract; (ii) not awarding pre-judgment interest on OKI's counterclaim; and (iii) setting off OKI's counterclaim against Sunrise's

claim before awarding pre-judgment interest from the date of the writ on the net amount payable by OKI to Sunrise.

(d) Finally, the Judge should not have awarded costs to Sunrise on the basis that it was the successful party in Suit 8 as OKI had recovered more in the action than Sunrise and therefore, in substance, had succeeded in the litigation.

27 Sunrise makes the following submissions:

(a) The Judge rightly allowed its claim for the Final 10%. The Judge's interpretation of Clause 3.1 of the Supply Contract was correct. Moreover, in order to give business efficacy to the contract, it was necessary to imply terms to the effect that: (i) OKI must take steps to issue the Acceptance Certificate to Sunrise with reasonable despatch; and (ii) if the installation works were undertaken by a third party and the Acceptance Certificate was issued to that party, Sunrise would nonetheless be entitled to the Final 10%.

(b) The Judge correctly found that OKI was not entitled to terminate the Supply Contract under Clause 16.1(c) of Annex III. OKI's right to terminate did not arise as Sunrise was not in delay under the Supply Contract and/or the delays were caused by OKI. Moreover, the Judge correctly found that OKI had waived its right to terminate the Supply Contract. In any event, Clause 16.1(c) was an unenforceable penalty clause. Further, allowing OKI to exercise its rights under Clause 16.1(c) would result in it being unjustly enriched at Sunrise's expense.

(c) The Judge did not err in awarding Sunrise pre-judgment interest as OKI had not pleaded Clause 4.2 of Annex III of the Supply Contract.

Also, OKI was not entitled to pre-judgment interest as: (i) it had the benefit of retaining the sum received under the Bank Guarantee; and (ii) it did not plead its entitlement to pre-judgment interest.

(d) OKI was not entitled to the costs of Suit 8 as the net effect of the Judge's orders was payment in favour of Sunrise.

The parties' cases in AD 15

28 In AD 15, Sunrise makes the following arguments against various aspects of the Judgment:

(a) First, the Judge erred in only allowing SUM 3368 in part, thereby preventing Sunrise from pleading that various clauses in the Supply Contract and Installation Contract were unenforceable penalty provisions.

(b) Second, the Judge erred in finding that Sunrise had breached the Supply Contract by failing to meet the Supply Contract Delivery Deadline. OKI's pleaded position was that the last shipment date had been extended by agreement to 29 February 2016 as a result of the amendments to the last shipment date in the LCs, and OKI was bound by its pleadings. The authorities support the conclusion that an extension of the shipment date(s) in a letter of credit may result in a variation of the shipment date(s) in the underlying sale contract. The correspondence between the parties evinced an agreement to vary the Supply Contract Delivery Deadline as a result of the amendments to the last shipment date in the LCs. Further, when amending the last shipment date in the LCs, OKI did not reserve its right to seek damages against Sunrise for delay in the delivery of the Goods and was estopped from doing so now.

The requirements under Clause 5.2 of the Supply Contract to vary the Supply Contract Delivery Deadline were not pleaded and were in any event satisfied. OKI did not plead a failure of consideration for the variation of the Supply Contract Delivery Deadline. In any case, Sunrise had provided consideration by conferring a benefit on OKI. Finally, Sunrise was under no obligation to ship the Goods until OKI had paid the downpayments under the Supply Contract, as provided in Clause 11 of the Supply Contract and Clause 5.5 of Annex III of the Supply Contract.

(c) Third, the Judge erred in finding that Sunrise had breached the Installation Contract by, *inter alia*: (i) refusing to perform the installation works unless OKI agreed to make payment of the Final 10%; and (ii) demobilising its personnel. The correct interpretation of the Installation Contract was that Sunrise had until 20 October 2016 to perform the installation works and Sunrise had ample time to do so when it demobilised. Moreover, Sunrise only demobilised because of OKI's unreasonable conduct in refusing to provide accommodation unless Sunrise paid for the accommodation in advance, even though there was no prior agreement to that effect and OKI could have deducted the costs of the accommodation from the sums payable to Sunrise under the Installation Contract. OKI had in fact repudiated the Installation Contract, which Sunrise had accepted. Sunrise was therefore entitled to damages.

29 OKI makes the following submissions:

(a) This court has no jurisdiction to hear Sunrise's appeal in relation to SUM 3368 as Sunrise did not obtain permission to appeal.

(b) The Judge correctly decided that Sunrise had breached the Supply Contract as a result of the delay in the delivery of the Goods. Variation of the Supply Contract Delivery Deadline was in issue by implied joinder. Moreover, the authorities relied upon by Sunrise do not support the proposition it contends for and the evidence does not show that the Supply Contract Delivery Deadline was varied. Sunrise has failed to establish that there was consideration to support the variation. Sunrise did not plead that it was not obliged to ship the Goods until the downpayments were paid by OKI and, in any case, misinterpreted Clause 11 of the Supply Contract and Clause 5.5 of Annex III of the Supply Contract. Sunrise also did not plead, and could not establish, that OKI had either waived its right to assert or was estopped from asserting that there was no variation.

(c) Finally, the Judge correctly found that Sunrise had repudiated the Installation Contract. Sunrise had accepted in its pleadings that the deadline for performance of the installation works was 31 January 2016, and did not plead that it was extended by agreement. Sunrise repudiated the Installation Contract by: (i) demobilising its installation team and refusing to remobilise unless OKI agreed to *inter alia* pay the Final 10% and the sum under the Installation Contract pursuant to an irrevocable letter of credit; or (ii) informing Sunrise that it no longer had any interest in doing business with Sunrise. OKI did not breach the Installation Contract by requiring advance payment in order to provide accommodation to Sunrise's personnel as OKI had no obligation to do so. Also, OKI did not breach the Installation Contract by refusing to pay Sunrise the first 20% of the price of the Installation Contract, as Mr Pradeep had not worked continuously at the Mill for two months.

Issues to be determined

30 The following issues arise for determination:

(a) Whether this court has jurisdiction to hear Sunrise's appeal against the Judge's decision in SUM 3368.

(b) Whether Sunrise had breached the Supply Contract due to delay in the delivery of the Goods, such that OKI was entitled to call on and receive the sum of US$832,413.20 under the Bank Guarantee to satisfy liquidated damages.

(c) Whether OKI was entitled to a refund of the amounts paid to Sunrise under the Supply Contract.

(d) Whether Sunrise was entitled to payment of the Final 10%.

(e) Whether Sunrise or OKI had breached the Installation Contract and the remedies that are available to the party not in breach including the right to terminate the Installation Contract.

(f) Whether Sunrise and/or OKI was entitled to pre-judgment interest on its claim or counterclaim respectively and relatedly, whether the Judge erred in setting off OKI's counterclaim against Sunrise's claim before awarding pre-judgment interest.

Issue 1: Sunrise's appeal against the Judge's decision in SUM 3368 (AD 15)

31 We first address Sunrise's appeal in relation to SUM 3368. As we noted at [18] above, SUM 3368 was Sunrise's application for leave to amend RDCC A2 to plead that Clauses 6 and/or 16 of Annex III of the Supply Contract

and Clauses 6 and/or 24 of the Installation Contract were unenforceable penalty clauses.

32 Sunrise argues that permission to appeal is not required, as the Judge's refusal to allow the application was a final order and an appeal against the Judgment includes an appeal against the Judge's interlocutory decisions. Sunrise relies on an extract from *Singapore Civil Procedure 2020* vol 1 (Chua Lee Meng gen ed) (Sweet & Maxwell, 10th ed, 2020) at para 20/8/18, which cites *Laird v Briggs* (1881) 16 ChD 663 ("*Laird*") (at 664):

> [T]he refusal of leave to amend is simply part of the trial. As you have appealed from the whole judgment the whole case will be open on the appeal, and if the Court of Appeal shall be of opinion that you ought to have had leave to amend, it will have power to give you leave then.

Sunrise also refers to O 19 r 25(1)(*a*) of the Rules of Court 2021 (the "ROC 2021"), contending that O 19 does not prescribe any requirement to obtain permission to appeal against a judgment rendered after trial, and that the word "trial" is defined in O 19 r 3 of the ROC 2021 to mean hearings "on the merits of an originating claim or an originating application" and to include "all applications taken out or heard on the same day as such hearing and at any time after the commencement of such hearing until the giving of the judgment". Sunrise further argues that the amendments should have been allowed as OKI did not show that it would suffer any prejudice if they were allowed.

33 On the other hand, OKI submits that Sunrise's failure to obtain permission to appeal, as required by s 29A(1)(*c*) read with para 3(*h*) of the Fifth Schedule of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) (the "SCJA"), means that this court has no jurisdiction to hear Sunrise's appeal on SUM 3368. OKI further argues that Sunrise has not shown that the Judge's

decision was plainly wrong so as to justify appellate intervention, even if permission to appeal is not required.

34 We do not accept Sunrise's submissions. The effect of s 29A(1)(*c*) read with para 3(*h*) of the Fifth Schedule of the SCJA is clear – permission of the appellate court is required before an appeal may be brought against a decision of the General Division of the High Court where a judge makes an order refusing permission to amend pleadings. This applies squarely to the decision of the Judge in SUM 3368.

35 It is well established that an appellate court is only seised of the jurisdiction statutorily conferred upon it. Accordingly, where the SCJA requires an appellant to obtain permission to appeal and such permission is not obtained, the appellate court will not be seised with jurisdiction to hear the appeal: see *Grassland Express & Tours Pte Ltd and another v M Priyatharsini and others* [2022] SGHC(A) 28 at [27] and *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 at [25]–[35].

36 Sunrise's reliance on *Laird* is misplaced. Unlike the present case, there was no statutory requirement in *Laird* for permission to appeal. *Laird* therefore does not stand for the proposition that an appeal against the main judgment *obviates the need to obtain permission to appeal* against interlocutory decisions made in the main case. Such a conclusion is untenable where primary legislation, namely the SCJA, requires permission to be obtained.

37 We are also not persuaded by Sunrise's submission based on O 19 of the ROC 2021. To interpret O 19 of the ROC 2021 in the manner suggested by Sunrise would be to undermine s 29A(1)(*c*) read with para 3(*h*) of the Fifth

Schedule of the SCJA. This cannot be a correct reading of O 19 of the ROC 2021. In any event, the SCJA, being primary legislation, takes precedence.

38 As Sunrise has failed to obtain permission to appeal, this court is not seised with jurisdiction to hear Sunrise's appeal against the Judge's decision in SUM 3368. It is therefore not necessary, and indeed inappropriate, for us to consider whether permission would have been granted if an application had been made.

39 In any event, the question of whether Clauses 6 and/or 16 of Annex III of the Supply Contract are unenforceable penalty clauses is moot in the present appeals. These clauses entitle OKI to a full refund of the amounts paid to Sunrise, in the event OKI terminates the Supply Contract on the ground that it is entitled to maximum liquidated damages due to delay in the delivery of the Goods by Sunrise. However, for reasons that we elaborate below at [48]–[77], we are of the view that Sunrise did not delay delivery of the Goods and OKI is therefore not entitled to maximum liquidated damages under the Supply Contract. Accordingly, OKI is not entitled to terminate the Supply Contract and claim a refund of the sums paid under the Supply Contract.

Issue 2: Whether Sunrise breached the Supply Contract by failing to deliver the Goods on time (AD 15)

40 We turn next to whether Sunrise had breached the Supply Contract in circumstances which entitled OKI to maximum liquidated damages. This issue is raised by Sunrise in AD 15 and is relevant to whether OKI was entitled to call on the Bank Guarantee and retain the sum of US$832,413.20 that was paid thereunder.

41 We start by setting out the various changes to the delivery dates in the Supply Contract. Clause 5.4 of Annex III of the Supply Contract, which pertains to "Adjustments of the delivery Time Schedule", provides that the "Target Time Schedule for Deliveries is set out in Annex VII Appendix 1". Prior to the amendments introduced by Supply Contract A1 and Supply Contract A2, Annex VII Appendix 1 of the Supply Contract stipulated a "SHIPMENT DEPARTURE DATE" of 10 October 2015 and a "SHIPMENT ARRIVAL DATE" of 25 November 2015. The latter was the delivery date then.

42 Clauses 3.1 and 5 of Supply Contract A1 provided that Section I of the goods under Supply Contract A1 (the "Section I Goods") were to be delivered to the Port of Discharge according to the following timelines:

	Date of shipment	**Date of arrival at Port of Discharge**
First consignment	2 October 2015	17 November 2015
Last consignment	10 October 2015	25 November 2015

43 Clauses 3.1 and 5 of Supply Contract A2 required Sunrise to ensure that the last consignment of Section II of the goods to be delivered under Supply Contract A2 (the "Section II Goods") was to be shipped by 15 December 2015 and was to arrive at the Port of Discharge on 15 January 2016. The latter is the Supply Contract Delivery Deadline.

44 The parties do not dispute that as far as the Supply Contract was concerned, the last date by which the Goods were to arrive at the Port of Discharge was 15 January 2016.

45 The last shipment date stated in LC1 was 10 October 2015. The last shipment date was extended to 3 December 2015 in LC1 A1, and then to 29

February 2016 in LC1 A2 and LC2. The parties do not dispute that under the LCs, the last shipment date of the Goods was 29 February 2016. The parties accept that the Goods were shipped by Sunrise before 29 February 2016 and arrived at the Port of Discharge on 24 March 2016 (the Judgment at [8]–[10]).

46 As stated earlier, it is readily apparent that the last shipment date stated in the LCs, 29 February 2016, was well after the Supply Contract Delivery Deadline on 15 January 2016. If the LCs had the effect of extending the last shipment date under the Supply Contract to 29 February 2016, it must follow that the last date for delivery of the Goods to OKI at the Port of Discharge could no longer be 15 January 2016 as stated in Supply Contract A2. It would make no sense for the last shipment date to post-date the Supply Contract Delivery Deadline. Thus, the question of whether Sunrise had breached the Supply Contract by failing to deliver the Goods on time turns on the anterior question of whether the Supply Contract Delivery Deadline was extended as a result of the amendments to the last shipment date to 29 February 2016 in LC1 A2 and LC2.

47 In our view, OKI is precluded by its pleadings from arguing that: (a) the Supply Contract Delivery Deadline had not been extended by agreement, by reason of the amendments to the last shipment date in the LCs; (b) the conditions in the Supply Contract for any such extension were not complied with; and/or (c) any such extension was unsupported by consideration. In any event, the evidence also demonstrates that the parties agreed to vary the Supply Contract Delivery Deadline as a result of varying the last shipment date as described above. This conclusion makes it unnecessary for us to determine whether, as Sunrise submits, OKI had waived or was estopped from asserting its contractual rights.

OKI's pleaded position

48 OKI's pleaded position is that the Supply Contract Delivery Deadline had effectively been varied as a result of the amendments to the last shipment dates in LC1 A2 and LC2, although that plea was qualified by the plea of duress.

49 OKI pleaded at para 14(d) of the Defence and Counterclaim (the "DCC") that:

> *The delivery deadline for the last consignment of the Goods was purportedly extended from 25 November 2015 to 29 February 2016 by way of [LC1 A2].* [OKI] was forced to agree to this extension in order to avoid threatened delays in delivery by duress on the part of [Sunrise]. In an email dated 16 December 2015 which was copied to [Sunrise], [OKI] noted that '4th shipment is hold by [Sunrise] without [OKI's] agreement and [Sunrise] will start shipment for this Section I when LC for another section is opened …'. [OKI] therefore denies that this purported extension is valid … [emphasis in original omitted; emphasis added]

We note that para 14(d) of the DCC refers to the "delivery deadline" under the Supply Contract being extended to 29 February 2016. However, it is clear to us that this was a reference to the last shipment date of the Goods, as that date was the last shipment date stated in LC1 A2 and LC2. The reference in the plea to Sunrise "start[ing] shipment" of the Section I Goods reinforces this.

50 In our view, para 14(d) of the DCC binds OKI to the position that the parties had agreed to extend the last shipment date under the Supply Contract to 29 February 2016, by the amendments in the LCs. Whether the plea of duress vitiates the agreement is a separate point. However, duress was not pursued in evidence at trial nor put to Sunrise's witness in cross-examination. Indeed, it was also not raised in OKI's case in these appeals.

51 OKI argues that there is an implied joinder of issue on the pleading last served under the relevant rules of court which was the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Accordingly, it is permitted to take the position that the Supply Contract Delivery Deadline was never varied. OKI's submission misses the point. An implied joinder operates as a denial of the relevant facts alleged in a defence where no reply is served in answer to the defence, such that the claimant is not precluded from adducing evidence to support his claim merely because he had failed to file a reply (*Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 18/14/1). More importantly, because OKI's defence had expressly accepted that there was an agreement to vary the last shipment date, there was no dispute or issue to be joined.

52 In the circumstances, we are of the view that OKI is bound by its position in the DCC that, pursuant to the amendments to the LCs, the last shipment date under the Supply Contract was also extended to 29 February 2016. Given that this was well past the Supply Contract Delivery Deadline of 15 January 2016, it must necessarily follow that there was a corresponding extension of the Supply Contract Delivery Deadline to a date after 29 February 2016. The parties did not address what that date would be as their focus was solely on whether they had agreed to amend the last shipment date in the Supply Contract by amending that date in the LCs. In our view, it is unnecessary to determine what that specific date would be. Instead, what is significant is that the parties had agreed to extend the last shipment date under the Supply Contract to 29 February 2016, with the result that it is not open to OKI to assert that the Goods should have been delivered at the Port of Discharge by 15 January 2016. It follows that the Judge erred in finding that Sunrise had breached the Supply

Contract by failing to deliver the Goods by 15 January 2016 (*ie*, the Supply Contract Delivery Deadline).

53 OKI also did not plead that: (a) Sunrise had failed to comply with the conditions stated in Clause 5.2 of the Supply Contract to vary the Supply Contract Delivery Deadline; and (b) any agreement to extend was unenforceable for want of consideration.

54 In this regard, we do not share the Judge's reading of *Lim Zhipeng v Seow Suat Thin and another matter* [2020] 2 SLR 1151 ("*Lim Zhipeng*"), namely that a defendant's failure to plead a lack of consideration did not preclude it from arguing that the variation of the Supply Contract was invalid on that basis (the Judgment at [56]). In *Lim Zhipeng*, the appellant creditor made a loan to the debtor. The debtor asked his mother, the respondent, to act as guarantor for his debts. The appellant subsequently claimed the outstanding sum under the guarantee. One of the issues was whether consideration had been pleaded. The Court of Appeal held that consideration had been adequately pleaded, making the following observations (at [54]):

> Given that the issue of consideration was not raised until the Respondent filed her Defence and Counterclaim, it would not have been appropriate for the Appellant to pre-empt the issue and raise in it in his statement of claim. … [*I*]*t is not necessary for a plaintiff to plead consideration until the absence of consideration is raised as a defence.* Once the issue was raised, the Appellant appropriately traversed the issue in his Reply, and provided further details in his Defence to Counterclaim (see [51] above) although, perhaps, it would have been clearer if these had been provided in the Reply proper. The Reply and Defence to Counterclaim form part of the Appellant's pleadings. We hold, therefore, that consideration was adequately pleaded. [emphasis added]

55 It is apparent that the Court of Appeal did not hold that a defendant was not required to plead an absence of consideration. On the contrary, the Court of

Appeal's observations are in fact consistent with the conclusion that an absence of consideration has to be pleaded. The Court of Appeal was making it clear that it was not for a plaintiff to anticipate and pre-emptively address the allegation in the statement of claim. However, if the point is made in the defence, it was appropriate for the plaintiff to traverse the allegation in its reply. It follows therefore that OKI's failure to plead that the variation of the Supply Contract was unsupported by consideration precludes it from making the argument.

Whether the evidence shows that the last shipment date under the Supply Contract and the Supply Contract Delivery Deadline were extended

56 A holistic assessment of the factual matrix supports the conclusion that OKI and Sunrise agreed to vary the last shipment date under the Supply Contract, and consequently the Supply Contract Delivery Deadline, in accordance with the last shipment dates in the LCs.

57 We begin by observing as a preliminary point that the authorities relied upon by Sunrise do not stand for the proposition that *as a matter of law*, an extension of the last shipment date in a letter of credit *ipso facto* results in a corresponding amendment to the last shipment date in the underlying contract. Indeed, it is trite that a letter of credit, which governs the obligations owed by the issuing bank to the beneficiary, is autonomous and operates independently of the underlying contract between the buyer and seller: see *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another appeal* [2023] SGCA(I) 7 at [18], referring to *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, N.A.* [2023] SGCA 28 at [29] and [35].

58 However, we nevertheless accept that an amendment to a letter of credit may be evidentially relevant and indeed significant to the question of whether the parties intended to also amend the underlying contract correspondingly. That said, any such amendment must be weighed against the entire factual matrix to ascertain whether it is evidentially significant. An indication that the parties did not intend to amend the underlying contract is where there is a reservation of rights under the underlying contract notwithstanding the amendment to the letter of credit.

59 In our view, the parties' correspondence on the amendments to the last shipment date in the LCs suggests that OKI had in fact agreed to extend the last shipment date under the Supply Contract and the Supply Contract Delivery Deadline. In this regard, the fact that under the terms of the Supply Contract, time for delivery of the Goods only starts to run upon payment by OKI of the downpayments explains why the parties agreed to extend the last shipment date and consequentially the Supply Contract Delivery Deadline. We turn to the evidence.

The parties' correspondence

60 First, we note that throughout the parties' correspondence on the amendment of the last shipment date in the LCs, OKI never reserved its right to seek damages against Sunrise for delay in delivery under the Supply Contract. The following chronology of events is relevant:

(a) Counsel for OKI referred to OKI's e-mail to Sunrise dated 29 November 2015, where OKI, after learning that Sunrise had arranged for the final shipment of the Section I Goods to be shipped with the Section II Goods, informed Sunrise that to do so would be a "DISASTER PLAN" as it meant that work would not be able to start

until 20 January 2016. Counsel for OKI thus submitted that "concern over the lateness of the delivery" of the Goods was raised to Sunrise in as early as November 2015. However, as we pointed out during the hearing of the appeals, the issue was not whether OKI had timeously raised concerns over the lateness of the delivery. Rather, the point was whether OKI had alleged that Sunrise was in breach of the Supply Contract when Sunrise failed to deliver the Goods in accordance with the Supply Contract Delivery Deadline.

(b) In an e-mail on 3 December 2015 to OKI, Sunrise informed OKI that it had difficulty shipping the balance of the Section I Goods due to the non-availability of vessels, and that the last shipment date in LC1 A1 (*ie*, 3 December 2015) did not give Sunrise the required minimum of 30 days for shipment under the Supply Contract from the date of receipt of LC1 A1 on 16 November 2015.

(c) In an e-mail dated 7 December 2015 to Sunrise, OKI stated that if Sunrise required LC1 A1 to be amended, Sunrise should provide a letter stating its proposed last shipment date.

(d) By an e-mail dated 16 December 2015 sent in response to OKI's e-mail dated 7 December 2015, Sunrise attached a letter requesting that the last shipment date in LC1 A1 be amended to 28 February 2016.

(e) OKI replied by an e-mail on the same day indicating that the last shipment date should be amended to 29 February 2016 instead of 28 February 2016 as there were 29 days in February 2016.

(f) Sunrise replied by an e-mail on the same day, providing a further letter requesting that the last shipment date in LC1 A1 be amended to

29 February 2016. LC1 A1 was eventually amended to LC1 A2, which stipulated a last shipment date of 29 February 2016.

(g) As for LC2, OKI first provided Sunrise with a draft of LC2 on 28 December 2015. After Sunrise confirmed on 29 December 2015 that the draft was acceptable, OKI asked Sunrise on 30 December 2015 whether the last shipment date should be 29 February 2016 "as per amendment of [LC1 A1]". Sunrise replied on the same day indicating that "the date of last shipment … can be the same as per [LC1 A2]". LC2 was thereafter opened on 11 January 2016 stating the last shipment date as 29 February 2016.

The above exchange makes it apparent that the focus of the parties was to amend the last shipment date in the Supply Contract, with the LCs being amended to ensure conformity.

61 It is also significant that even after Sunrise failed to deliver the Goods by 15 January 2016, OKI did not timeously assert that Sunrise had breached the Supply Contract as a result. The first time OKI asserted that Sunrise was in delay was in its e-mail to Sunrise dated 5 March 2016, by which time the Goods had been shipped in compliance with the last shipment date stated in the LCs. Even then, OKI did not clearly explain the basis of its allegation that Sunrise failed to deliver the Goods on time, much less assert that there was no extension of the Supply Contract Delivery Deadline as it did before the Judge and in these appeals.

62 Counsel for OKI acknowledged at the hearing of the appeals that while OKI's call on the Bank Guarantee dated 10 October 2016 made reference to Sunrise failing to fulfil its contractual obligations under the Supply Contract and

Installation Contract, there was no specific mention of any delay by Sunrise in the delivery of the Goods. While we accept that there was no necessity to do so in a call on an on-demand guarantee, the failure to make the point does suggest that OKI did not regard delay in delivery as a reason for making the call. Indeed, it is significant that OKI waited for almost nine months until 10 October 2016 to make the call when, on its case, delivery ought to have been completed by 15 January 2016.

63 In our view, it would have been abundantly clear to OKI from Sunrise's request on 16 December 2015 for the last shipment date to be extended to 29 February 2016 (see [60(d)]–[60(f)] above) that Sunrise only intended to ship the Goods to OKI by that date. This was well past the Supply Contract Delivery Deadline of 15 January 2016. It is telling that in agreeing to amend the last shipment date in the LCs to a date well past 15 January 2016, OKI did not caveat that its agreement only extended to the LCs and not the Supply Contract and that its rights were reserved accordingly. It is also telling that despite Sunrise making delivery well after 15 January 2016, there was no timeous assertion that such delivery was a breach of the Supply Contract and that OKI reserved its right to seek damages as a result.

64 While we do not disagree with the Judge that a buyer may agree to extend the delivery date under a letter of credit to facilitate delivery and payment to the seller whilst reserving its right to recover damages caused by the seller's delay pursuant to the underlying contract (the Judgment at [35]), it is evident from the evidential material that such reservation was never expressed by OKI.

65 The picture that therefore emerges is that the parties had: (a) agreed to extend the last shipment date under the Supply Contract to 29 February 2016; and (b) consequentially agreed to an extension of the Supply Contract Delivery

Deadline to a date after 29 February 2016 to account for the new last shipment date.

The time for delivery only commenced after payment of the downpayments by OKI

66 There was sound reason for the parties to agree to these extensions. Time for Sunrise to deliver the Goods only started after OKI paid the downpayments under the Supply Contract. OKI made the downpayments rather belatedly, consequently offering a basis for Sunrise to contend that the timelines for delivery had to be pushed back. This explains why the parties would have agreed to an extension. Sunrise makes this point in its submissions.

67 Clause 11 of the Supply Contract provides that "the Delivery Time shall start when the Down Payment has been received by [Sunrise]". Clause 5.5 of Annex III of the Supply Contract similarly provides that "the Delivery Time for the Plant shall start when [Sunrise] has received the Down Payment from [OKI]". Under Clause 3.1 of the Supply Contract, "Down Payment" refers to the first 10% of the price of the Supply Contract which was to be paid by OKI within 15 days after the parties signed the Supply Contract and after OKI has received Sunrise's original invoice and the Bank Guarantee.

68 The Supply Contract was originally dated 10 July 2015, whereas Supply Contract A1 and Supply Contract A2 were dated 14 September 2015 and 10 November 2015 respectively. The Bank Guarantee was first furnished by Sunrise on 21 September 2015. Sunrise's position is that the Bank Guarantee was subsequently amended on or about 6 January 2016 in accordance with Supply Contract A2 while OKI's position is that the Bank Guarantee was amended on or about 7 January 2016. Given that Clause 3.1 of the Supply Contract is stated with reference to when OKI receives the Bank Guarantee, we

proceed on the basis that the Bank Guarantee was amended on 7 January 2016 (see also the Injunction Judgment at [11]). OKI was therefore obliged to make the downpayments by:

(a) 6 October 2015 under Clause 3.1 of Supply Contract A1; and

(b) 22 January 2016 under Clause 3.1 of Supply Contract A2.

69 Sunrise submits that the effect of Clause 11 of the Supply Contract and Clause 5.5 of Annex III of the Supply Contract is that Sunrise was not under an obligation to ship the Goods until the respective downpayments under Supply Contract A1 and Supply Contract A2 had been paid. Sunrise highlights that the downpayment under Supply Contract A1 was only paid on 10 November 2015 (notified to Sunrise on 13 November 2015), and on 5 February 2016 under Supply Contract A2. Sunrise contends that the time for delivery started from these dates and consequently, it was not obliged to deliver the Goods by 15 January 2016. OKI submits that Sunrise never pleaded that it was not obliged to ship the Goods because OKI had failed to pay the relevant downpayments. OKI further submits that the "Delivery Time" referred to in Clause 11 of the Supply Contract and Clause 5.5 of Annex III of the Supply Contract merely refers to "the period of time between payment of the Down Payment and when OKI received the Goods", and does not permit Sunrise to withhold delivery under the Supply Contract.

70 We are satisfied that this point was sufficiently pleaded by Sunrise. Although Sunrise did not plead Clause 5.5 of Annex III the Supply Contract, we do not regard this as an issue. The point is sufficiently reflected in Clause 11 of the Supply Contract, which was pleaded by Sunrise.

71 We are unable to accept OKI's interpretation of "Delivery Time" in Clause 11 of the Supply Contract and Clause 5.5 of Annex III of the Supply Contract. OKI's interpretation renders Clause 11 of the Supply Contract and Clause 5.5 of Annex III of the Supply Contract otiose, which could not have been the parties' intention.

72 Instead, Sunrise's construction is more tenable. When interpreted holistically, the collective effect of Clause 11 of the Supply Contract and Clause 5.5 of Annex III of the Supply Contract is that the time for delivery of the Goods under the Supply Contract only started to run after the downpayments had been paid by OKI following receipt by OKI of the original invoice and the Bank Guarantee.

73 As we noted above at [66]–[68], the respective downpayments were to be paid by OKI within 15 days after OKI had received the Bank Guarantee (*ie*, by 6 October 2015 and 22 January 2016 respectively). It is undisputed that OKI only made payment of the downpayment on 10 November 2015 under Supply Contract A1 and on 5 February 2016 under Supply Contract A2, well past the original deadline for payment. Accordingly, pursuant to Clause 11 of the Supply Contract and Clause 5.5 of Annex III of the Supply Contract, time for delivery under Supply Contract A1 and Supply Contract A2 only started to run from 10 November 2015 and 5 February 2016 respectively. The deadlines for delivery were 25 November 2015 under Supply Contract A1 and 15 January 2016 under Supply Contract A2 (see [42]–[43] above). If the original delivery dates applied, Sunrise would only have had about 15 days to deliver under Supply Contract A1. As for Supply Contract A2, it would lead to the absurd result of the time for delivery commencing *after* the deadline for delivery under Supply Contract A2.

74 In these circumstances, we accept Sunrise's submission. It is unsurprising that the parties would have agreed to an extension of the Supply Contract Delivery Deadline to afford Sunrise sufficient time to deliver the Goods under the Supply Contract. We clarify that it is unnecessary for us to determine, and we do not determine, whether OKI had breached the Supply Contract as a result of when the downpayments were made.

Conclusion on Issue 2

75 For the reasons stated above, Sunrise was not in delay in the delivery of the Goods. The question of breach of the Supply Contract therefore does not arise.

76 In the present case, OKI called on the Bank Guarantee purportedly to satisfy the damages suffered as a result of late delivery of the Goods by Sunrise (see [14] above). Notably, the sum of US$832,413.20 received by OKI pursuant to the call corresponds to the maximum amount of liquidated damages prescribed in Clauses 6.1 and 6.5 of Annex III of the Supply Contract for delay in delivery.

77 As there was no delay by Sunrise, OKI is not entitled to any liquidated damages under Clauses 6.1 and 6.5 of Annex III of the Supply Contract. Accordingly, OKI was not entitled to call on the Bank Guarantee and receive the sum of US$832,413.20. OKI does not contend that Sunrise is not entitled to a refund if we conclude that Sunrise was not in breach of the Supply Contract. Accordingly, we hold that OKI is to refund the sum of US$832,413.20 to Sunrise.

Issue 3: OKI's entitlement to a refund under the Supply Contract (AD 10)

78 We next consider whether OKI is entitled to a refund of the amounts it has paid under the Supply Contract (being US$7,491,718.80), with interest thereon at 12% per annum.

79 OKI's claim rests on Clause 16.1(c) read with Clause 6.1 of Annex III of the Supply Contract. For OKI to be entitled to a refund of the moneys paid, pursuant to Clause 16.1(c) of Annex III of the Supply Contract, OKI must have terminated the Supply Contract on the ground that Sunrise was in delay in the delivery of the Goods thereby entitling OKI to the maximum amount of liquidated damages. In view of our conclusion above at [75] that Sunrise is not in delay, there is no basis for OKI to seek a refund.

80 For completeness, we address OKI's argument that the Judge's interpretation of Clause 16.1(c) of Annex III of the Supply Contract was incorrect. We agree with the Judge's interpretation of Clause 16.1(c) of Annex III of the Supply Contract. OKI's entitlement to terminate the Supply Contract and to receive a refund under Clause 16.1(c) arises only where OKI has not accepted the Goods. Once OKI has accepted the Goods, its only remedy for any delay on Sunrise's part would be liquidated damages pursuant to Clause 6 of Annex III of the Supply Contract, unless it chooses to return the Goods to Sunrise. This is supported by the last para of Clause 16.1(c) which provides that as an alternative to termination, OKI would be entitled to contract with a new supplier to complete delivery of the Goods at Sunrise's expense. Such alternative would only make sense where OKI has not accepted delivery of the Goods from Sunrise or has returned the Goods to Sunrise.

81 In this regard, we do not accept OKI's argument that the court is restricted to interpretations of contractual terms pleaded by the parties. In *Bumi Geo Engineering Pte Ltd v Civil Tech Pte Ltd* [2015] 5 SLR 1322, the court accepted at [60] that the court is free to depart from the pleaded interpretations of a contract (citing *Quainoo v NZ Breweries Ltd* [1991] 1 NZLR 161 at 165, line 18).

82 We note that the Supply Contract is silent on whether OKI may: (a) terminate the Supply contract and claim a refund of the amounts it has paid under the Supply Contract; *and* (b) at the same time, retain the Goods that have been delivered and accepted. As a matter of principle, absent specific contractual provisions to the contrary, where a purchaser exercises his right to terminate a sale contract and claim a full refund *prima facie* the purchaser is not permitted to, at the same time, retain the benefit of the sale contract as that would be akin to double recovery. It falls on the purchaser to justify his claim that he is entitled to do both. On the facts, it is undisputed that OKI has, by accepting delivery of and installing the Goods, retained the benefit of the Goods. Aside from Clause 16.1(c) of Annex III of the Supply Contract, OKI has not referred to any provision in the Supply Contract nor referred to any collateral agreement that in the event OKI legitimately exercises its right under Clause 16.1(c), it may also retain the Goods. Accordingly, even if we accept that Sunrise was in breach of the Supply Contract due to delay in the delivery of the Goods, which we do not, we are of the view that OKI has not established its entitlement to a refund under Clause 16.1(c) of Annex III of the Supply Contract. In our view, it was egregious of OKI to keep the Goods and seek a full refund of whatever it had already paid.

Issue 4: The Final 10% of the Supply Contract (AD 10)

83 We next address OKI's appeal in AD 10 that Sunrise is entitled to the Final 10%. Under Clause 3.1 of the Supply Contract, OKI is obliged to pay to Sunrise the Final 10%, which totalled US$832,413.20 following the revisions to the contract price, "by telegraphic transfer *after [OKI] has received [Sunrise's] original invoice and the Certificate of Performance Test Acceptance [ie, the Acceptance Certificate] issued and signed by authorized representatives of [OKI]*" [emphasis added].

84 The Acceptance Certificate is defined in Clause 1 of Annex III of the Supply Contract as "the Certificate issued by [OKI] to [Sunrise], that the Plant has met the performance Guarantees as per Annex II Appendix 1 and has fulfilled all the conditions stated in the model Certificate of Performance Test Acceptance in Annex II Appendix 3". Annex II Appendix 1 prescribes the guarantees that Sunrise was to provide (the "Performance Guarantees"), while Annex II Appendix 3 sets out certain conditions on the delivery and installation of the Goods (the "Appendix 3 Conditions").

85 The parties do not dispute that OKI had on 18 and 19 June 2017 signed a completion certificate dated 16 April 2016, and issued it to PT Piping, as PT Piping had carried out the installation works (the Judgment at [89]). OKI also accepted that the installation works were completed in December 2016 by PT Piping, and that the Mill was in operation thereafter.

86 Nevertheless, in our view, Sunrise is not entitled to the Final 10%. Under Clause 3.1 of the Supply Contract, payment of the Final 10% is conditional on *Sunrise* being issued the Acceptance Certificate by OKI. This of course assumes that Sunrise carries out the installation works, which it did not. If Sunrise's

omission to carry out the installation works was a result of a breach by OKI of the Installation Contract or if OKI wrongly refused to issue the Acceptance Certificate under the Supply Contract, Sunrise would arguably have a valid claim for damages for being deprived of the right to receive the Final 10% and the quantum of damages would then likely be the equivalent of the Final 10%. However, for reasons stated below at [105]–[112], we are of the view that OKI did not breach the Installation Contract. Accordingly, Sunrise's failure to obtain the Acceptance Certificate stands in the way of it making a claim for the Final 10%.

The conditions for payment of the Final 10% were not satisfied

87 Clause 3.1 of the Supply Contract provides that the Final 10% is only payable to Sunrise after the Acceptance Certificate is signed and issued by authorised representatives of OKI. Importantly, Clause 1 of Annex III of the Supply Contract specifically states that the Acceptance Certificate is issued by OKI to Sunrise. Furthermore, the Acceptance Certificate is defined under Clause 1 of Annex III as certifying that the Goods have met the Performance Guarantees, and that the Appendix 3 Conditions have been fulfilled. The Performance Guarantees and the Appendix 3 Conditions both make extensive reference to "the Supplier", who is identified as Sunrise in the Preamble to the Supply Contract. In our view, the clear and unambiguous meaning of Clause 3.1 of the Supply Contract is that the Final 10% would only be payable to Sunrise if the Acceptance Certificate is issued *to Sunrise* (as opposed to any other party). It is irrelevant that the Acceptance Certificate had been issued to PT Piping under an entirely separate contract for the installation works.

88 Further, it is clear from the Supply Contract that the understanding between the parties was that payment of the Final 10% was contingent on

Sunrise completing the installation works. As we noted at [87] above, the Acceptance Certificate certifies that Sunrise has met the Performance Guarantees and fulfilled the Appendix 3 Conditions. In this connection, the Performance Guarantees generally serve to ensure that the Goods supplied by Sunrise are in functional condition and if not, Sunrise takes steps to repair or replace them. For instance, para 3.1 read with para 2 of the Performance Guarantees mandates that Sunrise has an obligation to repair or remedy the Goods at Sunrise's cost. Similarly, para 3 of the Appendix 3 Conditions requires that "[a]ll installation and all repairs have been completed". It is evident from this that in order to obtain the Acceptance Certificate as defined under Clause 1 of Annex III of the Supply Contract, *Sunrise* must meet the Performance Guarantees and fulfil the Appendix 3 Conditions. This in turn requires it to complete the installation works.

89 There are therefore two conditions that must be satisfied under Clause 3.1 of the Supply Contract before Sunrise is entitled to payment of the Final 10%. First, the Acceptance Certificate must be issued to Sunrise. Second, Sunrise must have completed the installation works to be eligible to be issued the Acceptance Certificate. This is subject to the caveat that if Sunrise is not issued the Acceptance Certificate because: (a) OKI wrongfully refuses to do so; or (b) Sunrise is unable to carry out or complete the installation works by reason of OKI's breach, it may be said that Sunrise would have a claim for damages as mentioned at [86] above. In the present case, neither situation arises. It is not disputed that no Acceptance Certificate was issued to Sunrise. It is also not disputed that Sunrise did not perform the installation works. It is also our view that Sunrise's omission to do so was not attributable to any breach of the Installation Contract on OKI's part (see [105]–[112] below). We therefore hold that Sunrise is not entitled to the Final 10%.

90 We make a further point. Respectfully, the Judge erred in awarding the Final 10% to Sunrise as part of the price of the Supply Contract as that is contrary to Sunrise's pleaded position. At paras 6(4) and 33 of the Statement of Claim ("SOC"), Sunrise framed its claim for the Final 10% as a claim for damages arising from OKI's breach of contract. Similarly, at para 36(2)(iii) of the RDCC, Sunrise pleaded that as a result of OKI's repudiation of the Installation Contract, Sunrise was unable to fulfil its obligations under the Installation Contract and consequently unable to satisfy the Performance Guarantees and Appendix III Conditions, which in turn prevented it from obtaining the Acceptance Certificate.

91 Collectively, Sunrise's claim for the Final 10% is not pleaded as a claim for 10% of the price of the Supply Contract, but as a claim for damages for breach of contract on OKI's part. This is also consistent with Prayer (1) of the SOC. While it is slightly unclear from Sunrise's pleadings whether Sunrise premises its claim for damages on OKI's alleged breach of the Supply Contract or the Installation Contract, the essence of Sunrise's pleadings is that OKI's wrongful repudiation of the Installation Contract prevented Sunrise from satisfying Clause 3.1 of the Supply Contract, and being entitled to the Final 10%. Accordingly, the Judge's basis for awarding the Final 10% to Sunrise, *ie*, as part of the price of the Supply Contract, is with respect incorrect. In any event, the argument also fails because we have concluded at [105]–[120] below that it was Sunrise and not OKI that repudiated the Installation Contract.

The terms proposed by Sunrise should not be implied

92 We turn to consider whether certain terms proposed by Sunrise should be implied in the Supply Contract. To recapitulate, Sunrise submits that the following terms should be implied in the Supply Contract: (a) OKI must take

steps to issue the Acceptance Certificate with reasonable despatch; and (b) Sunrise would be entitled to the Final 10% even if Sunrise did not perform the installation works and receive the Acceptance Certificate.

93 The principles governing the implication of terms are well settled and were set out by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [93]–[101], and may be summarised as follows:

(a) The only situation where it would be appropriate to imply a term is where a gap arises because the parties did not contemplate the issue at all and so left a gap. The term to be implied pertains to what the parties would be presumed to have agreed on had the gap been pointed out to them at the time of the contract.

(b) The term sought to be implied must satisfy the business efficacy test and the officious bystander test. Under the business efficacy test, the court must consider whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy. Under the officious bystander test, the specific term to be implied 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 the time of the contract.

94 In our view, the only gap that conceivably arises is that the parties did not contemplate that Sunrise might not perform the installation works. There are three alternative reasons why this might be the case: (a) both parties agree that Sunrise should not perform the installation work; (b) the Installation Contract is terminated because OKI repudiated the Installation Contract; or

(c) the Installation Contract is terminated because Sunrise repudiated the Installation Contract. It is clear that the implied terms contended for would not have satisfied either the business efficacy test or the officious bystander test in a situation where Sunrise was in repudiatory breach of the Installation Contract by walking away from performing the installation works and OKI then terminated the contract. In that situation, Sunrise would have no entitlement to the Final 10%.

Issue 5: The Installation Contract (AD 15)

95 We next consider whether it was Sunrise or OKI that breached the Installation Contract. The consequential issue is the remedies that follow.

96 The matters that arise for consideration are as follows:

(a) First, was Sunrise in delay in performing its obligations under the Installation Contract such as to entitle OKI to liquidated damages under the Installation Contract?

(b) Second, did OKI breach the Installation Contract by failing to make the requisite payments under the Installation Contract and/or refusing to provide accommodation for Sunrise's personnel unless advance payment was made?

(c) Third, which party was in repudiatory breach of the Installation Contract? Relatedly, which party's purported termination of the Installation Contract was valid?

Whether Sunrise was in delay under the Installation Contract

97 We agree with the Judge that Sunrise was in delay in performing the installation works. Consequently, OKI was entitled to liquidated damages under the Installation Contract.

98 It is apposite to first determine the deadline for performance under the Installation Contract. Clause 5.1 of the Installation Contract provides:

> 5.1 Essential Delivery Dates
>
> The contractor shall install the Plant in accordance with the time schedule set out in Annex VII Appendix 1 of the Contract.
>
> For the purpose of calculating liquidated damages under Clause 6 below, the following start up dates shall be used:
>
> Start-up Date: 28 February 2016.

99 Annex VII Appendix 1 contains two separate tables containing different sets of dates for the commencement and completion of the installation works. The first table (which Sunrise refers to as the "Shipment Schedule") stipulates a start date of 31 January 2016 and a completion date of 20 October 2016. The second table (which Sunrise refers to as the "Time Schedule") stipulates a start date of 20 September 2015 and a completion date of 31 January 2016.

100 Sunrise now takes the position that the Shipment Schedule and the Time Schedule must be read together such that the deadline for completion of the installation works was 20 October 2016, and the parties had "intended to extend the time for the performance of the Installation Contract" to 20 October 2016. However, we note that this position was not pleaded or raised in Sunrise's submissions before the Judge.

101 It is evident from the pleadings that Sunrise conceded that the installation works were to be completed by 31 January 2016. OKI pleaded at paras 26 to 29 of the DCC the facts pertaining to Sunrise's failure to carry out the installation works in time. Paragraph 30(d) of the DCC relates to OKI's claim to liquidated damages under the Installation Contract. At paras 54 to 59 of the RDCC, Sunrise denied OKI's claim for liquidated damages under the Installation Contract. At para 7(e) of the DCC, OKI reproduced the Time Schedule stipulating that the installation works were to be completed by 31 January 2016. At para 7(5) of the RDCC, Sunrise admitted to para 7(e) of the DCC without qualification. Indeed, counsel for Sunrise accepted that Sunrise did not, at any point in its pleadings or in its submissions before the Judge, assert that the deadline for completing the installation works was 31 October 2016. In our view, Sunrise is bound to its pleaded position that the deadline for the completion of the installation works was 31 January 2016.

102 At para 28(c) of the DCC, OKI pleaded that there was no agreement between Sunrise and OKI to vary the deadline for Sunrise to carry out the installation works or to compensate OKI for additional expenses. At para 28(3)(b) of the RDCC, Sunrise merely denied OKI's plea and repeated para 11(2) of the SOC, which essentially stated that Sunrise had deployed its personnel to the Project Site on 24 February 2016 and that OKI refused to provide accommodation for Sunrise's personnel. Although Sunrise pleaded at para 14(4) of the RDCC that the Supply Contract Delivery Deadline had been pushed back, it did not expressly plead that the timelines under the Installation Contract were extended correspondingly and to what extent. At the hearing, counsel for Sunrise accepted that any variation of the timelines under the Installation Contract could only be possible by implication. However, having failed to plead this, it is not open to Sunrise to now argue that there was an

implied agreement to extend the deadline for the completion of the installation works to 31 October 2016 as a result of the extension of the Supply Contract Delivery Deadline. Also, this assertion was never tested at trial.

103 Pursuant to Clause 6.1 read with Clause 6.2 of the Installation Contract, OKI would be entitled to liquidated damages if the installation works were delayed. OKI would be entitled to 1.5% of the price of the Installation Contract for each week of delay for the first four weeks and 2.5% "for week day [*sic*] for the following period of delay", up to a maximum of 10% of the price of the Installation Contract. Further, Clause 5.1 provides that for the purpose of calculating liquidated damages under Clause 6, the relevant "Start-up Date" is 28 February 2016 (see [98] above).

104 In the present case, it is undisputed that the installation works remained uncompleted when OKI terminated the Installation Contract on 18 May 2016 (the Judgment at [109]). A delay between 28 February 2016 and 18 May 2016 would, pursuant to Clauses 6.1 and 6.2 of the Installation Contract, entitle OKI to maximum liquidated damages of 10% of the price of the Installation Contract which is US$144,154.50. We therefore uphold the Judge's decision to award OKI liquidated damages amounting to US$144,154.50.

Whether OKI breached the Installation Contract

105 Sunrise submits that OKI breached the Installation Contract by: (a) failing to make payment in accordance with its terms; or (b) by refusing to provide accommodation to Sunrise's personnel unless Sunrise made advance payment. In our view, Sunrise has not established either of these allegations.

Payment by OKI under the Installation Contract

106 Sunrise submits that OKI had breached the Installation Contract by failing to release payment of the first 20% of the price of the Installation Contract to Sunrise in accordance with the terms of the Installation Contract. This allegation is unmeritorious.

107 Clause 4.1 of the Installation Contract provides that the first 20% of the value of the Installation Contract (being US$258,387.00) is to be paid to Sunrise "in 2 months after the arrival of [Sunrise'] Supervisor(s) *working continuously at the Mill Site*" [emphasis added]. Although Clause 4.1 was subsequently amended in Clause 3.1 of Installation Contract A1 and Clause 3.1 of Installation Contract A2, the essence of the clause remained the same save for the price stipulated.

108 Sunrise's position is that Mr Pradeep arrived at the Project Site on 25 February 2016. Accordingly, the first 20% of the price of the Installation Contract would be payable to Sunrise two months later on 25 April 2016. However, this would only be the case if Mr Pradeep worked continuously at the Project Site during this period. It is undisputed that Sunrise had demobilised its personnel from the Project Site on 8 March 2016 pending the resolution of disagreements between the parties (see [12] above). In the circumstances, OKI's obligation to pay Sunrise the first 20% of the price of the Installation Contract did not arise. Mr Pradeep simply did not work continuously at the Project Site until 25 April 2016. It follows that OKI did not breach the Installation Contract by not paying Sunrise the first 20% of the price of the Installation Contract. It also follows that by insisting on payment of this sum before continuing with the installation works, Sunrise was in fact in breach of the Installation Contract.

Accommodation of Sunrise's personnel

109 Sunrise also takes the position that OKI had breached the Installation Contract by unreasonably refusing to provide Sunrise's personnel with accommodation unless Sunrise made advance payment for the accommodation, thereby preventing it from performing its obligations under the Installation Contract. It is important that the allegation is not that OKI refused to provide accommodation. Rather, it is that OKI insisted that Sunrise pay in advance for the costs of providing such accommodation.

110 As the Judge noted, OKI did not have an obligation under the Installation Contract to provide accommodation to Sunrise's personnel at its own cost. Clause 4 of Annex I Appendix 1 of the Installation Contract provides that Sunrise was to "arrange and furnish facilities for the Installation personnel", and to provide accommodation and food services for its supervisor (the Judgment at [97]–[99]). Hence, OKI's obligations under the Installation Contract did not extend to providing accommodation for Sunrise's supervisor or its personnel. This being the case, Sunrise's contention that OKI was wrong in insisting on advance payment before organising accommodation for Sunrise's personnel misses the point.

111 Sunrise claims that instead of insisting on advance payment, OKI should have set off the cost of accommodation against the first 20% of the price of the Installation Contract that was payable by OKI to Sunrise. However, first and foremost, OKI was not obliged to provide accommodation for Sunrise's personnel. If Sunrise had requested OKI to provide such accommodation, and OKI agreed to do so, OKI could make it a condition that Sunrise provide advance payment. In any case, as of 15 March 2016 when OKI asked for advance payment for the accommodation, OKI's obligation to pay the first 20%

of the price of the Installation Contract had not arisen (see [108] above), and there was nothing against which OKI could have set off the accommodation costs it was being asked to incur.

112 Accordingly, we agree with the Judge that OKI did not breach the Installation Contract in requiring advance payment for accommodation to be provided for Sunrise's personnel. Indeed, by insisting that OKI provide accommodation and set off the costs thereof against payments under the Installation Contract, it was in fact Sunrise that was in breach of the Installation Contract.

Which party was in repudiatory breach of the Installation Contract

113 As the Court of Appeal held in *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2022] 1 SLR 302 at [64]–[65], a party renounces a contract where, by words or conduct, it evinces an intention not to perform or expressly declares that he is or will be unable to perform his obligations in some material respect. In this regard, a refusal to perform a contract unless the other party complies with a condition that has no basis will not necessarily amount to a repudiation. Ultimately, short of an express refusal or declaration, *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 provisions*.

114 Applying these principles to the present appeals, we are of the view that the Judge correctly decided that Sunrise was in repudiatory breach of the Installation Contract and that OKI was entitled to terminate the Installation Contract as a result.

Sunrise was in repudiatory breach

115 By an e-mail dated 3 May 2016, Sunrise informed OKI that it would "not be able to continue to work against [OKI's] contract". Subsequently, by an e-mail dated 17 May 2016, Sunrise informed OKI it had no desire to continue working with OKI unless OKI amended its order, in the following terms:

> … we would like to inform you that inspite [*sic*] of our repeated requests and reminders we have not received the payment as per the terms and conditions of the contract, hence as informed in our earlier mail we will not be interested to continue the contract. If you are interested, you are requested to kindly amend your order for the following to enable us to proceed further in the matter:
>
> 1. Extension of the contract for delivery and installation. We will not be able to execute the installation at the same cost due to the delay, which will be
>
> increased, once we receive your confirmation and final discussion regarding all the pending issues.
>
> 2. Release of @10% payment pending against supply.
>
> 3. Release of 100% payment against installation against irrevocable letter of credit.

116 By the 17 May 2016 e-mail, Sunrise was effectively making performance of its obligations under the Installation Contract conditional on OKI doing what it was not contractually obliged to do. As we concluded above, the Final 10% was not due and payable to Sunrise (see [83]–[94] above). Likewise, for the reasons explained at [106]–[108] above, Sunrise was not entitled to payment of the first 20% of the price of the Installation Contract. In the circumstances, we agree with the Judge that a reasonable person would conclude, based on Sunrise's e-mail of 17 May 2016, that Sunrise no longer intended to be bound by the provisions of the Installation Contract. Therefore, in our view, Sunrise's e-mail of 17 May 2016 constituted a repudiation of the Installation Contract.

117 Sunrise's demobilisation of its personnel from the Project Site on 8 March 2016 made it not possible for it to perform its obligations under the Installation Contract. This therefore was also a repudiation of the Installation Contract. Importantly, Sunrise had informed OKI that it would not remobilise its personnel until OKI arranged for accommodation for its personnel. Once again, Sunrise was making its performance of the Installation Contract conditional on OKI satisfying conditions which it was not obliged to. In our view, this similarly amounts to an unequivocal expression of Sunrise's intention not to abide by the terms of the Installation Contract.

OKI was entitled to terminate the Installation Contract

118 Where a party has renounced a contract, the innocent party would be entitled to terminate the contract (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [93]). As we have concluded that Sunrise was in repudiatory breach of the Installation Contract, it follows that OKI was entitled to terminate the Installation Contract.

119 Alternatively, as OKI was entitled to maximum liquidated damages pursuant to Clauses 6.1 and 6.2 of the Installation Contract as a result of Sunrise's delay under the Installation Contract (see [104] above), it was also entitled to terminate the Installation Contract under Clause 24.1(c) of Annex III of the Installation Contract. This provision provides as follows:

> 24 **TERMINATION**
>
> 24.1 In addition to what has been stated elsewhere in this Contact, [OKI] shall be entitled to terminate unilaterally this Contract, or part of it and/or the Installation Work of the Plant or a part thereof:
>
> …
>
> c) if the Installation Work of the Plant has been delayed due to the activities of [Sunrise] so much that [OKI] is entitled to the

> maximum amount of liquidated damages as stated in the Contract Text or if such a delay becomes obviously imminent …

120 We agree with the Judge that OKI had validly exercised its right to terminate the Installation Contract by its e-mail of 18 May 2016, which we reproduce below:

> After all your tricks which has caused us severe delay and losses, we have no interest to continue business with you anymore.
>
> All our rights under the contract shall be claimed from you to the fullest extent possible.

It follows that Sunrise's *only* pleaded claim of a repudiatory breach on OKI's part (namely, that OKI's e-mail of 18 May 2016 was a repudiatory breach of the Installation Contract) necessarily fails. It was in fact Sunrise that was in repudiatory breach, which OKI accepted.

121 It may appear at first blush to be unfair to Sunrise to be denied the Final 10% of the Supply Contract when the Goods have been delivered. They have even been installed, although by a third party. However, Sunrise had agreed to tie the Final 10% to the Installation Contract. Furthermore, it was Sunrise and not OKI who repudiated the Installation Contract. Sunrise should have been more careful about the stance it was taking under the Installation Contract.

122 Sunrise also asserts that OKI had repudiated the Installation Contract by asking Sunrise's personnel to leave the Project Site on 7 April 2016. However, Sunrise cannot pursue this argument, having only pleaded OKI's e-mail of 18 May 2016 as constituting *repudiatory* breach of the Installation Contract (at para 13 of the SOC).

Issue 6: Pre-judgment interest (AD 10)

123 Finally, we consider OKI's appeal in AD 10 against the Judge's award of pre-judgment interest. To recapitulate, the Judge held that: (a) OKI was owed liquidated damages of US$832,413.20 under the Supply Contract (which it had satisfied by calling on the Bank Guarantee); (b) Sunrise was entitled to the Final 10% of US$832,413.20; and (c) OKI was owed US$144,154.50 as liquidated damages under the Installation Contract. On this basis, the Judge set off the liquidated damages under the Installation Contract against the Final 10% and awarded Sunrise US$688,258.70 and pre-judgment interest on that sum at the rate of 5.33% from the date of Sunrise's writ (the Judgment at [115]). OKI contends that the Judge's approach was incorrect, in essence submitting that the Judge ought to have considered *when* OKI's and Sunrise's entitlements respectively accrued. Specifically, OKI contends that it should be awarded pre-judgment interest from the date the liquidated damages under the Installation Contract accrued (which, as we observed at [103]–[104] above, was from 28 February 2016 until the cap of 10% of the price of the Installation Contract was reached). Conversely, Sunrise was entitled to the Final 10% in June 2017 when OKI signed the completion certificate issued to PT Piping (the Judgment at [89]). Thus, OKI says that the Judge was wrong to simply set off the two sums and award Sunrise pre-judgment interest on the balance from the date of Sunrise's writ, 6 January 2017, which moreover pre-dated Sunrise's entitlement to the Final 10%.

124 Thus far, we have concluded that: (a) OKI should refund to Sunrise the sum of US$832,413.20 paid under the Bank Guarantee (see [77] above); (b) Sunrise is not entitled to payment of the Final 10% (see [83]–[94] above); and (c) Sunrise should pay OKI liquidated damages of US$144,154.50 under the Installation Contract (see [104] above). In other words, it is only necessary

for us to consider: (a) whether Sunrise is entitled to pre-judgment interest on the sum of US$832,413.20 that OKI is to refund; and (b) whether OKI is entitled to pre-judgment interest on its claim for liquidated damages under the Installation Contract.

125 Pre-judgment interest generally runs from the date of accrual of the claimant's loss. However, the court may order interest to run from a date later than the date of accrual of loss (*eg*, from the date of the claimant's writ) where, for instance, there has been an unjustifiable delay on the part of the claimant in bringing his or her action to trial: see *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 at [138]; *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR 623 at [100]–[103].

126 It follows that where a claim and a counterclaim involve losses accruing at different times, the date on which pre-judgment interest should run with respect to each claim would likewise be different. Indeed, in *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296, this court observed at [140] that the extent to which a successful counterclaim is set off by a successful claim is not a matter of simply deducting one against the other, and that an issue which arises is the date on which the claimant's claim accrued, from which interest should be awarded. In other words, where there are successful claims and counterclaims, and assuming the court is inclined to exercise its discretion to award interest, the court must determine the date from which pre-judgment interest should run on each claim before setting off those sums awarded under those claims. We therefore turn to consider whether each party is entitled to pre-judgment interest on the claims mentioned at [124] above, and if so, the date on which such pre-judgment interest should run.

Entitlement to pre-judgment interest

127 In our view, Sunrise is entitled to pre-judgment interest on the sum of US$832,413.20 that OKI is to refund to Sunrise. This sum was paid by Dena Bank to OKI under the Bank Guarantee on 10 October 2016 (see [14] above). As a consequence, Sunrise was liable to Dena Bank for the same. Given our finding above at [77] that OKI was not entitled to any liquidated damages under the Supply Contract and therefore not entitled to call on the Bank Guarantee, we are satisfied that Sunrise had been wrongfully left with a liability for this sum to Dena Bank from the time that Dena Bank released the US$832,413.20 to OKI under the Bank Guarantee, *ie*, 23 May 2019. OKI has not put forth any reason for pre-judgment interest to run from a date later than the date at which Sunrise's loss (the liability to Dena Bank) accrued. There is also no suggestion of any unjustifiable delay on Sunrise's part in commencing Suit 8 on 6 January 2017 (see [15] above), less than three months after OKI's call on the Bank Guarantee.

128 We do not accept OKI's argument that Sunrise is not entitled to pre-judgment interest by reason of Clause 4.2 of Annex III of the Supply Contract, which provides *inter alia* that "[n]o claim for interest will be entertained by [OKI] in respect of any moneys or balance which may be in [OKI's] hand owing to any justified dispute between [OKI] and [Sunrise]". As Sunrise rightly submits, Clause 4.2 of Annex III of the Supply Contract was not pleaded by OKI and cannot therefore be raised.

129 OKI's submission that it is not necessary for it to plead Clause 4.2 of Annex III of the Supply Contract is misconceived. It is uncontroversial that pre-judgment interest is not a cause of action and is awarded at the court's discretion. Accordingly, a party need not plead a claim for pre-judgment interest

in its writ or statement of claim: see Jeffery Pinsler SC, *Singapore Court Practice 2017* vol 1 (LexisNexis, 2017) at para 18/15/6; *Riches v Westminster Bank Ltd* [1943] 2 All ER 725 at 725–726 in relation to the United Kingdom's equivalent of s 12 of the Civil Law Act 1909 (2020 Rev Ed)).

130 However, a claim for pre-judgment interest is not the same as a term in a contract which stipulates that interest does not accrue on certain payment. While the former is a matter of discretion, the latter is a matter of contractual right. Accordingly, where a party wishes to rely on a term in a contract as a basis to assert that pre-judgment interest ought not to be awarded, the term must be pleaded in order to give the other party an opportunity to respond. In this regard, in relation to a claim for indemnity costs premised on a contractual provision, the court in *Abani Trading Pte Ltd v BNP Paribas and another appeal* [2014] 3 SLR 909 cautioned at [66] that it would be prudent for a party to plead the term of the contract relied upon in order to avoid any arguments that the other party was taken by surprise or was prejudiced as a result of the lack of notice.

131 In the circumstances, we award Sunrise pre-judgment interest on its claim for the return of US$832,413.20 from OKI at 5.33% per annum from 23 May 2019 until the date of judgment.

132 As for OKI's counterclaim for liquidated damages under the Installation Contract, we are also satisfied that it attracts pre-judgment interest. OKI's entitlement to liquidated damages accrued from 28 February 2016 until the cap of 10% of the price of the Installation Contract was reached four weeks and two days later, on around 29 March 2016 (see [103]–[104] above). In our view, the mid-point between 28 February 2016 and 29 March 2016, *ie*, 14 March 2016, would be an appropriate start date for pre-judgment interest on OKI's counterclaim to run from. We therefore award OKI pre-judgment interest on the

sum of US$144,154.50 at 5.33% per annum from 14 March 2016 to the date of judgment.

133 In this regard, Sunrise contends that OKI is not entitled to any pre-judgment interest as OKI "has not specifically pleaded, or provided evidence or the facts that it intends to rely on for its claim for interest from the date the loss accrued". However, as we have mentioned above at [129], pre-judgment interest, being awarded at the court's discretion, need not be pleaded.

Conclusion

134 For the reasons above, we allow both AD 10 and AD 15 in part. We allow AD 10 to the extent that Sunrise is not entitled to the Final 10% in the sum of US$832,413.20. We also allow AD 15 to the extent that OKI is to refund to Sunrise the sum of US$832,413.20 paid under the Bank Guarantee. Accordingly:

(a) OKI is to refund to Sunrise the sum of US$832,413.20 with pre-judgment interest thereon at 5.33% per annum from 23 May 2019 to the date of judgment; and

(b) Sunrise is to pay OKI liquidated damages of US$144,154.50 with pre-judgment interest thereon at 5.33% per annum from 14 March 2016 to the date of judgment.

135 In relation to the costs of the proceedings below, on appeal Sunrise succeeded in its claim for the refund of US$832,413.20 representing the amount paid to OKI under the Bank Guarantee, but failed in its claims for: (a) US$832,413.20 representing the Final 10%; and (b) US$856,633.20 and US$600,000 for various losses caused by OKI's alleged repudiation of the

Installation Contract (see [16] above). On the other hand, on appeal, OKI succeeded in its claim for liquidated damages of US$144,154.50 under the Installation Contract, but failed in its claim for return of US$7,491,718.80 which it had paid to Sunrise under the Supply Contract (with interest thereon at 12% per annum). As noted earlier, OKI failed before the Judge on its claim for damages for repudiatory breach of the Installation Contract (see [17] and [23] above), and did not appeal that issue.

136 In the final analysis, leaving aside the issue of pre-judgment interest, OKI would have to pay Sunrise the sum of US$832,413.20 while Sunrise would have to pay to OKI US$144,154.50. The net result is that OKI has to pay Sunrise US$688,258.70. We do not consider the issues raised in respect of OKI's claim for liquidated damages under the Installation Contract to be significantly complex, such that OKI should be regarded as the successful party despite the quantum of its successful claim being lower than Sunrise's. On the other hand, Sunrise' claim for the refund of the sum paid under the Bank Guarantee involved a careful examination of the evidence. In these circumstances, we are satisfied that Sunrise should be considered the successful party in the proceedings below. We therefore do not propose to disturb the Judge's decision as to the costs of the trial (see [25] above).

137 As to the costs of the appeals, each of the parties has succeeded in part on its respective appeal. We award costs of S$20,000 (inclusive of disbursements) to OKI in respect of AD 10, and costs of S$30,000 (inclusive of disbursements) to Sunrise in respect of AD 15. In part, our award of costs also reflects our view that OKI's argument for a refund of the amounts that it had paid under the Supply Contract while at the same time seeking to retain the

Goods was wholly unmeritorious. Accordingly, after set-off, OKI is to pay Sunrise costs of S$10,000. The usual consequential orders are to apply.

Woo Bih Li
Judge of the Appellate Division

Kannan Ramesh
Judge of the Appellate Division

Andre Maniam
Judge of the High Court

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