

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2023] SGHCR 21

Originating Claim No 258 of 2023 (Summons No 3046 of 2023)

Between

Bumi Jaya Salvage &
Engineering Sdn Bhd

... Claimant

And

Brave Worth Shipping Co.,
Limited

... Defendant

JUDGMENT

[Admiralty and Shipping] — [Wreck removal]
[Civil Procedure] — [Judgments and orders] — [Setting aside default
judgment]

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Bumi Jaya Salvage & Engineering Sdn Bhd
v
Brave Worth Shipping Co Ltd

[2023] SGHCR 21

General Division of the High Court — Originating Claim No 258 of 2023
(Summons No 3046 of 2023)

AR Navin Anand

8 December 2023

20 December 2023

Judgment reserved.

AR Navin Anand:

Introduction

1 The claimant commenced HC/OC 258/2023 (“OC 258”) against the defendant for services rendered to the defendant’s vessel under a wreck removal contract. The defendant failed to file and serve a notice of intention to contest or not contest within the time permitted under the Rules of Court 2021 (“ROC 2021”), and judgment was consequently entered in the claimant’s favour pursuant to O 6 r 6(5) of the ROC 2021 (“Default Judgment”).

2 By HC/SUM 3046/2023 (“SUM 3046”), the defendant seeks to set aside or vary the Default Judgment.

3 Having considered the parties’ written and oral submissions, I have decided to substantially set aside the Default Judgment, save for a claim for

US\$275,000 and contractual interest on this sum. The consequence of this is that the Default Judgment is varied in the terms set out at [55] below. I now provide the reasons for my decision.

Background facts

The parties and the fire

4 The claimant is a Malaysian company in the business of providing salvage and engineering services¹. The defendant is the registered owner of the vessel “KMAX PRO” (“Vessel”).²

5 On 27 October 2022, the Vessel caught fire and grounded off Butterworth wharf number 2 at Penang Port (“Fire”).³ At the material time, the Vessel was laden with a consignment of medium density fibreboard (“Cargo”) in cargo holds 1 to 5.⁴ A substantial portion of the Cargo was damaged by the Fire and the water used to extinguish it, with the Cargo in cargo holds 3, 4 and 5 sustaining the most damage.⁵ The Vessel was thus involved in a marine casualty, and became wrecked in the sense that she suffered serious damage and

¹ Affidavit of Nurul Izzah Binti Mohd Ahkar Nawawi dated 6 November 2023 (“Nurul’s Affidavit”) at para 6.

² Affidavit of Jiang Xiuwu dated 19 October 2023 (“Jiang’s Affidavit”) at para 4; Nurul’s Affidavit at para 7.

³ Jiang’s Affidavit at para 4.

⁴ Nurul’s Affidavit at para 8.

⁵ Jiang’s Affidavit at para 4.

could not complete the contemplated voyage.

The wreck removal operations

The First Agreement

6 Subsequent to the Fire, the defendant engaged the claimant to salvage and refloat the Vessel. To this end, the parties entered into a wreck removal contract dated 15 November 2022 on the Baltic and International Maritime Council (“BIMCO”) Wreckfixed 2010 form (“First Agreement”).⁶ Standard form wreck removal contracts such as the BIMCO Wreckfixed 2010 form are essentially contracts between an appointed contractor performing wreck removal or similar activities and a hiring company (typically, the shipowner). Under the First Agreement, the claimant was the contractor, and the defendant was the hiring company.⁷

7 The parties differ on whether the Vessel was successfully refloated – the claimant pleads that this took place on or around 28 December 2022,⁸ while the defendant denies this and alleges that the Vessel’s bottom comes into contact with the seafloor twice a day during low tide.⁹ This difference in views is immaterial to the present application, and ultimately, the defendant paid the

⁶ Nurul’s Affidavit at para 9 and pp32-46.

⁷ *Ibid* at p32.

⁸ Statement of claim at para 7.

⁹ Jiang’s Affidavit at para 5.

claimant under the First Agreement.¹⁰

The Second Agreement

8 On 13 January 2023, the claimant (as contractor) and the defendant (as the hiring company) entered into a second wreck removal contract, this time on the BIMCO Wreckstage 2010 form (“Second Agreement”).¹¹ The parties’ choice to contract on the BIMCO Wreckstage 2010 form is significant, and I will explain why later in my decision (see [33]-[34] below).

9 The objective of the Second Agreement was to lighten the Vessel through the discharge of Cargo at berth, and to allow the defendant to deal with contaminated Cargo.¹² The nature of services undertaken under the Second Agreement is set out in Box 7, and the salient portion reads as follows:¹³

7. Nature of Services (Cl. 1, 2, 4)

(i) Nature of services:

1. [The claimant] would continue to discharge cargo hold 5, 3 and 4 at berth only. [The claimant] would discharge cargoes in respective holds 5, 3, 4 to [the claimant’s] best endeavor until semi solid / slurry / sludge level.

...

2. [The claimant] would discharge cargo hold 1 and 2 until empty at berth only.

...

5. The discharge[d] cargoes of cargoes hold No. 4 ... will be stored at a separate warehouse outside the port... The Department of Environment (DOE) has declared the cargo hold No. 4 as a schedule waste. The DOE has requested the cargo owner or ship-owner to appoint a Schedule Waste (SW)

¹⁰ Nurul’s Affidavit at para 9.

¹¹ *Ibid* at para 11 and pp94-113.

¹² Nurul’s Affidavit at p96; Jiang’s Affidavit at para 7.

¹³ Nurul’s Affidavit at pp94-96.

company who is able to dispose the cargo. Thus, the [defendant] shall appoint a SW company for the disposal of the contaminated cargoes and the [claimant] shall endeavour to assist [the defendant] to find a SW company for the [defendant]. The [defendant] shall appoint a suitable SW company in suitable time as not to disrupt the [claimant's] work schedule or pace. If there is undue delay of more than three (3) days beyond the control of the [claimant], then mobilization and demobilization costs of USD 10,000.00 each shall be applied.

...

6. The [claimant] shall endeavour to pump out to a maximum of 3000M³ of contaminated oily water, which is pump able, accessible from cargo holds. The [claimant] would leave semi solid / slurry / sludge cargoes in the respective holds for the custody of the [defendant]. All semi solid / slurry / sludge waste would be removed and disposed when the [defendant] appoints a SW company...

7. The sequence of cargo discharge would be as follows:-

(Scope of work)

- a) Discharge of hold 3, 4 and 5 to lowest tier possible before semi solid / slurry / sludge level.
- b) There is a possibility of contaminated cargo from hold 4 to hold 3 if trim, SF BM is not permissible.
- c) Discharge good cargo holds 1 until empty.
- d) Discharge good cargo holds 2 until empty.
- e) Transfer of non-contaminated wet cargo from hold 1 and 2 to open yard.
- f) Transfer of water to make trim.
- g) Throughout the cargo discharge process, the Master of [the Vessel] and all relevant Officers/crew will monitor the [Vessel's] stability and will always be responsible for the [Vessel's] condition and all machinery belonging to the Vessel....

[emphasis in original]

10 Two points ought to be noted on the services agreed under the Second

Agreement.

(a) First, the services undertaken by the claimant were to be performed in a particular sequence. Specifically, the claimant was to: (i) discharge cargo holds 3, 4 and 5 to the lowest tier possible before semi solid / slurry / sludge level, (ii) transfer contaminated Cargo from cargo hold 4 to cargo hold 3 if there was an issue with the Vessel’s trim, (iii) discharge good Cargo from cargo holds 1 and 2, (iv) transfer the uncontaminated wet Cargo from cargo holds 1 and 2 to an open yard, and (v) transfer water out of the cargo holds to improve the Vessel’s trim.¹⁴

(b) Second, it was the defendant’s responsibility to appoint a schedule waste contractor (“SW Contractor”) to remove and dispose of “schedule waste” or waste with hazardous characteristics in cargo holds 3, 4 and 5.

11 The payment obligations are set out in Boxes 9 and 11 of the Second Agreement.¹⁵ Broadly, the defendant agreed to pay the claimant a lump sum price of US\$1,650,000 (“Lump Sum”) for the claimant’s services, which was to be paid in three instalments at the following stages:¹⁶

(a) First, 50% of the Lump Sum, amounting to US\$825,000, before noon on 16 January 2023 (“Advance Payment”);

¹⁴ *Ibid* at para 11; Jiang’s Affidavit at para 9.

¹⁵ Nurul’s Affidavit at pp96-97.

¹⁶ Jiang’s Affidavit at para 8.

(b) Second, 25% of the Lump Sum, amounting to US\$412,500, within three banking days’ notice upon the completion of discharge of dry Cargo from cargo holds 1 and 2 (“2nd Stage Instalment”); and

(c) Third, the final 25% of the Lump Sum, amounting to US\$412,500, within three banking days’ notice upon the completion of the transfer of the maximum accessible / pump permissible oily water of not more than 3000 cubic metres from the cargo holds.

12 The rate of contractual interest for late payment of any sum due and payable under the Second Agreement is 1.5% per month, pursuant to Box 11 and Clause 10(f).¹⁷

13 Singapore law was chosen as the governing law of the Second Agreement, with any disputes to be referred to the Singapore courts.¹⁸

Part performance of the Second Agreement

14 The defendant did not pay the Advance Payment by noon time on 16 January 2023. Notwithstanding this, the claimant started discharging Cargo from cargo hold 2 on 16 January 2023, and subsequently from cargo holds 3 and 5 on 17 January 2023.¹⁹ The claimant completed discharge in cargo hold 2 on 30 January 2023, and started on cargo hold 1 from 11 February 2023.²⁰

¹⁷ Nurul’s Affidavit at pp97 and 102.

¹⁸ *Ibid* at pp97 and 105.

¹⁹ *Ibid* at para 14.

²⁰ *Ibid* at paras 14 and 16.

15 As the discharge operations progressed, the claimant grew increasingly impatient with the defendant over two matters:

(a) The first concerned the defendant's failure to pay the Advance Payment. The claimant sent numerous email reminders to the defendant to pay from 17 January 2023, citing, among other things, the mobilisation of the claimant's manpower and assets, the incurrence of daily running costs, and the payment of the claimant's vendors.²¹ The defendant made two partial payments of US\$100,000 and US\$450,000 on 31 January 2023 and 27 February 2023, but did not pay the remaining US\$275,000 of the Advance Payment.²²

(b) The second related to the appointment of a SW Contractor, which the claimant viewed as crucial for the removal of liquid pollutants present in cargo holds 3, 4 and 5, and imperative to preserving the safety of the Vessel.²³ From 26 January 2023, the claimant had sought, on no less than ten occasions, the defendant's confirmation that it had appointed a SW Contractor.²⁴ No such confirmation was forthcoming, even though the claimant provided a quote from Pentas Flora Sdn Bhd, a local SW Contractor approved by the Malaysian Department of Environment, to the defendant on 26 January 2023 for its consideration.²⁵

²¹ *Ibid* at pp257-268.

²² *Ibid* at para 22 and p257.

²³ *Ibid* at paras 54-55 and pp274-275.

²⁴ *Ibid* at pp257-258 and 262-265.

²⁵ *Ibid* at para 57 and pp264-265.

16 On 12 February 2023, the claimant ceased discharge operations in cargo hold 1, after removing approximately 10% of the Cargo.²⁶ According to the claimant, the Vessel’s trim would be affected had it proceeded any further with the discharge.²⁷ Shortly thereafter, on 14 February 2023, the claimant stopped discharging from cargo holds 3 and 5 as a result of the defendant’s failure to pay the full Advance Payment and appoint a SW Contractor.²⁸ From this point onwards, the parties were at an impasse as the claimant refused to resume work unless the defendant paid the balance of the Advance Payment and appointed a SW Contractor. The claimant’s position was aptly captured in its email to the defendant on 27 February 2023, which read as follows:²⁹

...

2. You have only paid USD450,000, (**which is only 64% of the advance required and 33% of the total payment**).

When would [the defendant] pay the remaining amounts which past overdue for a long time since 13/01/2023?

Please provide a clear schedule of payment for the remaining full amount for our consideration? We have [passed] the 75% work mark, payment and also waiting for your [SW Contractor] appointment to have some significant work progress.

3. The stop work notice sent to [you] on 10th Feb 2023 [and our] previous **5 reminders** pleading [the defendant] ... to make payment not to interrupt our work which eventually has been denied and not responded by your end. This has resulted in a break [of] momentum in our work progress and cost us additional demob in some areas. We shall bill you the “VO” Variation order as per notices sent to you.

4. [The claimant] had done substantial ground work, meetings, presentations, execution for the management of the schedule waste onboard... Our work has been much [affected] due to the delay in appointment of the [SW Contractor] ... We have reached to the final “slurry nature”

²⁶ *Ibid* at paras 16 and 40.

²⁷ *Ibid* at para 40.

²⁸ *Ibid* at paras 17 and 42.

²⁹ *Ibid* at pp257-258.

stage at [cargo hold 5] which requires, pumping out of liquids, management of SW solids in order to further progress in the salvage operations. Vessel also requires to discharge [cargo hold 4] quick as to relieve the stresses, have a better trim, lighten her for lower sea chests to be free. All the above continuation of work is dependent on the “appointment of [SW Contractor]”. Without this there is very little work progress that can be done...

[emphasis in original]

Proceedings in Singapore

17 On 2 May 2023, the claimant commenced OC 258 against the defendant for claims arising out of the Second Agreement.³⁰ On 8 May 2023, the originating claim, the statement of claim and the notice of intention to contest or not contest were served on the defendant by leaving these documents with a receptionist present at the defendant’s registered address in Hong Kong.³¹

18 The defendant did not file and serve a notice of intention to contest or not contest within 21 days after the statement of claim was served on it (*ie*, by 29 May 2023), as required under O 6 r 6(2) of the ROC 2021. As a result, the claimant applied for, and obtained, the Default Judgment on 7 June 2023.³² On 8 June 2023, the claimant’s solicitors sent a copy of the Default Judgment to the defendant by registered post.³³

19 Approximately three months later, on 12 September 2023, the defendant sought permission from the court to file an application to set aside the Default

³⁰ *Ibid* at para 24.

³¹ Affidavit of Helen Tang dated 30 November 2023; Affidavit of Cheng Ka Wai dated 30 May 2023.

³² HC/JUD 214/2023 dated 7 June 2023 (“Default Judgment”).

³³ Nurul’s Affidavit at para 25.

Judgment.³⁴ The court granted permission on the same day, and the defendant's setting aside application in SUM 3046 was filed on 3 October 2023.

The Default Judgment and the parties' positions

20 The Default Judgment against the defendant can be distilled into the following constituent parts.

(a) First, judgment in the sum of US\$781,178.15 for amounts owed under invoices no. BJSESB/PG/094/23 to BJSESB/PG/098/23.³⁵ Of this sum,

(i) US\$275,000 is the portion of the Advance Payment that remains unpaid;³⁶

(ii) US\$412,500 is claimed as the 2nd Stage Instalment;³⁷

(iii) US\$50,000 is claimed under "variation orders" for the standby of machinery from 14 February 2023 to 10 March 2023 ("Variation Orders");³⁸ and

(iv) US\$43,678.15 is claimed for the standby charges incurred by the claimant's tug "BIG HORN RIVER" ("Tug"), which was alongside the Vessel from 10 to 28 March 2023.³⁹

³⁴ *Ibid* at para 26.

³⁵ Default Judgment at para 1; statement of claim at para 13.

³⁶ Statement of claim at para 12.15.

³⁷ *Ibid* at para 12.17.

³⁸ *Ibid* at paras 12.18 and 12.20.

³⁹ *Ibid* at para 12.19.

(b) Second, an order that the claimant's claim for standby charges incurred by the Tug from 10 March 2023 until the cessation of services on 23 May 2023 proceed to an assessment of damages.⁴⁰

(c) Third, an order that the defendant indemnify the claimant for any claim by the Malaysian Marine Department under Form 491B of the Malaysian Merchant Shipping Ordinance 1952 ("Indemnity"), which rendered the claimant responsible for any claim arising from the salvage and discharge operations under the Second Agreement.⁴¹

(d) Fourth, judgment in the sum of US\$33,747.84 for contractual interest at the rate of 1.5% per month for late payment of the unpaid invoices, and for interest to continue accruing at US\$11,717.67 per month until the date of final payment.⁴²

(e) Fifth, costs of and incidental to the action fixed at S\$6,046.54.⁴³

21 The defendant accepts that the Default Judgment was regularly entered but submits that it should nevertheless be set aside as the defendant has a *prima facie* defence that raises triable issues.⁴⁴ Specifically, the defendant argues that:

(a) The Advance Payment is only earned by the claimant after it successfully discharged cargo holds 3, 4 and 5 to the lowest possible tier before semi solid / slurry / sludge level.⁴⁵ This did not take place.

⁴⁰ Default Judgment at paras 3 and 4; statement of claim at para 23.

⁴¹ Default Judgment at para 5; statement of claim at paras 21-22.

⁴² Default Judgment at para 2 and Annex A; statement of claim at para 12.21 and p18.

⁴³ Default Judgment at para 6.

⁴⁴ Defendant's Written Submissions ("DWS") at paras 2 and 25.

⁴⁵ *Ibid* at paras 7-11.

- (b) The claimant was not entitled to the 2nd Stage Instalment as it did not complete discharge of the dry Cargo from cargo hold 1.⁴⁶
- (c) The claimant never agreed to the Variation Orders or to pay for the standby of machinery.⁴⁷
- (d) The claimant could not claim standby charges incurred by the Tug, as the provision of the Tug was a service included as part of the Lump Sum price under the Second Agreement.⁴⁸
- (e) The claimant had no basis to seek the Indemnity as there was no pollution originating from the Vessel.⁴⁹

22 On the other hand, the claimant submits that the defendant's defence is entirely meritless and made up of bare assertions.⁵⁰ In particular, the claimant argues as follows:

- (a) The entire Advance Payment was due and payable on 16 January 2023, and it is undisputed that US\$275,000 of the Advance Payment remains unpaid.⁵¹
- (b) The claim for the 2nd Stage Instalment was justified as the claimant had completely discharged cargo hold 2, and discharged the

⁴⁶ *Ibid.*

⁴⁷ *Ibid* at para 24.

⁴⁸ *Ibid* at paras 21-23.

⁴⁹ Jiang's Affidavit at para 16.

⁵⁰ Claimant's Written Submissions ("CWS") at paras 58-64.

⁵¹ *Ibid* at para 50.

Cargo in cargo hold 1 to the best of its abilities.⁵² The claimant only managed to remove 10% of the Cargo in cargo hold 1, and could not proceed further without compromising the stability of the Vessel.⁵³ The defendant had to appoint a SW Contractor to remove the liquid pollutants in the cargo holds before the claimant could continue with the discharge operations.⁵⁴

(c) The claimant was entitled to charge for the standby of machinery under the Variations Orders. The standby of machinery from 14 February 2023 to 10 March 2023 was caused by the defendant's repeated assurances that it would pay the full Advance Payment.⁵⁵

(d) The defendant's failure to appoint a SW Contractor resulted in a need for the Tug to standby the Vessel (that was in an unseaworthy state) from 10 March 2023 to 23 May 2023, in case the Vessel listed or required emergency services.⁵⁶ These standby charges could have been avoided had the defendant appointed a SW Contractor in time.

23 The claimant further contends that the court should not exercise its discretion due to the defendant's inordinate delay in filing SUM 3046.⁵⁷

⁵² *Ibid.*

⁵³ *Ibid* at para 52.

⁵⁴ *Ibid* at paras 52-54.

⁵⁵ *Ibid* at para 50; Nurul's Affidavit at para 36.

⁵⁶ CWS at para 50; Nurul's Affidavit at paras 63-70.

⁵⁷ CWS at paras 65-70.

The law

24 The legal principles governing the setting aside of judgments entered in default of appearance under the revoked Rules of Court (Cap 322, R 5, 2014 Rev Ed) continue to be relevant to an application under the ROC 2021 to set aside a judgment in default of the notice of intention to contest or not contest: see *Spamhaus Technology Ltd v Reputation Administration Service Pte Ltd* [2023] SGHC 294 at [24]–[26]; *Management Corporation Strata Title Plan No 4572 v Kingsford Development Pte Ltd and others* [2023] SGHCR 8 at [8]; Jeffrey Pinsler, *Singapore Court Practice* (LexisNexis, 2023) at para 6.6.8. It suffices for me at this juncture to highlight a few general points on the court’s discretion to set aside a default judgment that has been regularly obtained.

25 The defendant must first meet the threshold requirement of establishing a *prima facie* defence, in the sense of showing that there are triable or arguable issues: see *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 (“*Mercurine*”) at [60] & [98]; *U Myo Nyunt (alias Michael Nyunt) v First Property Holdings Pte Ltd* [2021] 2 SLR 816 (“*U Myo Nyunt*”) at [61]. The assessment of whether there is a *prima facie* defence is an evaluative assessment on the merits of the defence based on the evidence, albeit on a preliminary basis, and is no stricter than the test to obtain permission to defend in an application for summary judgment: see *U Myo Nyunt* at [64].

26 It is only *after* the defendant has shown a *prima facie* defence that the issue of the court’s discretion arises: see *U Myo Nyunt* at [64]. In exercising this discretion, the court will balance the existence of a *prima facie* defence against other factors such as the length of the delay, the reason(s) for the delay, and any prejudice that the claimant would suffer if the judgment were to be set aside: see *U Myo Nyunt* at [64]. In this regard, a deliberate choice by the defendant to

stay away from the proceedings because of his or her litigation strategy, or an extended period of delay, are strong factors weighing against the exercise of the court’s discretion: see *U Myo Nyunt* at [66]–[67].

27 Where a portion of the default judgment is severable from the rest and is devoid of any triable issues, the court can allow the default judgment to stand only for that part and set aside the rest of the judgment: see *Powercom Yuraku Pte Ltd v Sunpower Semiconductor Ltd and others* [2023] 4 SLR 867 (“*Powercom Yuraku*”) at [16]–[28]. In determining the severability of the default judgment, a useful test is to assess whether the same defence is being raised such that the pleaded claims would fall together if the defence was made out: see *Powercom Yuraku* at [22].

28 In the final analysis, the court has a wide discretion to set aside, uphold or vary a default judgment, and it is the factual matrix that will determine the appropriate outcome in each application: see *Mercurine* at [99].

Issues

29 With the above principles in mind, the overarching issue of whether the Default Judgment should be set aside can be analysed in two parts. I deal first with whether the defendant has met the threshold requirement of establishing a *prima facie* defence, before considering whether the court’s discretion should be exercised to set aside or vary the Default Judgment.

Whether the defendant has established a *prima facie* defence

30 Before considering the claims on which the claimant obtained default judgment, it will be helpful to discuss the nature of wreck removal contracts and explain the importance of the parties’ choice in the standard form used. By

“wreck removal contracts”, I am referring to the contractual arrangements made by a shipowner to remove its vessel, which has become a hazard to navigation or a threat to the environment after a marine casualty.

31 Wreck removal contracts must cater for a far greater degree of uncertainty and risks as compared to other types of maritime contracts such as a charterparty. As explained by Professors Nicholas Gaskell and Craig Forrest in *The Law of Wreck* (Informa Law, 1st Ed, 2019) (“*The Law of Wreck*”) at p 609:

It is the level of uncertainty, though, that distinguishes wreck removal contracts from ordinary charterparties for the hire or use of a ship. Although a charterparty is also a type of service, the extent and level of performance provided by the shipowner is relatively clear and circumscribed, eg by the nature of an ordinary trading voyage – although force majeure clauses do exist for events that are out of the ordinary. In a wreck removal contract, by contrast, there is an inherent degree of uncertainty in the extent (and sometimes level) of service that may be required. In a general sense, the task may become much more difficult [than] any of the experts could have predicted. That difficulty may result in extra direct expenditure, eg in hiring in additional heavy lift craft, but is most likely to manifest itself in delays. The delays will simply mean that all the contractor’s assets will need to be mobilised for a longer period, which naturally means an added cost.

[emphasis added]

32 Thus, the standard form wreck removal contract chosen by parties to govern their contractual relations has a significant bearing on how parties intend to cope with the uncertainty inherent in any wreck removal operation and allocate risks: see *The Law of Wreck* at p 610. Put simply, the standard form sets out an overall framework for the allocation of risk, which the parties can alter through specific amendments to meet the precise needs of the operation: see *The Law of Wreck* at pp 609-610.

33 There are three main standard form wreck removal contracts, namely: (a) the BIMCO Wreckhire 2010 form; (b) the BIMCO Wreckfixed 2010 form; and (c) the BIMCO Wreckstage 2010 form. The allocation of the risks under these standard form contracts is reflected in the basis of remuneration, which may be described in the following terms.

(a) The BIMCO Wreckhire 2010 form places more risk on the hiring shipowner: see *The Law of Wreck* at p 640. The services provided by the contractor are to be paid for at a daily rate of hire, and the contractor does not guarantee a particular outcome as a result of its services: see Simon Rainey, *The Law of Tug and Tow and Offshore Contracts* (Informa Law, 4th Ed, 2017) (“*The Law of Tug and Tow and Offshore Contracts*”) at para 10.9; *The Law of Wreck* at p 611.

(b) At the other end of the spectrum is the BIMCO Wreckfixed 2010 form, which imposes more risk on the contractor: see *The Law of Wreck* at p 640. There is a single lump sum price that is only earned and payable as an indivisible amount upon the full completion of the contracted services: see *The Law of Tug and Tow and Offshore Contracts* at para 10.9.

(c) The BIMCO Wreckstage 2010 form sits between the Wreckhire 2010 form and the Wreckfixed 2010 form: see *The Law of Wreck* at p 640. The contractor’s services are paid for on a lump sum basis, but the form allows the parties to divide up the lump sum into a series of instalments that are payable at key stages in the anticipated operation: see *The Law of Wreck* at p 639; see *The Law of Tug and Tow and Offshore Contracts* at para 10.9. For instance, if the raising of a wreck involves six stages with only the fifth and sixth stages being the raising

of the wreck and if the wreck is not raised or the attempt fails, the shipowner is liable to pay for all the abortive preliminary steps even though these steps have produced no useful result and the work remains to be done: see *The Law of Tug and Tow and Offshore Contracts* at para 10.75.

34 In the present case, the parties contracted on basis of the BIMCO Wreckstage 2010 form, *ie*, the Second Agreement (see [8] above). The analysis of the claimant's claims must thus be guided by the parties' choice of standard form (and the amendments made to the form) in allocating risks in the contemplated operation.

Claim for Remainder of Advance Payment

35 I start with the claim for the remainder of the Advance Payment. In my view, the defendant has failed to show the existence of triable issues for this claim.

36 Under Boxes 9 and 11 of the Second Agreement, the defendant agreed to make payment of the first instalment of the Lump Sum before noon time on 16 January 2023 (see [11(a)] above). Clause 10 of the Second Agreement further provides that each instalment of the Lump Sum is *fully and irrevocably* earned the moment it falls due, and is to be paid in full without any discount, deduction, or set-off. These provisions in the Second Agreement are reproduced below:⁵⁸

9. Payments (Cl. 4, 8(b), 10(a), 10(b))	
(i) Lump Sum (in figures and words)	(ii) Amount due and payable on signing this Agreement
USD 1,650,000.00 (United	The advance payment of

⁵⁸ Nurul's Affidavit at pp96 and 102.

States Dollar One Million Six Hundred and Fifty Thousand) only.	50% in the sum of USD 825,000.00 shall be paid before 12 noon 16th January 2023.
	(iii) Amount due and payable on The 25% payment in the sum of USD 412,500.00 shall be paid within three (3) banking days notice upon complete of discharge of dry cargo from hold 1 and 2.

...

10. Payment

(a) The [defendant] shall pay the [claimant] the Lump Sum set out in Box 9, ~~which amount is due and payable as set out in Box 9.~~

(b) Each installment of the Lump Sum shall be fully and irrevocably earned at the moment it is due as set out in Box 9 ...

(c) All monies due and payable to the [claimant] under this Agreement shall be paid without any discount, deduction, set-off, lien, claim or counterclaim.

[emphasis in original]

37 Accordingly, the Advance Payment was an upfront payment that was due and irrevocably earned three days after the Second Agreement was entered into (*ie*, noon time on 16 January 2023). It was not tied to the attainment of any stage in the anticipated discharge operation, and there was no condition precedent for the Advance Payment to become due and owing. Hence, I reject the defendant’s argument that the Advance Payment was not earned yet because the claimant did not successfully discharge cargo holds 3, 4 and 5 to the lowest possible tier before semi solid / slurry / sludge level.

38 The defendant has not raised any other matter to explain why it persists

in refusing to pay the remaining US\$275,000 of the Advance Payment. Consequently, I find that the claimant is entitled to claim US\$275,000 under invoice no. BJSESB/PG/094/23 and contractual interest at the rate of 1.5% per month for late payment of this invoice (see [12] above).

Claim for 2nd Stage Instalment

39 A similar line of reasoning can be applied to challenge the claimant's entitlement to the 2nd Stage Instalment. The parties had pegged the payment of this amount to the completion of discharge of dry Cargo from cargo holds 1 and 2 (see [11(b)] and [36] above). Although this was achieved for cargo hold 2, it is common ground that the dry Cargo in cargo hold 1 was not fully discharged. On a plain reading of Boxes 9 and 11, and Clause 10 of the Second Agreement, the 2nd Stage Instalment was not due and irrevocably earned.

40 In my view, the claimant has not satisfactorily explained or pointed to any term in the Second Agreement that allows it to claim the 2nd Stage Instalment in spite of it only managing to discharge part of the Cargo in cargo hold 1. It is arguable that the claimant bore the risk of unexpected difficulties affecting the discharge of Cargo from cargo hold 1.

41 In any event, the defendant has adduced evidence that it was possible to continue discharging from cargo hold 1,⁵⁹ and there are triable issues as to whether the discharge operations could have continued, and if not, whether it was caused by the defendant's failure to appoint a SW Contractor. It therefore follows that the defendant has a *prima facie* defence to the claim for the 2nd Stage Instalment.

⁵⁹ Jiang's Affidavit at paras 17-18 and p20.

Claim under the Variation Orders

42 At the hearing before me, the claimant’s counsel clarified that the claim under the Variation Orders were not being made pursuant to the Second Agreement, but under a separate agreement made through the defendant’s repeated assurances to the claimant that it would pay the full Advance Payment. However, the claimant did not plead the existence of any separate agreement, and instead the relevant paragraphs in the statement of claim read:

12.18 On about 3 March 2023, the [claimant] also sent invoice BJSESB/PG/096/23 in the sum of USD 30,000 being variation order for period 14 February 2023 to 28 February 2023.

...

12.20 On about 28 March 2023, the [claimant] issued invoice BJSESB/PG/098/23 in the sum of USD 20,000 being variation order of standby machinery for period 1 March 2023 to 28 March 2023.

43 Where a party seeks to rely on an agreement for its claim, the party should, aside from pleading the existence of the agreement, give particulars of the date of the alleged agreement, the names of all parties to it, whether it was made orally or in writing, in the former case stating by whom it was made and in the latter case identifying the document, and in all cases setting out the relevant terms relied on: see *Arovin Ltd and another v Hadiran Sridjaja* [2018] SGHC(I) 9 at [3].

44 In the present case, the claimant did not properly plead and particularise its claim under the Variation Orders, much less the separate agreement purportedly underlying these Variation Orders. There are also no contemporaneous documents in the affidavits to support the existence of the alleged separate agreement. The defendant has thus established a *prima facie* defence to the claim under the Variation Orders.

Claims for the Tug’s standby charges and the Indemnity

45 Under the BIMCO Wreckstage 2010 form, the parties are to specify who is to bear the cost of an assisting tug deemed necessary by the contractor: see *The Law of Tug and Tow and Offshore Contracts* at para 10.76. Under the Second Agreement, it appears that the parties intended for the claimant to shoulder the cost of an assisting tug. This is borne out by the following:

(a) Box 12, which allowed the parties to state who is responsible for the cost of an assisting tug, had the typewritten words, “Not applicable”.⁶⁰

(b) Pursuant to clause 4 and Annex I of the Second Agreement, the claimant agreed to deploy, as part of the Lump Sum price, “one (1) unit shallow draft work boat”.⁶¹ It is not disputed that the Tug was the “shallow draft work boat” deployed under the Second Agreement.

46 The claimant sought to claim the Tug’s standby charges under clause 21(b) of the Second Agreement,⁶² which reads as follows:

21. Pollution

....

(b) The [defendant] shall indemnify and hold the [claimant] harmless in respect of any and all consequences of any pollution which results from any discharge or escape of any pollutant from the Vessel except where such pollution arises as a consequence of the negligence of the [claimant] ...

⁶⁰ Nurul’s Affidavit at p97.

⁶¹ *Ibid* at pp98 and 109.

⁶² Statement of claim at paras 17-23.

47 Leaving aside the fact that the Second Agreement contemplated that the claimant was to bear the cost of the Tug, clause 21(b) only operates to cover the *consequences of pollution* that resulted from a discharge or escape of pollutant from the Vessel. There is no evidence of such pollution, and it appeared that the Tug was on standby due to the impasse between the parties over the defendant's refusal to pay the balance of the Advance Payment and appoint a SW Contractor (see paragraph [16] above).

48 The claimant's claim for an Indemnity in respect of any claim by the Malaysian Marine Department is also premised on clause 21(b) of the Second Agreement, and similarly faces the difficulty of there being no evidence of pollution from the Vessel.

49 For these reasons, I am satisfied that the defendant has a *prima facie* defence to the claims for the Tug's standby charges and the Indemnity.

Appropriate orders in this case

50 Having found that the defendant has a *prima facie* defence in respect of all the claims except the sum of US\$275,000 due as part of the Advance Payment, I now consider how the court's discretion should be exercised in determining the appropriate orders to make in respect of the Default Judgment.

51 The length of delay in this case was around 3 months, from the time the Default Judgment was entered (*ie* on, 7 June 2023) to the time that the defendant sought permission from the court to file the setting aside application (*ie*, on 12 September 2023). This cannot, by any stretch, be described as an extended period of delay.

52 As for the reasons for the delay, the defendant explained that its

registered address in Hong Kong was not its place of business, and the defendant's staff did not receive any originating process from the receptionist at the registered address.⁶³ The defendant was only aware of the existence of present legal proceedings when it received a copy of the Default Judgment by registered post in Hong Kong on or about 13 June 2023.⁶⁴ Thereafter, time was required for the defendant to investigate the matter and appoint Singapore solicitors.⁶⁵ These reasons do not show the defendant's inaction to be a deliberate litigation strategy.

53 The assessment of damages proceedings in OC 258 are also at a relatively early stage, being the disclosure of documents. Any prejudice suffered by the claimant in the form of work that will be wasted or superseded by the setting aside of the Default Judgment can be adequately met by an appropriate order as to costs.

54 Balancing the factors mentioned above, I find it just to set aside the entire Default Judgment, save for the claim for US\$275,000 under invoice no. BJSESB/PG/094/23 and contractual interest on this sum. Judgment should continue to stand for the latter, as it is severable from the other claims (*ie*, it concerns a different defence) and there are no triable issues raised.

55 In the circumstances, I will vary the Default Judgment in the following

⁶³ Jiang's Affidavit at para 25.

⁶⁴ Letter from CTLC Law Corporation dated 12 September 2023.

⁶⁵ *Ibid*.

terms:

(a) Judgment is entered against the defendant in favour of the claimant for the sum of US\$275,000 in respect of invoice no. BJSESB/PG/094/23;

(b) Judgment is entered for the sum of US\$12,375, being the contractual interest at the rate of 1.5% per month from March to May 2023, and continuing at US\$4,125 per month until the date of final payment; and

(c) The claimant's costs of and incidental to the Default Judgment are reserved, pending the determination of the remaining claims in OC 258.

56 I will also direct the defendant to file its notice of intention to contest or not contest by 4.00 pm on 3 January 2024. The Registry is to fix a Registrar's Case Conference to deal with the consequential directions on pleadings.

Conclusion

57 For the foregoing reasons, I substantially allow the defendant's application in SUM 3046.

58 On the issue of costs, the parties are to file written submissions not exceeding five pages by 4.00 pm on 3 January 2024. The parties are to take heed of the Court of Appeal's observation in *Mercurine* at [105] that it is typically the defendant who bears the costs of an application to set aside a default judgment which was regularly obtained.

59 Finally, it remains for me to thank counsel for their helpful submissions.

Navin Anand
Assistant Registrar

Tan Hui Tsing and Abiramee Ghandhidass (DennisMathiew) for the
claimant;
Ong Sie Hou Raymond (CTLIC Law Corporation) for the defendant.
