IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 245

Suit No 416 of 2015

Between

PT Surya Citra Multimedia

… Plaintiff

And

Brightpoint Singapore Pte Ltd

… Defendant

JUDGMENT

[Commercial Transactions] — [Sale of goods] — [Breach of contract]
[Commercial Transactions] — [Sale of goods] — [Breach of contract] — [Damages for breach of contract]
[Civil Procedure] — [Pleadings]

TABLE OF CONTENTS

INTRODUCTION **1**

PERSONS OF IMPORTANCE ACTING FOR THE PARTIES **4**

SUMMARY OF THE PARTIES' CASES **5**

THE MAY PRICE PROTECTION 5

THE NOVEMBER PRICE PROTECTION 7

COUNTERCLAIMS 9

DECISION ON SCM'S CLAIMS **9**

THE MAY PRICE PROTECTION 9

The calculation of the price protection *9*

Accruals or funding from Blackberry *17*

Agreement of US$300,000 made on or about 11 September 2013 ..... *17*

THE NOVEMBER PRICE PROTECTION 21

The Condition *21*

Whether SCM had obligations to pick up the committed stocks *29*

Whether the time of delivery was of the essence 31

Whether the parties took the position that the pick-up obligation lapsed after the delivery dates in any case 42

Agreement to pay the November Price Protection made on or about 25 November 2013 ..... *45*

CONCLUSION ON SCM'S CLAIMS 46

DECISION ON BRIGHTPOINT'S COUNTERCLAIM **46**

WHETHER THERE IS A REQUIREMENT OF NOTICE 51

WHETHER SCM BREACHED THE SUB-DISTRIBUTOR AGREEMENT 52

DAMAGES....54

Whether the units sold to third parties are the units SCM refused to pick up....55

Mitigation – offer by the party in breach....57

The law....57

Application of the law....61

CONCLUSION....63

PT Surya Citra Multimedia
v
Brightpoint Singapore Pte Ltd

[2018] SGHC 245

High Court — Suit No 416 of 2015
Belinda Ang Saw Ean J
27–28 February, 1, 2, 6–8 March 2018; 24 April 2018;
31 October 2018

9 November 2018 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, PT Surya Citra Multimedia ("SCM") is suing the defendant, Brightpoint Singapore Pte Ltd ("BrightPoint"), for breaches of the price protection clause in a sub-distributor agreement dealing with the distribution of Blackberry mobile phones in Indonesia. SCM's claims concern two instances of price protections that arose from the reduction of retail prices by the manufacturer of Blackberry mobile phones, Research in Motion Limited (now known as Blackberry Limited). It is not disputed that any reduction of retail prices would affect stocks already purchased by sub-distributors in Indonesia like SCM, and the purpose of the price protection clause is to compensate the sub-distributors for potential losses arising from any reduction in the retail prices.

2 Separately, BrightPoint has counterclaimed against SCM for its alleged failure to pick up certain Blackberry mobile phones according to its purchase orders.

3 Counsel for the SCM is Mr S Selvam ("Mr Selvam") and BrightPoint is represented by Mr Jimmy Yim, SC ("Mr Yim").

Overview of the disputes

4 BrightPoint, a subsidiary of Ingram Micro Asia Pacific Pte Ltd ("IMM"), is a wholesaler of technology products, including Blackberry products manufactured by Blackberry Limited, and provides services such as distribution and customer support. SCM is incorporated in Indonesia and is in the business of selling wireless communication devices and related accessories in Indonesia. PT Blackberry Indonesia ("Blackberry") is the subsidiary of Blackberry Limited that was involved in the dealings between the parties.

5 On 7 November 2012, BrightPoint and SCM entered into the Sub-Distributor Agreement whereby BrightPoint appointed SCM as a sub-distributor of Blackberry products in Indonesia. Pursuant to the agreement, SCM purchased from BrightPoint and BrightPoint supplied to SCM Blackberry mobile phones and related accessories. In the course of this sub-distributorship arrangement, the parties had multiple disagreements that resulted in the present suit. As stated, SCM's claims are in relation to two instances of price protections, which I will refer to as the May Price Protection and the November Price Protection. With regard to the May Price Protection, SCM claims that it is entitled to a higher sum than what BrightPoint had calculated. With regard to the November Price Protection, SCM claims that it is entitled to the price protection because it has fulfilled the condition precedent, while BrightPoint

claims otherwise. The key clause in the Sub-Distributor Agreement in relation to SCM's claims is paragraph 3 of Schedule A ("the Price Protection Clause"), reproduced as follows:

> BrightPoint will from time to time provide such invoice price protection as is afforded by the manufacturers of the Products in the event of a price reduction by the relevant manufacturer. BrightPoint reserves the right to vary any such price protection at any time by notice in writing.

6 BrightPoint has counterclaimed that SCM refused to pick up all the units it had ordered via purchase orders in relation to two Blackberry mobile phone models. The key clause in the agreement in relation to BrightPoint's counterclaims is clause 2 (the "Purchase Order Clause"), reproduced as follows:

> **2. <u>Purchase Orders</u>.** A written purchase order ("**Order**") from Distributor [*ie*, SCM] is required for all purchases of Products from BrightPoint. All Orders are subject to approval of credit by BrightPoint and acceptance in writing by BrightPoint in its sole discretion. The terms and conditions set forth herein shall control and prevail over any contrary terms in Orders. The individual contracts for the sale of Products formed by BrightPoint's acceptance of Orders shall automatically incorporate, to the extent applicable, the terms and conditions of this Agreement. Unless otherwise expressly set forth to the contrary in BrightPoint's invoice, these terms and conditions are for delivery to Distributor's carrier, Ex Works (Incoterms 2010) BrightPoint's warehouse or other point or points of delivery designated by BrightPoint. BrightPoint shall not be responsible for spotting, switching, demurrage or other transportation charges unless agreed to in writing signed by an authorized officer of BrightPoint. Distributor agrees to purchase a minimum quantity of five hundred (500) units per shipment from BrightPoint, or with respect to RIM [*ie*, Blackberry] Products such higher minimum quantities as may be advised from time to time ("**Minimum Order Quantity**"), unless a lower minimum amount is agreed in writing by the Parties. *Any Purchase Order confirmed by Distributor shall not be changed, rescheduled, or cancelled by Distributor thirty (30) days prior to the scheduled shipping date unless otherwise agreed by the Parties* and shall be subject to reasonable handling fees and actual expenses incurred by BrightPoint.
>
> [emphasis added]

7 The facts in this case are largely contained in the extensive email correspondence between the parties and internal email correspondence within each party. The parties do not dispute the email correspondence, but take different positions as to the purport of some of these correspondence. To avoid unnecessary repetition of the relevant correspondence and events that occurred, I will address them in the decision proper.

Persons of importance acting for the parties

8 In SCM, in order of seniority, Alino Sugianto ("Sugianto") was the director and Handani Sutrisna ("Sutrisna") was the general manager at the material time.

9 In BrightPoint, in order of seniority, Felix Wong ("Wong") was the senior vice president and managing director at the material time, Tim Birch ("Birch") was the sales director until 22 October 2013 before Rajesh Sokhal ("Sokhal") took over, Benjamin Williams ("Williams") was the business development manager, and Ernawati Tan ("Tan") was the senior product executive.

10 In Blackberry, Nicholas Mastroianni ("Mastroianni") was the interim country head of Indonesia and senior business operations manager, Maspiyono Handoyo ("Handoyo") was the managing director, and Andi Utomo ("Utomo") was the sales or distribution director at the material time. Mastroianni made the decisions in relation to financial approvals, arrangements and calculations of price protection. Utomo did not have authority to decide price protection on his own accord and had to get permission from Mastroianni whenever he communicated any information on price protection to SCM or to BrightPoint.

11 Sugianto, Sutrisna and Utomo took the stand to testify on behalf of SCM, while Wong and Tan testified for BrightPoint.

Summary of the parties' cases

The May Price Protection

12 The May Price Protection concerns the price protection for Blackberry 9220, Blackberry 9320, Blackberry 9790 and Blackberry 9900, and the parties' dispute centres on the method of calculation of the sum SCM is entitled to. The two email announcements on the May Price Protection stated that "[t]he calculation is based on the previous four weeks invoiced sales (pickup) from IMM; this is in alignment with previous communications from BlackBerry" and "the previous four weeks include weeks 16, 17, 18 and 19".[1] On top of that, the first email announcement states that the sum of price protection for SCM was US$23,520, and the second email announcement stated that "the inventory support amounts per unit is: 9220 @ 14 per unit for the 1,680 units invoiced during WK16", meaning that the price protection was US$14 for each of the 1680 units of Blackberry 9220 invoiced in week 16, amounting to a total price protection of US$23,520.

13 SCM's position is that the price protection should be calculated based on the number of units picked up during weeks 16 to 19 as reflected under the data entry "Pick up order to Distributor" in the Compass Tool ("RCP"). The RCP was a data system created by Blackberry and used by Blackberry, BrightPoint and SCM to monitor, plan and manage sales, forecasts, orders, shipments and inventory. Using the number of units picked up as reflected in the RCP, the price protection should be US$544,720. Originally, SCM claimed for US$813,912.60, based on the number of units reflected in the RCP at a price

[1] Agreed Bundle vol 1 ("1AB") at pp 554 and 569.

protection per unit of US$15.51, but this claim was amended to US$544,720 after Sugianto conceded at trial that the price protection per unit was US$14, based on BrightPoint's second email announcement on the May Price Protection.

14 In the alternative, SCM alleges that BrightPoint has received funding from Blackberry or by way of an accrual fund for the price protection in the sum of US$300,000 or alternatively US$250,000. The thrust of this alternative claim is unknown. Presumably, SCM wishes to claim the money received by BrightPoint, but it did not plead the basis for this entitlement. In the further alternative, SCM claims that there was an agreement made on or about 11 September 2013 that BrightPoint was to provide price protection in the sum of US$300,000 for the reductions in retail prices of Blackberry 9790 and Blackberry 9900 (collectively known as Blackberry Bold).

15 On the other hand, BrightPoint's position is that SCM is only entitled to price protection in the amount of US$23,520 calculated based on 1680 units of Blackberry 9220 at a price protection of US$14 per unit, as communicated to SCM at the material time. The 1680 units were BrightPoint's invoiced sales to SCM in weeks 16 to 19, and not based on the data in RCP. In relation to SCM's pleading in the alternative, BrightPoint maintains that Blackberry did not provide any price protection by way of an accrual fund or transfer of funds for the four models of Blackberry mobile phones, and explains that the accrual funds were utilised for a number of purposes, of which price protection was only one. BrightPoint further denies the alleged agreement to provide price protection on or about 11 September 2013. Its position was that an offer of full and final settlement in the sum of US$300,000 had been made, which SCM rejected while continuing to press for the full payment of US$813,912.60.

16 At this juncture, it is apposite to explain the disparities between the data in the RCP and the actual invoiced units during weeks 16 to 19. SCM came to an agreement with BrightPoint to pick up the units scheduled for weeks 14 to 17 via ex-works shipment on 30 March 2013 (meaning that SCM would pick up the stocks directly from BrightPoint's warehouse in Singapore). Although the units were picked up on 30 March 2013 (which was before week 14), they were entered under weeks 16 to 19 in the RCP. The pick-ups in week 13 were also reported under weeks 16 to 19. It is not disputed that the data entered into the RCP does not reflect the true state of the pick-ups; the dispute is on which data set is eligible for price protection.

The November Price Protection

17 The November Price Protection relates to the price protection for Blackberry Q5 and Blackberry Q10 models. SCM takes the position that BrightPoint afforded price protection of US$271,285 for Blackberry Q5 and US$1,388,000 for Blackberry Q10, and BrightPoint has breached the Price Protection Clause by refusing to give the price protection. The dispute concerns the construction of the condition to the November Price Protection. The condition according to the email sent by BrightPoint on 6 November 2013 states that "[p]rice protection will be issued via Credit Note (CN) and is dependent upon future Payment & Pickup commitments",[2] and the condition according to the second email sent by BrightPoint on 8 November 2013 states that "Pickup Plan is required before CN can be issued".[3]

18 BrightPoint takes the position that SCM is not entitled to the November Price Protection because it neglected to meet the condition by only partially

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2 Agreed Bundle vol 3 ("3AB") at pp 1735 and 1736.

3 3AB at pp 1748 and 1749.

picking up the stocks of Blackberry Q5 and Blackberry Q10 that it had ordered, and failing, refusing and/or neglecting to pick up the remaining stocks, which amounted to 15,100 units of Blackberry Q5 and 17,630 units of Blackberry Q10 ("the committed stocks"). SCM's case is that the condition did not stipulate that it needed to pick up the committed stocks, so a fulfilment of a future pick-up commitment of any model would satisfy the condition, and that the condition referred to commitments to be entered into in the future. SCM also alleges that BrightPoint stated verbally that SCM could pick up any model to satisfy the condition.

19 In any case, SCM claims that there was no existing commitment to pick up the committed stocks because the delivery dates in the purchase orders ("POs") of Blackberry Q5 and Blackberry Q10 had passed, on the basis that time of delivery was of the essence, and that any subsequent pick-up would be subject to the mutual agreement of the parties. SCM also argues that BrightPoint could not impose the condition it alleges because it was not imposed by Blackberry. In the alternative, SCM alleges that BrightPoint has received funding from Blackberry or by way of an accrual fund for the price protection. Similarly, SCM presumably wishes to claim the money received by BrightPoint, but it did not plead the basis for this entitlement. In the further alternative, SCM claims that there was an agreement made on or about 25 November 2013 for BrightPoint to provide the price protection of US$1,659,285, when Sokhal of BrightPoint informed that the price protection for Blackberry Q5 and Blackberry Q10 would be paid and that the credit notes had been sent to Blackberry for processing.

20 Except for the point that BrightPoint has received funds from Blackberry covering the price protection, BrightPoint denies SCM's claims. In relation to the alleged agreement, BrightPoint argues that Sokhal merely said that

BrightPoint would escalate SCM's claim to Blackberry and revert if Blackberry approved SCM's claim. In any case, BrightPoint contends that Sokhal did not have any authority to promise payment of US$1,659,285.

Counterclaims

21 BrightPoint claims that SCM, in breach of the Sub-Distributor Agreement, failed, refused and/or neglected to take delivery of 15,680 units of Blackberry 9720 and 4200 units of Blackberry 9900, which it had ordered from BrightPoint. As a result, BrightPoint sold the 15,680 units of Blackberry 9720 to third parties at prices lower than the price quoted in SCM's PO, and suffered a loss of US$80,890.50. Similarly for Blackberry 9900, BrightPoint suffered a loss of US$477,895 after selling the units to third parties.

22 SCM's case in relation to both counterclaims is that it did not have any obligation to pick up the units because BrightPoint was unable to deliver them by the delivery dates set out in the POs. Any subsequent pick-up after the delivery dates was subject to mutual agreement.

Decision on SCM's claims

The May Price Protection

The calculation of the price protection

23 The Price Protection Clause (see [5] *supra*) makes it clear that price protection was to be afforded by Blackberry, and that BrightPoint reserved the right to vary any such price protection at any time by notice in writing. Blackberry had the discretion to set the price protection whenever it saw fit to afford such protection. Even if SCM did not agree with the calculation of price

protection, it only had as much price protection as afforded by Blackberry, subject to any variations by BrightPoint.

24 From the outset, the May Price Protection, along with its terms and conditions, was duly afforded by Blackberry. Birch of BrightPoint had sought and obtained Mastroianni's approval of the terms of the May Price Protection, as evidenced by Birch's internal email to Williams dated 29 May 2013.[4] Birch reported that it was agreed with Mastroianni *inter alia* that the price protection per unit for each Blackberry 9220 was to be US$14 and the price protection would cover units in the last four weeks before the price reduction. Sugianto and Utomo confirmed that the May Price Protection was approved by Blackberry.

25 I find that it is clear from the email announcements from BrightPoint on the May Price Protection that the calculation of the quantum was based on the actual number of units invoiced from week 16 to week 19. In the first email announcement sent on 3 June 2013, BrightPoint stated that the "calculation is based on the previous four weeks invoiced sales (pickup) from IMM" and stated the price protection sum to be US$23,520, which corresponded to the calculation based on the actual number of units invoiced and picked up by SCM from week 16 to week 19. It is not disputed that invoiced sales referred to the invoices issued by BrightPoint to SCM following pick-ups of stocks by SCM, whether via ex-works or via Carriage and Insurance Paid To (CIP) shipment. The email sent on the following day further confirmed that the price protection was US$14 for each of the 1680 units Blackberry 9220 invoiced in week 16, amounting to a total price protection of US$23,520.

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4 1AB at pp 527 and 528.

26 BrightPoint's reply to SCM's dispute on the calculation further reveals the unsustainability of SCM's argument. In the reply, BrightPoint unequivocally confirmed that the calculations stated in the two email announcements were correct. It was explained that the price protection per unit of Blackberry 9220 was fixed at US$14 by Blackberry, and that the units qualifying for price protection were the "ACTUAL quantity" units invoiced.[5] SCM correctly conceded during the trial that because Blackberry had the discretion to dictate the amount of price protection and it had fixed the price protection per unit at US$14, it had no claim for US$15.51 per unit. Therefore, the statement of claim was amended from a claim of US$813,912.60 to a claim of US$544,720. I find that not only was the amount of price protection per unit clear (as conceded by SCM), the method of determining the units qualifying for price protection was also clear. BrightPoint had communicated from the very start that the quantity was to be calculated based on the invoiced sales from week 16 to week 19 giving a price protection amounting to a total of US$23,520, and it had clarified that invoiced sales referred to the actual invoiced sales, which amounted to 1680 units of Blackberry 9220.

27 BrightPoint's budgeting of the May Price Protection, which was carried out before the price protection announcements, also shows that the price protection was calculated based on invoiced sales. After approval from Blackberry but prior to announcing the price protection to SCM, Williams calculated the price protection for SCM to be US$23,520. Williams sent this calculation to Birch and Wong on 29 May 2013, and Wong gave the go-ahead.[6] In another budgeting document, it was similarly stated that the amount for the price protection allocated to SCM was US$23,520.[7]

5 Agreed Bundle vol 2 ("2AB") at p 839.

6 1AB at pp 527–528.

7 Agreed Bundle vol 5 ("5AB") at p 3164.

28 Furthermore, the email correspondence between BrightPoint and Blackberry, after the dispute arose, shows that SCM's claim was not acceptable to Blackberry. Mastroianni emailed BrightPoint on 21 November 2013, stating that Blackberry supported the payment of US$23,500 to SCM, which was in alignment with the previous decision of BrightPoint, but not SCM's claim, because "SCM manipulated RCP reporting to reflect inaccurate information" and RCP did not reflect the units "imported by SCM [in the 30-day period]".[8]

29 SCM, on the other hand, alleges that the data in the RCP has always been used to calculate price protections, as testified by Utomo and Sugianto. SCM claims that it must have been the intent of Blackberry to use pick-ups to calculate the price protection because Blackberry had access to the data under the entry "Pick Up Order to Distributor" entered into RCP but no access to the invoices issued by BrightPoint. This was why, SCM posits, the word "(pickup)" was added to the phrase "invoiced sales" in the announcement emails. SCM also places reliance on the phrase "in alignment with previous communications from Blackberry" stated in the emails announcements. SCM claims that Blackberry had relied on the data in the RCP in the previous instance of price protection given in February 2013 for the price reductions of Blackberry 9790 and Blackberry 9900 (the "February Price Protection"), as shown by Utomo's email to SCM dated 20 February 2013.[9] Utomo set out the calculations for the February Price Protection based on the lesser of the units of Blackberry models "SOH" (*ie*, stock on hand) or "4wks ship" (*ie*, four weeks' shipment). SCM claims that the data for stock on hand was taken from the data entry "Projected Inventory" in RCP while four weeks' shipment referred to the number of units

8 Agreed Bundle vol 4 ("4AB") at p 2245.

9 1AB at p 195.

shipped to SCM in the four weeks prior to the date of price reduction and was taken from the data entry "Pick Up Order to Distributor" in RCP.

30 In response, BrightPoint claims that the February Price Protection as announced, referred to "Four Weeks Invoiced Units", which was similarly based on invoiced sales and not on data from the RCP. For reference, the price protection announcement from BrightPoint is reproduced as follows:[10]

> **Price Protection**
>
> The new invoice price is eligible for Price Protection (PP); PP is calculated based on the lesser per model unit quantity of either:
>
> - Four Weeks Invoiced Units~ previous four weeks invoiced units from BP
> - Stock on Hand ~ SOH as reported in the Compass Tool

31 Subsequent to the announcement made by Williams, Utomo sent the email, upon which SCM relies. BrightPoint argues that the calculations included in Utomo's email were wrong because they were based on the number of units shipped in the four weeks prior to the price reduction rather than on invoiced units. Utomo agreed that the words used in Williams' emails were "invoiced" and he had used "ship[ped]" instead (and calculated the numbers based on units shipped), but insisted that the two words were equivalent, without providing any evidence. This was despite his lack of knowledge as to when BrightPoint issued invoices for deliveries via ex-works and deliveries via CIP.[11] BrightPoint on the other hand was able to produce contemporaneous documents to show the differences in the numbers of units invoiced and units shipped. These documents were attached to the email sent by Williams to Mastroianni on 8 March 2013 asking for his approval to use the accruals for *inter alia*, the price protection of US$328,645.93 for SCM.[12] In arriving at the figure of

10 1AB at pp 193 and 194.

11 ("Notes of Evidence") NE Day 4 at p 24–26.

US$328,645.93, the lesser of the SOH data as reported in the RCP and units invoiced for each model was used. Given the differences in the numbers of units invoiced and units shipped, the figure that Utomo calculated – US$229,038 – was different from that calculated by BrightPoint. It is notable that US$328,645.93 was actually given to SCM.[13] The data for invoiced sales was not obtained from the RCP, which means that even for the February Price Protection, the data used was not fully obtained from the RCP, contrary to SCM's claim. SCM takes issue with the fact that BrightPoint's calculation was not put to Utomo on the stand, so he was not given a chance to respond. Nothing turns on this criticism. I find that it was not necessary for the calculation to have been put to Utomo – Utomo had already testified that "invoiced" and "ship[ped]" meant exactly the same to him, and Utomo was not privy to BrightPoint's calculation at the material time. There was nothing to be gained from cross-examining Utomo on BrightPoint's calculation.

32 SCM further claims that the inaccurate reporting of data in RCP from week 16 to week 19 was at the suggestion of BrightPoint. SCM argues that since BrightPoint was the party which suggested the inaccurate reporting, BrightPoint cannot now claim that the data in the RCP is inaccurate. In any case, BrightPoint cannot claim the data to be inaccurate because it was reported based on the mutual understanding of both parties.

33 I find that it is not important on the facts as to which party had requested the RCP reporting. Regardless of which party had first requested the reporting, and regardless of whether the data was based on the mutual agreement of both parties, the data remains objectively inaccurate because it does not reflect the true state of affairs that took place. It is not disputed that the data in the RCP

12 1AB at p 214; Exhibit D8, at p 2.

13 1AB at p 259.

does not reflect the actual pick-ups during weeks 16 to 19. In any case, whether the data in the RCP is accurate or not does not change the fact that it had been communicated clearly by BrightPoint that the calculation was to be based on actual invoiced units, without any mention that the calculation was to be based on the data in the RCP. The inaccuracy of the RCP data does not add much to the crucial issue of what had been communicated in the price protection announcements.

34 Given that much has been ventilated on the issue of the genesis of the inaccurate RCP reporting, I venture to state that the data reported was based on the mutual understanding of both parties. An internal BrightPoint email dated 12 June 2013 stated that the parties had "a mutual understanding" on the RCP reporting,[14] and Wong and Tan testified that the reporting was done based on a mutual understanding. The internal BrightPoint email actually shows that it was probably SCM which had first requested the reporting, because in it, Williams expressed frustration at SCM's claim for the May Price Protection even though BrightPoint had supported SCM by agreeing to delivery via ex-works and agreed to "their" RCP reporting. An internal SCM email similarly supports the inference that it was SCM which had requested the inaccurate RCP reporting.[15] In that email, Huang of SCM stated that based on confirmation from Tan, the (inaccurate) data could be entered into RCP. The inference drawn is therefore that Tan confirmed SCM's request. Furthermore, Sugianto conceded that it was SCM which had requested to take delivery earlier than the scheduled timings.[16] SCM submits that the email sent by Tan on 15 April 2013 stating the actual shipment dates for the units scheduled in weeks 14 to 16 shows that the RCP reporting was done based on Tan's instructions.[17] However, there was no

14 2AB at p 963.

15 1AB at p 390.

16 NE Day 1 at p 130.

indication that it contained instructions for RCP reporting. Tan testified that the information was to update Blackberry as to the length of delay from Singapore to Jakarta as a result of the new import regulation at that time and sent to SCM to keep it informed.

35 In addition, Sutrisna alleged that Utomo had verbally informed SCM that the May Price Protection would be calculated based on the RCP. However, there was no evidence indicating that Utomo had indeed done so, and Sutrisna agreed likewise.[18]

36 Lastly, SCM submits that the subsequent behaviour of BrightPoint was inconsistent with its position that the calculation of the price protection was based solely on actual invoiced sales. SCM referred to an email sent by Birch on Sutrisna on 14 June 2013 asking SCM to send a spreadsheet for the weeks 16 to 19 to facilitate BrightPoint's review of SCM's claim,[19] and an internal BrightPoint email dated 13 June 2013 sent by Williams to Birch suggesting that BrightPoint could offer an additional US$56,000 in response to SCM's claim.[20] SCM alleges that the fact that BrightPoint asked SCM for information regarding its claim and was considering an increase in the amount of price protection, instead of denying SCM's claim straightaway, shows that BrightPoint did not actually take the position that the calculation was based only on actual sales. I find this argument vacuous. The subsequent negotiations and the internal suggestion are not behaviour necessarily inconsistent with BrightPoint's position that only actual invoiced sales were eligible for price protection. These behaviours are consistent with the ongoing business relationship between the

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17 1AB at p 388.

18 NE Day 3 at p 57.

19 2AB at p 986.

20 2AB at p 963.

parties at that point in time and can be construed as friendly gestures on the part of BrightPoint to understand a sub-distributor's claim (*ie,* SCM's claim).

Accruals or funding from Blackberry

37 In the alternative, SCM alleges that BrightPoint has received funding from Blackberry or by way of an accrual fund for the price protection in the sum of US$300,000 or alternatively US$250,000. I find that whether this is true does not affect the substance of the May Price Protection as approved by Blackberry and announced by BrightPoint, and SCM's entitlement to the price protection.

Agreement of US$300,000 made on or about 11 September 2013

38 In the further alternative, SCM takes the position that there was an agreement made on or about 11 September 2013 between the parties for BrightPoint to pay US$300,000 to SCM. The source of the alleged agreement started with an email sent by Birch to SCM on 10 September 2013, following a meeting between them, to inform that BrightPoint had emailed Blackberry to request for approval of the outstanding credit notes owed to SCM and that BrightPoint would be discussing SCM's claims with Blackberry.[21] On the same day, Birch sent an email to Blackberry, seeking its review and support for the claims made by SCM, including a claim of US$300,000 for the May Price Protection.[22] The next day, Birch emailed SCM that following his meeting with Blackberry, US$300,000 for the price protection of Blackberry Bold models, *ie*, Blackberry 9900 and Blackberry 9790, would be paid. In reply, Sugianto thanked Birch for his support and asked to "ensure the credit notes promised [would] be timely credit [*sic*] back to [SCM]".[23]

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21 3AB at p 1510.

22 3AB at p 1513–1514.

23 3AB at p 1516.

39 SCM submits that there was no mention that the sum of US$300,000 was a goodwill payment or an offer to settle SCM's claim in full. SCM's position is that the agreement to pay US$300,000 for Blackberry 9900 and Blackberry 9790 was an agreement to pay that amount *simpliciter*, and not an offer of settlement.

40 BrightPoint, on the other hand, claims that the offer of US$300,000 was an offer made to settle SCM's claim in relation to the May Price Protection. The contention is therefore whether the offer from BrightPoint was an offer to pay without more, or an offer to settle SCM's claim in relation to the May Price Protection. I find that based on the background context in which the offer was made, the offer was an offer made to settle SCM's claim in full. The parties had been engaged in discussions regarding SCM's claim and offering US$300,000 was one move in the ongoing dispute as to the method of calculation of the price protection. In view of the background, the sum of US$300,000 was made as a goodwill sum in the hope of resolving the dispute. It made no commercial sense for BrightPoint to offer to pay US$300,000 without more and continue engaging SCM on the remainder of its US$813,912.60 claim. The tenor of the discussions between the parties was to settle SCM's claim fully. However, SCM in accepting the offer to settle, had in mind a different nature of the offer, *ie*, an offer to pay US$300,000 without more. There was thus no meeting of minds and no valid acceptance of the offer.

41 This finding is buttressed by Sokhal's email on the 25 November 2013 meeting (attended by Sugianto, Sutrisna, Utomo and Sokhal). He stated that SCM had claimed that Blackberry had agreed to pay a goodwill amount during a meeting between Blackberry and SCM (SCM claiming the amount to be US$300,000 while Utomo claiming the amount to be US$250,000), but SCM had "refused to even take the Goodwill [sum] and wanted to claim the full

amount".[24] Further, in an email sent internally within BrightPoint on 2 December 2013, Sokhal reported that Blackberry had offered US$250,000 as a goodwill sum and asked SCM to "forget the $813 claim as it was not correctly reported". He also reported that SCM agreed that it was offered the amount but claimed that it "never agreed" to the offer and wanted to get its "full money".[25] These contemporaneous emails show that the parties' understanding of the offer of US$300,000 was an offer to settle SCM's May Price Protection claim in full.

42 It is further supported by Sutrisna's agreement with Mr Yim, that the sum offered (*ie,* US$300,000) was to settle SCM's claim of US$813,912.60. Sutrisna also testified that there was no chaser sent to BrightPoint for US$300,000 because SCM wanted the full amount of US$813,912.60. Similarly, Sugianto testified that there was no agreement as to SCM's claim even as of 13 January 2014 because the parties were still engaged in discussions. Utomo, also a witness for SCM, similarly recalled that Blackberry offered US$250,000 as "goodwill payment" but that this would have to be approved by Blackberry's headquarters.[26]

43 In the light of my finding, there is no need to determine the issue of Birch's authority in making the offer to SCM. In any case, I find that Birch did have at least apparent authority to convey the offer to SCM. Apparent authority arises where the principal, by words or conduct, makes a representation to the other party that the agent has the requisite authority to act on his behalf (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R)

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24 4AB at pp 2240 and 2241.

25 4AB at p 2239.

26 NE Day 4 at p 18.

788 at [80]). It is notable that the email sent by Birch to SCM containing the offer was copied to Wong, who had the actual authority to make such an offer.[27] The previous email sent by Birch to SCM on 10 September 2013 informing SCM that he would be discussing SCM's claim with Blackberry was also copied to Wong. Moreover, it can be seen from the email that Birch was the one who had met SCM to discuss its claim and was going to meet Blackberry to discuss the same. There was no communication from Wong to SCM stating that the offer was invalid because Birch lacked the authority to make it. Taken together, these conduct are sufficient to constitute a representation to SCM that Birch had the requisite authority to make the offer. In any event, Wong testified that he had ratified the offer subsequently.

44 I decline to draw any adverse inference under s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) on the basis that BrightPoint did not call Birch as a witness to testify on the nature of the offer made and his authority, as urged by SCM. Even though Birch was the one who sent the email containing the offer to SCM, he was not the only person in BrightPoint apprised of the issues at that time. Wong was engaged in the discussions with SCM regarding its claim on the May Price Protection, and was copied in all the three emails sent on 10 and 11 September 2013 from Birch to SCM and from Birch to Blackberry.

The November Price Protection

The Condition

45 Although I agree with SCM that not all cases of price protection contained pick-up conditions, I find that SCM's entitlement to the November Price Protection was subject to the condition of fulfilling its obligations to pick up the Blackberry Q5 and Blackberry Q10 units it had ordered. The existence

[27] NE Day 5 at p 2.

of the condition and its contents are clear from the announcements made on the November Price Protection, the surrounding email correspondence, and the past practice between the parties.

46 The email announcement for the November Price Protection sent on 6 November 2013 stated that the price protection was "dependent upon future Payment & Pickup commitments".[28] Just based on this phasing alone, SCM has a point in arguing that the failure to specify the model to be picked up means that any model could be picked up, and the reference to "future" pick-up commitments referred to commitments SCM would enter into after the announcement and not before. However, the second email announcement on 8 November 2013 sets out that a "Pickup Plan [was] required before CN [could] be issued". A pick-up plan was a schedule that a sub-distributor such as SCM had to provide to BrightPoint in relation to the pick-ups of "open orders quantity", *ie*, units already ordered through POs. The pick-up plan referred to in the email sent on 8 November 2013 would necessarily refer to existing POs placed by SCM. Reading the two emails together, the condition did not refer to future commitments to be entered into by SCM. Rather, the word "future" referred to pick-ups by SCM in the future.

47 In relation to SCM's claim that the condition would be fulfilled by picking up any Blackberry model, the overall picture presented by the objective evidence and the testimonies of witnesses supports BrightPoint's position that the condition would only be fulfilled if the committed stocks were picked up. First, Utomo's testimony on the parties' past practice lends support to BrightPoint's position. He testified that though it was not always the case that a pick-up condition must refer to the Blackberry model that was the subject of the price protection, it was the starting position, and it was only if the model was

[28] 3AB at pp 1735 and 1736.

not available that another model would be offered by BrightPoint to fulfil the condition. Even though Utomo insistently refused to commit to the position that the starting point in the present case was that the pick-up commitments referred to Blackberry Q5 and Blackberry Q10, he testified that they "could" refer to Blackberry Q5 and Blackberry Q10, and that if the models were "not available, [the parties] could discuss other model as well".[29] Despite his refusal to commit to the position, the logical conclusion from his testimony is that since there was no indication that Blackberry Q5 or Blackberry Q10 units were unavailable at the material time, the pick-up obligation for the November Price Protection pertains to the committed units of Blackberry Q5 and Blackberry Q10.

48 Second, the surrounding email correspondence supports BrightPoint's position. In Sokhal's email report on the 25 November 2013 meeting (see [41] *supra*), it was stated that SCM was "not agreeing to pick up Q10 & Q5" and SCM said that it had "enough stocks and would like to pick some other models from this credit note".[30] This shows that BrightPoint had asked SCM to pick up the committed stocks but SCM did not want to and wanted to pick up another model instead. This was confirmed by Utomo. Further, there was no indication at the material time that SCM put forward its position that it was entitled to the November Price Protection because it had picked up Blackberry units, regardless of the model. When confronted with Sokhal's email report during cross-examination, Sutrisna claimed that SCM had verbally informed BrightPoint about its position during the meeting but he did not know why Sokhal did not put it down in his email report. This was plainly contradicted by the evidence of Utomo, also SCM's witness. Utomo testified clearly that SCM "never said" that it had already satisfied the condition attached to the November

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29 NE Day 4 at p 63.

30 4AB at p 2241.

Price Protection on the basis that it had already picked up Blackberry units of another model.[31]

49 Moreover, Sokhal's email to SCM on 9 January 2014 stated unequivocally that as per the meeting SCM had with Wong on 20 December 2013 ("the 20 December 2013 meeting"), Wong "had made it clear that SCM did not pick the committed stocks, so IMM [would] not be able to process any PP [*ie*, price protection] credit notes for those models".[32] This email was in response to SCM's proposition to offset the amount of money it owed to BrightPoint with the November Price Protection. When questioned about this email, Sutrisna conceded that Wong did make it clear during the meeting on 20 December 2013 that if SCM did not pick up the committed stocks, there would be no price protection. Sugianto also agreed in cross-examination that Wong did state during the meeting that SCM must pick up its committed stocks. Sugianto further conceded that SCM did not put its position across to BrightPoint and Blackberry. While SCM did offer to pick up another model to fulfil the condition during the 20 December meeting (and was rejected), an offer to pick up another model is different from an insistence that the condition was fulfilled by picking up any model.

50 In addition, none of the reasons SCM provided for its refusal to pick up Blackberry Q10 units touched on its position that the condition need not be fulfilled by picking up the committed stocks: SCM had expressed its concerns about the slow sale, the loss made on sales due to exchange rates, and the large stocks of Blackberry Q10.[33] The lack of any documentary evidence and the insistence on the existence of verbal communication rob SCM's position of

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31 NE Day 4 at pp 73–74.

32 4AB at p 2424.

33 3AB at pp 1576 and 1577.

credibility. The position that SCM takes, even if it had been taken during the material times, was only held subjectively and never communicated to BrightPoint. The objective email evidence shows that the objective understanding of the parties was that SCM was not entitled to the November Price Protection because it did not pick up the committed stocks.

51 On the other hand, Mr Selvam highlights that BrightPoint did not document its position prior to the 20 December 2013 meeting that SCM was not entitled to the November Price Protection because of the non-fulfilment of the condition. On the contrary, as claimed by Sugianto, BrightPoint had promised during or around the 25 November 2013 meeting that the November Price Protection would be paid to SCM. BrightPoint had told SCM that the price protection would be paid once Blackberry processed the credit note. In the email report on the 25 November 2013 meeting, Sokhal stated that IMM had told SCM that the credit notes had been sent to Blackberry "for processing" and that SCM would revert once the approval was obtained.[34] In addition, in the internal email dated 2 December 2013 sent by Sokhal to Wong, it was stated that BrightPoint had informed SCM that the November Price Protection had been sent to Blackberry for approval and that SCM would get it once Blackberry approved.[35] Sokhal similarly told SCM in his email dated 10 December 2013 that the price protection had been sent to Blackberry for processing and would be issued only when BrightPoint received the credit notes from Blackberry.[36] There was also no mention of the non-fulfilment of the condition. In reply, Sugianto expressed impatience at the delay, stating that it had been two weeks since the promise to send the credit notes to Blackberry for processing.

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34 4AB at p 2241.

35 4AB at p 2240.

36 4AB at p 2274.

52 Mr Selvam submits that it can be concluded from the evidence that the condition alleged by BrightPoint was only first communicated to SCM during the 20 December 2013 meeting. Moreover, there was no document from Blackberry to say that SCM's claim for the November Price Protection was rejected due to non-fulfilment of the condition, unlike the email dated 21 November 2013 from Mastrioanni rejecting SCM's claim for the May Price Protection (see [28] *supra*). Mr Selvam's arguments can be addressed by turning to the testimonies of the witnesses for SCM. None of the witnesses took the position that the 20 December 2013 meeting was the first time BrightPoint stated the condition to be pick-ups of the committed stocks. Moreover, the lack of any contention in SCM's reply to Sokhal's email dated 9 January 2014 as to the meaning of the condition and its entitlement to the price protection on the basis that it had picked up other Blackberry models speaks volumes. Had SCM held the view that it had fulfilled the condition because the condition meant pick-up of any model, it would be reasonable to expect SCM to state its position in reply to Sokhal. Instead, Sugianto merely replied SCM requesting for another meeting to settle all outstanding issues, including the November Price Protection.[37] Although the email correspondence from BrightPoint prior to 20 December 2013 and from Blackberry did not state that there was non-fulfilment of the condition imposed, I find that the entire picture painted by the objective documentary evidence shows that the parties were *ad idem* that the condition meant SCM had to pick up the committed stocks to obtain the November Price Protection.

53 Mr Selvam further submits that weight should be placed on the differences in the ways the conditions to the February Price Protection, the May Price Protection and the November Price Protection were phrased. The February

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37 4AB at p 2277.

Price Protection was subject to mandatory pick-up of the models that were the subjects of the price protection, and the quantities and the pick-up schedule were set out in the same email.[38] The May Price Protection stated that price protection would be afforded after "all purchase order payment & pickup commitments to IMM [had] been completed".[39] Mr Selvam argues that in contrast to the specific models and quantities specified in the February Price Protection, and in contrast to the reference to PO pick-up commitments in the May Price Protection, the condition to the November Price Protection only referred vaguely to "future Payment & Pickup commitments" and a pick-up plan. He concludes from this that the November Price Protection did not require SCM to pick up specifically Blackberry Q5 and Blackberry Q10 models. Mr Selvam also draws attention to the different phrasings of the conditions to the November Price Protection addressed to other sub-distributors, such as Erajaya. In the price protection announcement to Erajaya, it was stated that "50% [would] be issued and [could] be used for Pickup; the balance 50% [would] be issued upon completion of [Blackberry] Q5 Pickup" and "completion of [Blackberry] Q10 Pickup" respectively.[40] Mr Selvam points out that the models to be picked up to satisfy the price protection condition was specified for Erajaya, but not for SCM.

54 Wong testified that because there was no definite pick-up schedule agreed between the parties as to Blackberry Q5 and Blackberry Q10 at the material time after multiple rounds of email correspondence, a table detailing the quantities to be picked up similar to the one in the February Price Protection would not have been viable. Despite that, he agreed that the quantities and the specific models "could have" been set out in the November Price Protection. He conceded that BrightPoint did not specify all the details, and that BrightPoint

38 1AB at p 195.

39 1AB at p 554.

40 4AB at p 2116.

could have written a better email. The reason for not specifying all the details, according to Wong, was that the parties were clear as to what the issue was, and what models and what quantities were to be picked up by SCM to fulfil the condition. Even if the email announcements were unclear, Wong asserted that the condition was made clear in subsequent conversations. In the light of all the circumstances I have considered above, I find that the absence of some details in the November Price Protection and the differences in phrasing of the conditions to the February and May Price Protections and the condition addressed to Erjaya are not of such significance as to be capable of proving SCM's case on a balance of probabilities.

55 Thirdly, the background context in which the November Price Protection was announced supports BrightPoint's position. BrightPoint had been reminding SCM to pick up the remaining units of Blackberry Q10 in September 2013, before SCM declared on 25 September 2013 that it would withhold pick-ups for *inter alia* Blackberry Q5 and Blackberry Q10.[41] The question of pick-ups of Blackberry Q5 and Blackberry Q10 was already a live issue between the parties when the November Price Protection was announced; seen in this context, it was likely that the condition imposed referred to pick-ups of the committed stocks. The disputed issue continued after the announcement of the November Price Protection, resulting in various meetings between the parties, including the 25 November 2013 meeting and the 20 December 2013 meeting. During the latter meeting, Wong had made it clear that since SCM did not pick up the committed stocks, BrightPoint would not be able to process any price protection credit notes for the price protection (see [49] *supra*).

56 I also find that the November Price Protection including its condition was announced with the approval of Blackberry. In the first draft announcement

[41] 3AB at p 1582.

on the price protection sent by BrightPoint to Blackberry, the only condition imposed was for BrightPoint to have received funds from Blackberry.[42] The draft was edited after a phone call between Blackberry and BrightPoint, and the second draft announcement sent by BrightPoint to Blackberry contained the condition that the price protection was "dependent upon Payment & Pickup".[43] Following that, Wong told Williams, with Blackberry copied, to specify that the price protection was subject to "SCM future pickups and payments".[44] The actual announcement was sent out to SCM on the same day, also with Blackberry copied, in which the condition stated was "dependent upon future Payment & Pickup commitments". It was clear from the evidence that the November Price Protection with its condition as contained in the announcement was approved by Blackberry. Utomo, witness for SCM, testified so, and Sugianto similarly conceded that the condition was worked out between Blackberry and BrightPoint, and Blackberry had agreed to the condition.

57 Although Blackberry subsequently provided the amount of price protection to BrightPoint, the condition to the November Price Protection was not varied by BrightPoint. Neither is there any evidence to show that Blackberry had told BrightPoint to remove the condition and give the amount of price protection to SCM. Thus, the fact that the funds were given to BrightPoint is inconsequential to whether SCM is entitled to the same.

Whether SCM had obligations to pick up the committed stocks

58 Sutrisna agreed that SCM was supposed to pick up Blackberry Q5 according to the pick-up plan SCM had agreed to. This was the revised pick-up

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42 3AB at p 1712.

43 3AB at pp 1717 and 1725.

44 3AB at p 1730.

plan that SCM had sent to BrightPoint on 23 September on the basis of BrightPoint's original pick-up proposal. The revised pickup plan provided for the pick-up of 22,310 units of Blackberry Q5 from week 38 (15 to 21 September 2013) to week 45.[45] SCM only picked up 7200 units in week 38 according to the plan and failed to pick up the rest. Nevertheless, SCM claims that it had no obligation and no existing commitment to take delivery of the committed stocks because the delivery dates stated on the POs had passed.

59 Pursuant to the Purchase Order Clause (see [6] *supra*), a PO placed by SCM was subject to approval of credit by BrightPoint and acceptance in writing by BrightPoint. Once the PO was confirmed by BrightPoint, it shall not be changed, rescheduled, or cancelled by SCM within 30 days before the scheduled shipping date unless otherwise agreed by the Parties. This means that a binding contract was formed upon the acceptance and confirmation of the PO by BrightPoint, subject to any changes, rescheduling, or cancellation made by SCM before 30 days from the scheduled shipping date. No changes, rescheduling or cancellation could be made within 30 days before the scheduled shipping date. Absent any changes, rescheduling or cancellation, the PO was binding and SCM would have the obligation to pick up its orders in the PO even after the delivery date stated in the PO had passed. This is in line with the relationship between BrightPoint and its sub-distributors – BrightPoint would take orders from them and place the orders with Blackberry, and then arrange the shipment of those stocks to its sub-distributors after receiving the stocks from Blackberry. Thus, BrightPoint was not in a position to hold the stocks ordered by its sub-distributors.

60 It is not disputed that the POs in relation to Blackberry Q5 and Blackberry Q10 were accepted by BrightPoint. On 9 July 2013, SCM attempted

[45] 3AB at p 1579.

to cancel 8670 units of Blackberry Q10 from the shipment scheduled for week 31 (28 July 2013 to 3 August 2013), and 8510 units for which delivery dates were to be confirmed.[46] It could not have unilaterally cancelled the 8670 units scheduled for delivery week 31 since the request to cancel was not issued before 30 days from the scheduled shipping date. In any case, BrightPoint agreed to cancel 11,600 units of Blackberry Q10 on 23 July 2013 from the PO with the delivery date stated as 3 June 2013. As for Blackberry Q5, 8320 units from the PO with the delivery date stated as 8 July 2013 (or 22 July 2013 as counter-proposed by BrightPoint)[47] were also cancelled on 23 July 2013.[48] There were no further cancellations nor changes, thus SCM had the obligation to take delivery of the committed stocks.

Whether the time of delivery was of the essence

61 Nevertheless, SCM argues that its obligations to take delivery ended with the lapse of the delivery dates stated in the POs, because time of delivery was of the essence, given that the Sub-Distributor Agreement was a sale of goods contract. This would mean that a failure to deliver by the delivery dates stated in the POs would constitute a repudiatory breach, for which SCM could accept to terminate the POs. In submitting that the time was of the essence, SCM relies on *Himatsing & Co v Joitaram P R* [1968-1970] SLR(R) 766 ("*Himatsing*"), which was approved in *LED Linear (Asia) Pte Ltd v Krislite Pte Ltd* [2017] SGHC 150 ("*LED Linear*") at [134], and *Bunge Corporation, New York v Tradax Export SA, Panama* [1981] 1 WLR 711 ("*Bunge*"). On the other hand, BrightPoint takes the position that there is no presumption that time of delivery is of the essence in a sale of goods contract, and that time of delivery

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46 2AB at pp 1137–1139.

47 1AB at p 546.

48 2AB at p 1262.

was not of the essence in the Sub-Distributor Agreement. In this regard, BrightPoint relies on *Tian Teck Construction Pte Ltd v Exklusiv Auto Pte Ltd* [1992] 1 SLR(R) 948 ("*Tian Teck Construction*").

62 On the surface, it seems that SCM and BrightPoint have presented two opposing strands of cases, but an analysis of the case law shows a coherent picture in the law as to whether stipulations as to time in mercantile contracts and sale of goods contracts are construed to be of the essence, *ie*, as conditions. The starting point to determine whether time is of the essence in a sale of goods contract is s 10(2) of the Sale of Goods Act (Cap 393, 1999 Rev Ed), which states:

> Whether any other stipulation as to time [*ie*, stipulations other than time of payment] is or is not the essence of the contract depends on the terms of the contract.

63 Turning to the cases cited by SCM, the Court of Appeal in *Himatsing* followed *Hartley v Hymans* [1920] 3 KB 475 ("*Hartley*") at 483 that the common law "looked rather to the nature of the contract and the character of the goods dealt with", and in "ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery". The Court of Appeal held that the time of delivery was of the essence in that case, which concerned an ordinary commercial contract for the sale of goods, because the party asserting that time was not of the essence had failed to prove so (at [13] and [14]). Tan Lee Meng SJ in *LED Linear* (at [134]) repeated the position stated in *Himatsing* at [13] that "in most mercantile transactions, as regards stipulations other than those relating to time of payment, time is of the essence of the contract". Tan SJ held that following *Himatsing*, the term in the contract stipulating the time of delivery of goods was a condition.

64 As to the cases cited by BrightPoint, the Court of Appeal in *Tian Teck*

Construction (at [15] and [16]) cited with approval Lord Fraser in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 958 ("*United Scientific*") in holding that time will not be considered to be of the essence unless (a) the parties expressly stipulate that conditions as to time must be strictly complied with, or (b) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or (c) a party who has been subject to unreasonable delay gives notice to the party in default making time of the essence. The origin of this position is found in *Halsbury's Laws of England* vol 9(1) (Butterworths, 4th Ed, 1998 Reissue) ("*Halsbury's 1998 Reissue*") at para 931. *Teo Teo Lee v Ong Swee Lan and others* [2002] 2 SLR(R) 760 ("*Teo Teo Lee*") followed *Tian Teck Construction*, and the court went on to cite para 932 of *Halsbury's 1998 Reissue* as to what circumstances would make time of the essence (at [23]). The paragraph is as follows:

> *Whilst the time of performance will not ordinarily be considered to be of the essence, it will readily be so construed in a 'mercantile contract'.* For example, time will be considered of the essence in stipulations specifying a fixed date for performance in such a way as to show that the date was essential, such as in a sale of goods, or of shares, or in a charterparty. Generally, time will be considered of the essence in other cases where the nature of the contract or of the subject matter or of the circumstances of the case require precise compliance. However, although *stipulations as to the time for delivery of goods are considered essential unless a contrary intention is shown*, stipulations as to time for payment in contracts for the sale of goods are not deemed to be of the essence unless a different intention appears.
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> [emphasis added]

65 The contract central to *Tian Teck Construction* was on the sale and purchase of a property, and the court considered a term which entitled the purchaser of the property to, "by notice in writing served on the vendor within seven (7) days of receipt of such replies, rescind this agreement" in the event

that the replies from legal requisitions were not satisfactory (at [2]). The court treated the absence of a time frame for resolution of the substantive issue of the satisfactoriness of the replies in the clause to be a sufficiently strong indication that the parties did not intend the period of seven days to rescind to be of the essence. The court concluded that as a matter of construction having regard to the interrelation of the clause and the other clauses, as well as the surrounding circumstances, the parties did not intend the time stipulated in the clause to be of the essence (at [28]). *Teo Teo Lee* concerned a lease contract and the issue was whether time was of the essence in relation to the signing of the tenancy agreement. There was no express stipulation that time was to be of the essence, and the court held that there were no circumstances to justify a finding that time was intended to be of the essence (at [31]). In arriving at the decisions, the courts in both *Tian Teck Construction* and *Teo Teo Lee* undertook a construction of the relevant clauses.

66 *Himatsing*, *Hartley* and *LED Linear* on one hand suggest that there is a presumption that time is of the essence in mercantile contracts, *ie*, that time is *prima facie* of the essence. On the other hand, *Tian Teck Construction* and *Teo Teo Lee* seems to suggest that there is no such presumption or *prima facie* position. It is apposite at this juncture to consider the Court of Appeal's decision in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*"), which considered the relevant factors in ascertaining whether or not a given contractual term is a condition in contracts generally (at [159]–[174]). Taking an Archimedean point, the Court of Appeal held that "there is no magical formula" and at bottom, "*the focus is on ascertaining the intention of the contracting parties themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole*" (at [160] and [161]). Out of the four factors that the

Court of Appeal set out to determine the nature of a contractual term, the relevant ones for the purposes of the present case are the availability of a prior precedent (at [171]–[172]) and mercantile transactions (at [173]). With regard to the availability of a prior precedent, the court cautioned that there still needs to be an inquiry as to whether or not the analysis and reasoning in the prior precedent passed muster in principle. The court opined that the factor of mercantile transactions "centres on the importance placed on *certainty and predictability*", and stated that case law "suggests that courts are more likely to classify contractual terms as conditions in this particular context, especially where they relate to timing". On the facts of *Man International*, none of the four factors applied, and the court held that a construction of the entire contract, including the term in question, showed that the clause providing for non-solicitation and non-competition for a period of seven months was a condition (at [191]).

67 Keeping the broad picture in mind, I turn to consider other cases specifically on the question of whether time stipulations are conditions in the context of mercantile contracts. In *Addictive Circuits (S) Pte Ltd v Wearnes Automation Pte Ltd* [1991] 2 SLR(R) 246 ("*Addictive Circuits*"), Lai Siu Chiu JC (as she then was) placed emphasis on the defendant's objections and protests against the plaintiffs' earlier attempts to reschedule the delivery of the goods to a later date in finding that the time of delivery was the essence of the contract (at [29]). In arriving at the finding, Lai JC did not seek to invoke any presumption or *prima facie* position that the term as to the delivery schedule was a condition because the contract was mercantile in nature.

68 In *United Scientific*, which was cited in *Tian Teck Construction*, the House of Lords had to consider whether clauses providing for annual rents to be reviewed at fixed intervals during the terms of leases are conditions. Lord

Diplock held at 930 that "in the absence of any contra-indications in the express words of the lease or in the interrelation of the rent review clause itself and other clauses or in the surrounding circumstances the presumption is that the time-table specified in a rent review clause for completion of the various steps for determining the rent payable in respect of the period following the review date is not of the essence of the contract". Similarly, Lord Fraser, although stating that "it is not possible … to state any rule as to the effect of stipulations as to time that will apply to all such clauses [*ie*, rent review clauses]", nevertheless went on to hold that "stipulations as to time [in rent review clauses] ought not to be strictly enforced unless there is something in a particular clause to indicate that time is of the essence in that case" because "the substance of a review clause is … to provide machinery for ascertaining the market rent from time to time … rather than to confer a benefit on the landlord" (at 957 and 959). In *obiter dicta*, Lord Diplock also stated that in "commercial contracts for the sale of goods prima facie a stipulated time of delivery is of the essence" (at 924).

69 In *Bunge*, the stipulation in question concerned the buyers' obligation to give at least 15 consecutive days' notice of probable readiness of the vessel(s) before the delivery of soya bean meal by the seller. The House of Lords held unanimously that the term was a condition of the contract. Lord Roskill, in giving his reasoning which the others agreed with, held at 728 that the appellants rightly made the concession that the doctrine set out by Lord Diplock in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 – that stipulations of time were *not* regarded as conditions if the failure to abide by the stipulations did not deprive the other party of substantially the whole benefit – did *not* apply in three classes of cases of which the second was "where the courts may infer from the nature of the contract or the surrounding circumstances that the parties regard time stipulations as of the essence of their bargains: mercantile contracts…". Although Lord Roskill expressed

reservations on whether any help is necessarily to be derived in determining whether a particular term is to be construed as a condition by attaching a particular label to the contract, "the need for certainty in mercantile contracts is often of great importance and sometimes may well be a determining factor in deciding the true construction of a particular term in such a contract" (at 729). On the facts, Lord Roskill held that in a mercantile contract when the performance of a party is a condition precedent to the ability of the other party to perform another obligation, especially an essential one, the term as to time for the performance of the former obligation will in general fall to be treated as a condition (at 729).

70 In the same case, Lord Wilberforce held that as to a time clause, "the questions which have to be asked are, first, what importance have the parties expressly ascribed to this consequence, and secondly, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole" (at 715). The court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties, and broadly speaking, time will be considered of the essence in mercantile contracts. He went further to hold that the term in question fell within the principles cited and was a condition, most especially because the ability of the seller to fulfil its obligation might well be totally dependent on punctual performance by the buyer (at 716). Lord Lowry opined that "the treatment of time limits as conditions in mercantile contracts does not appear to me to be justifiable by any presumption of fact or rule of law, but rather to be a practical expedient founded on and dictated by the experience of businessmen" (at 719). Lord Lowry held that the circumstances peculiar to the particular contract and other similar contracts, including the enormous practical advantages in certainty especially with regard to the prevalence of string contracts, pointed in favour of the term in question being a condition (at

720–721). The sentiments and holdings of Lord Wilberforce and Lord Lowry have been echoed in *Samarenko v Dawn Hill House Ltd* [2013] Ch 36 at [9]–[11].

71 There has also been ample commentary on the issue. *Halsbury's Laws of Singapore* vol 5(2) (LexisNexis, 2014) at para 60.126 sets out the law as follows:

> In commercial contracts for the sale of goods, the *presumption* at common law is that *time is of the essence* of the contract with regards to, for instance, time of shipment, *delivery of goods* and giving of notices, which are usually treated as conditions, unless the circumstances indicate otherwise.
>
> [emphasis added]

Similarly, Bridge stated in Michael Bridge, *The Sale of Goods* (Oxford University Press, 2nd Ed, 2009) at para 6.25 that the cases decided since the sale of goods was first codified in England have generally held that timely delivery is of the essence of the contract in commercial cases. However, *Benjamin's Sale of Goods* (Sweet & Maxwell, 9th Ed, 2014) ("*Benjamin's Sale of Goods*") states at para 8-025 that there is "no presumption or rule of law that stipulations as to time of delivery are of the essence of a contract of sale of goods", but "in commercial contracts, they are frequently so construed, even though this is not expressly stated in the words of the contract" (citing *inter alia*, *Bunge*).

72 The editors of *Chitty on Contracts* (Sweet & Maxwell, 32nd Ed, 2015) have set out at para 21-013 three scenarios where time is of the essence, of which the second is pertinent to the present case: where "the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with, e.g. the purchase of a leasehold house required for immediate occupation …; 'mercantile contracts', such as a contract for the sale of goods where a time is fixed for delivery". However, the editors cautioned

that "the mere fact that the contract can be labelled 'mercantile' or 'commercial' does not determine the issue" and whether "a time limit is of the essence of a contractual provision is a question of interpretation of the provision in the context of the contract as a whole". "The question is whether the time specified in the particular clause was (expressly or by necessary implication) intended by the parties to be essential." Further, at para 44-128, the editors stated that as to delivery, "it has been said that 'in ordinary commercial contracts for the sale of goods the rule clearly is that time is prima facie of the essence with respect to delivery', although there is no presumption or rule of law to that effect and the question ultimately depends on the terms of the contract and the nature of the goods".

73 In my opinion, the passages from the two paragraphs in *Halsbury's 1998 Reissue* (which have been reproduced in *Halsbury's Laws of England* vol 22 (LexisNexis, 5th Ed, 2012) at paras 502 and 503) that have been approved in *Teo Teo Lee* set out the law correctly. The starting point in all contracts is that time is of the essence in three classes of cases: where (a) the parties expressly stipulate that conditions as to time must be strictly complied with, or (b) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or (c) a party who has been subject to unreasonable delay gives notice to the party in default making time of the essence. This analysis is in line with ascertaining the intention of the contracting parties in the light of the surrounding circumstances as a whole (*Man Financial* at [161]).

74 An important factor that needs to be considered in the second class is whether the contract is mercantile in nature (*Halsbury's 1998 Reissue* at para 932; *Man Financial* at [173]). Determining whether the contract is mercantile is not the end of the enquiry, for not all stipulations of time in mercantile

contracts are conditions. For example, a stipulation as to the time of payment is not of the essence of the contract of sale unless a different intention appears from the terms of the contract (s 10(1) of the Sale of Goods Act). The differences in the nature of the time stipulations in *Himatsing*, *Hartley*, *LED Linear*, *Addictive Circuits*, *Tian Teck Construction*, *Teo Teo Lee*, *United Scientific*, and *Bunge* may explain the differences in the courts' approaches in ascertaining whether the time in the stipulations is of the essence. *Himatsing*, *Hartley*, *LED Linear* and *Addictive Circuits* concern stipulations of time of delivery in sale of goods contracts, *Bunge* concerns the time of notice in a sale of goods contract, while *Tian Teck Construction*, *Teo Teo Lee* and *United Scientific* concern contracts dealing with property. The courts in the first group of cases (as well as Lord Diplock's *obiter dicta* in *United Scientific*) started with the position that time of delivery in sales of goods contracts is of the essence. *Addictive Circuits*, an outlier in the first group of cases, and *Bunge* proceeded with a construction of the clauses in question. In the group of cases on contracts dealing with property, the courts approached the issue of timing from a matter of construction without any starting point as to whether the clauses are usually conditions. In *United Scientific*, after undertaking the exercise of construction, Lord Diplock and Lord Lowry set the starting point that rent review clauses are not conditions.

75 The approach to determining whether time is of the essence depends on both the type of clause and the type of contract. I agree with Lord Lowry's opinion that the treatment of time as conditions in mercantile contracts is not based on any presumption of fact or rule of law, but is a practical expedient founded on and dictated by the experience of businessmen. To that, I would add that the importance placed on certainty and predictability in relation to the primary obligation of delivery in mercantile contracts is a significant factor pointing towards timing of delivery being of the essence. There is no

presumption of fact or rule of law in that there is no reversal of the burden of proof. The party asserting that time of delivery is of the essence still has to prove so, and this is supported by s 10(2) of the Sale of Goods Act, which provides that whether a stipulation of time is of the essence depends on the terms of the contract. Moreover, there is no statutory stipulation with regard to the timing of delivery, unlike s 10(1) of the Sale of Goods Act with regard to the timing of payments. That said, based on the long-standing body of established case law and the importance placed on certainty and predictability in business dealings, the time of delivery of goods in a mercantile contract is generally taken to be of the essence. The references to a presumption or a *prima facie* position in the cases and commentaries should be taken to refer to a starting point that time of delivery in mercantile contracts is of the essence, rather than a presumption of fact or a rule of law that reverses the burden of proof.

76 On the facts of the present case, there is at the outset no express stipulation in the Sub-Distributor Agreement or in the POs that the time of delivery was of the essence. The Sub-Distributor Agreement was a mercantile contract so the starting point is that the time of delivery is of the essence. However, the surrounding circumstances show otherwise. It cannot be of the essence because the understanding of the parties was that the delivery dates stated on the POs were subject to change. Both Blackberry Q5 and Blackberry Q10 were new product introduction ("NPI"), meaning that the order quantities and the tentative wanted delivery date ("WDD") were subject to change, and this was stated in the confirmation emails sent by BrightPoint.[49] Both Sugianto and Sutrisna agreed as to the same.[50] In the light of his concession that the delivery dates were subject to change, Sugianto's evidence that the mobile

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49 1AB at p 223.

50 NE Day 2 at p 12 and Day 3 at p 95.

phone industry is a time-sensitive industry does not bear weight. Given the understanding that the delivery dates were not final and confirmed, it cannot be the case that the time of delivery of Blackberry Q5 and Blackberry Q10 was of the essence.

Whether the parties took the position that the pick-up obligation lapsed after the delivery dates in any case

77 When confronted with his own testimony that the delivery dates were subject to change, Sutrisna insisted that the dates stated on the POs were nevertheless the decisive marker of SCM's pick-up obligation.[51] SCM takes the position that deliveries had to be mutually agreed after the delivery dates stated on the POs had passed. I find this to be untenable for the reasons below.

78 First, SCM did not point out any agreement between the parties or any contractual clause in the Sub-Distributor Agreement for this position; nor is there any. Second, there were no emails, no minutes, and no notes indicating that SCM had complained about the inability of BrightPoint to deliver by the delivery dates stated in the POs and had insisted on BrightPoint complying with the delivery dates. Sutrisna agreed during his cross-examination that there was no such evidence, and that SCM did not give notice to BrightPoint stating that the delivery dates had passed and that SCM would cancel the orders if the Blackberry units were not delivered within a certain number of days. Sutrisna claimed that there was a verbal complaint which was not documented, but this is a bare assertion with no objective support. Similarly, there was no indication in the evidence that SCM had refused to pick up the committed stocks because it believed that it had no more obligation to do so after the delivery dates. In SCM's emails to BrightPoint explaining its concerns regarding Blackberry Q10,

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[51] NE Day 3 at p 103.

none of the reasons it provided for its refusal to pick up touched on the passing of the delivery dates (see [49] *supra*). In the absence of any indication in the contemporaneous evidence of SCM's current position, it seems to be an afterthought made up to negate its pick-up obligations.

79 Third, the formal cancellation of 11,600 units of Blackberry Q10 and 8320 units of Blackberry Q5 on 23 July 2013 reveals that the parties were of the understanding that SCM did have the obligation to pick up the committed stocks even after the delivery dates of 3 June 2013 and 8 July 2013[52] (or 22 July 2013, which was the WDD proposed by BrightPoint) in the relevant POs respectively had passed.[53] There is dispute between the parties as to which of them had requested this cancellation, but that dispute does not impinge on the main point that there was a formal PO cancellation, as requested by BrightPoint and provided by SCM. There was no indication on either side, especially on the part of SCM, that there was no need for a formal cancellation because SCM did not even have the obligation to pick up in the first place on the basis that the delivery dates had passed. The conduct of the parties in requesting a cancellation and willingly providing a formal cancellation shows that they believed it was necessary, or in any event, did not think it was superfluous. SCM's understanding at that point in time is further illustrated by an earlier email sent by Sugianto to BrightPoint on 9 July 2013, cancelling 17,180 units of Blackberry Q10.[54] This was after the delivery dates (27 May 2013 and 3 June 2013),[55] and shows SCM's understanding that it had an obligation to take delivery which it wanted to be freed of.

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52 1AB at pp 346 and 543.

53 2AB at p 1262.

54 2AB at pp 1137–1139.

55 1AB at pp 230, and 346.

80 Mr Selvam points out that the language used in an email sent by Birch on 20 September 2013 regarding SCM's pick-up obligations suggests that BrightPoint was seeking a commitment from SCM rather than reminding SCM of its existing obligations. In that email, it was stated that BrightPoint "wanted to gain [SCM's] feedback and hopeful commitment" and that IMM "request[ed]" for SCM to make full payment and pick up the outstanding units of Blackberry Q10.[56] Caution has to be exercised when relying on the choice of words and phrasings to determine a party's intentions, because there may be various reasons behind the choice. In the same email, Birch also highlighted that SCM had "previously placed orders for Q10 product and at present there [were] still 17,630 units remaining awaiting pick-up". In the email sent by Tan on the same day, she set out the pick-up details and stated "SCM make full pick-up & payment".[57] In the light of Birch's express reminder as to the remaining units SCM had to pick up and Tan's email, it is difficult for SCM to rely simply on certain phrases in Birch's email to support its assertion that BrightPoint did not think SCM had an existing obligation to pick up the remaining units of Blackberry Q10. The choice of words and manner of phrasing was probably tempered in view of the ongoing business relationship between the parties at that time.

81 SCM submits that the label of NPI does not mean that SCM had to take delivery of the NPI product at any date or quantity decided by BrightPoint when BrightPoint was unable to meet the delivery dates specified in the POs. This position is misconceived. The obligation to take delivery of the goods specified in the POs does not stem from the fact that the Blackberry model is a NPI, but from the Purchase Order Clause (see [59] *supra*).

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56 3AB at pp 1586 and 1587.

57 3AB at p 1586.

Agreement to pay the November Price Protection made on or about 25 November 2013

82 Sutrisna's evidence was that Sokhal had promised to pay the November Price Protection during the 25 November 2013 meeting. Upon clarification by Mr Yim, Sutrisna agreed that Sokhal had promised him verbally that BrightPoint would pay SCM the November Price Protection after Blackberry processed and approved it. This is consistent with Sokhal's email report on the 25 November 2013 meeting, where he reported that IMM told SCM that "the credit note [had] been sent to [Blackberry] for processing and [it would] revert once [it got] the same approved".[58] Similarly by email dated 10 December 2013, Sokhal informed SCM the November Price Protection had been "sent to [Blackberry] for processing" and would "be issued only when IMM [got] the credit notes from [Blackberry]".[59] Importantly, Sugianto conceded that these communications from BrightPoint were "some sort of public relations talk" because ultimately Mastroianni from Blackberry had the last say and he told SCM that he could not promise a favourable result.[60] Sugianto conceded as well that BrightPoint "had no agreement" with SCM.[61]

83 Although Blackberry did provide the relevant funds to BrightPoint, I find that the understanding between the parties at all material times was that the pick-up of the committed stocks was the pre-requite to obtain the November Price Protection. The continued understanding is evidenced through their correspondence, especially by the email sent from Sokhal to SCM on 9 January 2014 stating it was made clear that SCM needed to pick up its committed stocks and the subsequent lack of contention in the email reply from SCM. There was

58 4AB at pp 2240–2241.

59 4AB at p 2274.

60 4AB at p 2430.

61 NE Day 2 at pp 89–90.

also no change to the condition of the November Price Protection. In the light of my finding, there is no need to deal with the issue of Sokhal's authority to enter into the agreement alleged by SCM.

Conclusion on SCM's claims

84 For all the reasons stated above, (a) SCM's claim for the May Price Protection in the sum of US$544,720, and its fall back claim of either US$300,000 or US$250,000 fail, and (b) SCM's claim for the November Price Protection in the sum of US$1,659,285 and its fall back claim of the alleged agreement to pay US$1,659,285 also fail.

Decision on BrightPoint's counterclaims

85 It is not disputed that 15,680 units of Blackberry 9720, and 4200 units of Blackberry 9900 were not picked up by SCM. However, SCM submits that it had no obligation to pick up the units because BrightPoint did not manage to deliver by the delivery dates stated in the POs. The delivery dates stated in the PO for Blackberry 9720 were week 39 (22 to 28 September 2013), week 41 (6 to 12 October 2013), and week 43 (20 to 26 October 2013)[62] and the delivery dates stated in the two POs for Blackberry 9900 were 1 July 2013 and 8 July 2013.[63] SCM takes the position that any pick-up after the lapse of the delivery dates was at the subsequent mutual agreement of both parties; absent such agreement, SCM did not have to pick up any units. SCM further advances the following in support of its position that BrightPoint is not entitled to the damages it claims: (a) BrightPoint has not proved that the units of Blackberry 9720 and Blackberry 9900 it sold to third parties were the exact units allocated to SCM; (b) there is a pre-condition in law that the seller must give notice to the

62 2AB at p 1276.

63 1AB at pp 519, and 548.

buyer before re-selling the goods but BrightPoint failed to do so; (c) in relation to Blackberry 9900, BrightPoint did not accept SCM's offer to buy the units at US$260 per unit.

86 SCM had an obligation to take delivery of the units specified in a PO after it was accepted and confirmed by BrightPoint, pursuant to the Purchase Order Clause (see [59] *supra*). On the facts, it is not disputed that the POs in relation to Blackberry 9720 and Blackberry 9900 were approved and confirmed by BrightPoint. Therefore, the POs were binding, subject to any changes, rescheduling or cancellation before 30 days from the scheduled shipping date, and any changes agreed upon mutually. Since these qualifications do not apply to the remaining 15,680 units of Blackberry 9720 and the 4200 units of Blackberry 9900, SCM has the obligation to take delivery of them.

87 SCM submits that because time of delivery was of the essence in relation to both Blackberry 9720 and Blackberry 9900, even if there were binding obligations formed upon confirmation of the POs by BrightPoint, SCM could treat them as repudiated after the delivery dates stated in the POs and terminate the POs.

88 I find that time of delivery was not of the essence for both Blackberry 9720 and Blackberry 9900. First, there is no express stipulation in the Sub-Distributor Agreement or the POs that time of delivery was of the essence. Second, the surrounding circumstances show that time was not considered to be of the essence. In relation to Blackberry 9720, because it was also an NPI,[64] the reasoning above pertaining to whether time was of the essence for the delivery of Blackberry Q5 and Blackberry Q10 (at [61]–[76] *supra*) similarly applies. Moreover, SCM was informed as early as 30 July 2013 that the white

64 2AB at p 1273.

Blackberry 9720 units might be delivered late,[65] and it did not contend the possible delay at that point in time. Time of delivery was not of the essence, so SCM cannot claim that the inability of BrightPoint to deliver by the delivery dates stated on the PO was a repudiatory breach of a condition, which it accepted to terminate the PO.

89 In relation to Blackberry 9900, although it was not an NPI, I find that the circumstances show that time of delivery was not of the essence. SCM was aware that the delivery dates stated in the POs were subject to change. Sugianto testified during cross-examination that delivery dates were subject to change even for existing (*ie*, non-NPI) models, "not necessarily new product".[66] Moreover, when Tan notified SCM that 36,000 units would only be ready for delivery in week 42 (the week of 13 October 2013), SCM confirmed that it still required the 36,000 units.[67] At all material times, SCM had never complained of late deliveries, nor mentioned its position that time of delivery was of the essence and that it had the right to terminate the POs after the lapse of the delivery dates stated therein.

90 SCM's claim that it was the understanding of both parties that the obligation to pick up lapsed after the passing of the delivery dates is also unsustainable. No contractual clause nor any evidence of such an understanding has been adduced to support this claim. On the contrary, the conduct of the parties shows otherwise. As stated above, at no time did SCM mention its position that its pick-up obligation lapsed after the passing of the delivery dates, despite delays in delivery on many occasions. In addition, the execution of a formal cancellation letter to cancel Blackberry 9900 units after the delivery

65 2AB at p 1291.

66 NE Day 2 at p 12.

67 1AB at pp 592–593.

dates stated in the POs had passed is inconsistent with the position that there was no existing obligation to take delivery at that time. A portion of the PO with delivery date 1 July 2013 and the entire PO with delivery date 8 July 2013 were cancelled on 23 July 2013. BrightPoint requested that it be provided with a formal cancellation letter and SCM duly complied, without any indication of its view that such a letter was unnecessary.[68] Mr Selvam, on the other hand, relies on the language of "hopeful commitment" in BrightPoint's letter to SCM regarding the pick-ups of Blackberry 9900[69] to support the alleged mutual understanding. The analysis in [80] *supra* applies here as well – the choice of words does not carry the intention suggested.

91 SCM claims that the pick-ups of Blackberry 9720 and Blackberry 9900 after the delivery dates are examples of subsequent mutual agreements to pick up the stocks. SCM picked up 6720 units of Blackberry 9720 on 10 October 2013, 2240 units on 2 December 2013 and 4480 units on 17 January 2014. As for Blackberry 9900, SCM picked up 3480 units on 20 June 2013 and 7700 units on 22 July 2013. These pick-ups involved prior communications between BrightPoint and SCM comprising of proposals and agreements as to the quantities to be picked up in a certain week. The presence of such communication does not necessarily mean that the pick-ups were subsequent mutual agreements divorced from the POs that SCM had placed. It has never been expressly stated in the communications that the deliveries were new mutual agreements. Instead, they seem to show that the parties were working out the quantity to be delivered for each week. In this regard, I find Tan's testimony as to the practice between the parties credible: once a PO was accepted, it became an open order, and every week BrightPoint would send a

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68 2AB at pp 1261–1263.

69 3AB at pp 1586–1587.

shipment schedule to SCM for the next two or three weeks' shipment, and SCM would use the shipment schedule to confirm the pick-ups. The proposals and confirmations for deliveries that SCM relies on are in line with the practice between the parties, and the units of Blackberry 9720 or Blackberry 9900 that were the subjects of these deliveries were part of the open orders that arose as a result of the POs that SCM had placed. They were not new agreements entered into separate from the POs.

92 The unsustainability of SCM's argument could be seen from its reliance on two deliveries – (a) the delivery of 3480 units of Blackberry 9900 on 20 June 2013, and (b) the delivery of 4200 units of Blackberry 9900 (out of the 7700 units delivered on 22 July 2013) – to illustrate its point that all the deliveries were results of mutual agreements. The 3480 units of Blackberry 9900 were delivered on 20 June 2013, which was before the delivery date of 1 July 2013 stated in the PO. Yet, SCM claims indiscriminately that this delivery was also based on a subsequent mutual agreement. As for the delivery of 4200 units of Blackberry 9900 on 22 July 2013, Tan had informed SCM that the estimated time of delivery was 27 June 2013 and SCM had confirmed the same. The date 27 June 2013 was similarly before the delivery date stated in the PO. SCM only took delivery of the 4200 units on 22 July 2013, and evidence as to the reason for the delay is unclear. Nevertheless, this alleged mutual agreement was for a delivery with an estimated delivery date before the delivery date stated in the PO. These show that the practice of the parties in relation to deliveries before and after the delivery dates in the POs was the same. This is in line with Tan's testimony stated at [91] above, and reveals the weakness in SCM's argument.

93 I also find that SCM has mischaracterised Tan's testimony in claiming that she agreed during cross-examination that pick-ups after the delivery dates were subject to mutual agreements. Tan, in agreeing that she sought SCM's

confirmation for each delivery, did not mean that the subsequent pick-ups were new agreements separate from the POs, but rather that it was in line with the parties' practice. She clarified unequivocally that SCM still had the obligation to pick up the stocks in the POs even after the delivery dates stated therein had passed.

94 Thus, I find that time of delivery was not of the essence for both Blackberry 9720 and Blackberry 9900, and that SCM had the obligation to pick up the units in the POs even after the passing of the delivery dates stated in the POs.

Whether there is a requirement of notice

95 SCM contends that it is a pre-condition in law that the seller must give notice to the buyer before re-selling the goods pursuant to s 48(3) of the Sale of Goods Act, and BrightPoint acted wrongfully in failing to give notice. SCM is mistaken in this regard. Section 48(3) addresses the remedies of a seller in the scenario that he is unpaid. In that situation, because the time of payment is not ordinarily the essence of the contract pursuant to s 10(1) of the Sale of Goods Act, there is no repudiatory breach by the buyer where he fails to pay the seller on time. In such a situation, s 48(3) provides that the seller can give notice to the buyer, after which if the buyer does not pay the price within a reasonable time, the seller can treat the contract as terminated and sell the goods to other parties. The section provides an avenue for a seller to terminate a contract. The passage from *Benjamin's Sale of Goods* cited by SCM also explains s 48(3) as such. At para 15-123, it is stated that a failure by the buyer to pay at the stipulated time "does not entitle the unpaid seller to treat the contract as repudiated", so s 48(3) "enables the unpaid seller, by giving notice, to make payment within a reasonable time thereafter to be of the essence of the contract,

so that failure to pay within a reasonable time after notice will entitle the seller to treat the contract as repudiated: he can then terminate the original contract and resell the goods".

96 BrightPoint is claiming for non-acceptance of goods by SCM, and claims that it sold the goods in mitigation. The statutory provision in the Sale of Goods Act applicable to the present case is s 50(1), which states that "[w]here the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance". There is no pre-condition in law that the seller must give notice to the buyer before re-selling even where the buyer has wrongfully neglected or refused to accept the goods.

Whether SCM breached the Sub-Distributor Agreement

97 After finding that SCM had obligations to pick up the remaining units according to the POs even after the delivery dates stated therein and that there is no legal requirement of a notice if SCM had wrongfully neglected or refused to accept the goods, the question remains as to whether SCM had indeed wrongfully neglected or refused to pick up the remaining units of Blackberry 9720 and Blackberry 9900 in breach of the Sub-Distributor Agreement thereby giving rise to damages under s 50 of the Sale of Goods Act.

98 In relation to Blackberry 9900, SCM's conduct shows that it unequivocally refused to pick up the 4200 remaining units. BrightPoint had reminded SCM on 20 September 2013 to pick up the remaining 4200 units in week 39 (22 September to 28 September 2013), to which SCM indicated that it could do so, and even replied with a revised schedule for weeks 38 to 46 which included pick-up of the 4200 units in week 39.[70] However, before SCM took

delivery of the 4200 units, it told BrightPoint on 25 September 2013 that it "[would] hold all future shipments until meeting discussion [between SCM and BrightPoint] … to discuss the business going forward".[71] SCM ultimately did not pick up the 4200 units, and that refusal to pick up was plainly the consequence of SCM's decision to hold all further shipments of the 4200 units of Blackberry 9900 that continued well after the meeting between SCM and BrightPoint.

99 However, in relation to Blackberry 9720, I find that the words and conduct of SCM would *not* lead a reasonable person to think that it wrongfully neglected or refused to pick up the remaining 15,680 units. In this regard, I will trace the communications and conduct by SCM from September 2013 to February 2014.

100 In September 2013, SCM indicated that it would hold all future shipments, including those of Blackberry 9720. BrightPoint emailed SCM on 24 September 2013 to confirm what stocks it would be picking up that week, and SCM replied stating that it would hold all future shipments until the meeting between SCM and BrightPoint (see [98] *supra*). Sugianto confirmed during his cross-examination that all future shipments included Blackberry 9720 units.

101 Subsequently, it is not disputed that SCM did pick up Blackberry 9720 units in October 2013, December 2013 and January 2014. 6720 units of Blackberry 9720 were picked up on 10 October 2013 at US$171.56 per unit, 2240 units were picked up on 2 December 2013 at US$161.56 per unit, and 4480 units were picked up on 17 January 2014 at US$158.33 per unit. Moreover, on 3 February 2014, SCM requested to pick up 10,000 units at

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70 3AB at pp 1586, 1576 and 1579.

71 3AB at p 1593.

US$155.00 per unit. However, BrightPoint told SCM that it did not have any stocks of Blackberry 9720 left, and that it would "surely inform [SCM] if there [was] any change".[72] There seemed to be no further communications between the parties regarding the pick-up of Blackberry 9720 after that.

102 The evidence shows that despite the initial indication to hold shipments of Blackberry 9720, SCM picked up Blackberry 9720 units on three occasions after that, and even asked to pick up further units in February 2014. Significantly, further pick-ups did not occur because BrightPoint had informed that it had no more stock. All in all, I am satisfied that there is nothing in SCM's conduct that would lead a reasonable person to think that it wrongfully neglected or refused to pick up the remaining units of Blackberry 9720. Thus, there has been no breach of the Sub-Distributor Agreement by SCM in relation to the pick-ups of 15,680 units of Blackberry 9720.

103 Therefore, on the counterclaims, I find that SCM has breached the Sub-Distributor Agreement only in refusing to pick up the 4200 units of Blackberry 9900.

Damages

104 As provided for by s 50(1) of the Sale of Goods Act, where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. Section 50(3) states that "[w]here there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted or (if no time was fixed for

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72 4AB at p 2717.

acceptance) at the time of the refusal to accept". BrightPoint claims its damages to be US$477,895 for Blackberry 9900, the figure being the difference in the contract prices and the prices at which Blackberry sold the units to third parties.

Whether the units sold to third parties are the units SCM refused to pick up

105 SCM submits that BrightPoint has not adduced sufficient evidence to show that the very same 4200 units of Blackberry 9900 that BrightPoint sold to third parties in mitigation had been allocated to SCM. When Mr Selvam raised this point about the unique IMEI numbers of the units sold during the cross-examination of Tan, Mr Yim objected to the line of questioning on the basis that SCM did not plead this point and the point was not raised in any AEICs at all. In its Reply and Defence to Counterclaim (Amendment No 2) at para 39, SCM merely denies that BrightPoint suffered any loss or damage, without providing any reasons. BrightPoint submits that a defendant is required to set out in its pleadings all material facts on which it relies for its defence especially where a positive assertion is being taken (*Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1992] 2 SLR(R) 382 ("*Intraco HC*")). Put another way, if the defence is a bare denial, the defendant would not be permitted to lead evidence or cross-examine the opponents' witnesses on the point omitted from the pleadings (*Intraco HC* at [24(b)]). Having not averred to the unique IMEI numbers in the defence, SCM could not make use of IMEI numbers to challenge BrightPoint's evidence that the units they sold were those allocated to SCM.

106 SCM's denial of BrightPoint's claim of damages is a bare denial that BrightPoint has suffered loss or damage as alleged, and such a plea is similar to putting the other party to strict proof of its pleaded position. SCM's point during the trial is that BrightPoint did not adduce sufficient evidence to prove its case.

The burden lies on BrightPoint to prove the existence of facts on which it relies to claim the quantum of damages, for s 103(1) of Evidence Act (Cap 97, 1997 Rev Ed) stipulates that the party who desires the court to give judgment as to any legal right, dependent on the existence of facts that he asserts, must prove that those facts exist. BrightPoint is asserting that the difference in the prices at which the units were sold and the contract price represents the quantum of damages. BrightPoint has to prove the facts on which it relies, including the fact that the units sold were allocated to SCM.

107 Tan testified that at the material time, there were only 4200 units of Blackberry 9900 in BrightPoint's warehouse for the Indonesian market, and this means that the 4200 units sold must have been allocated to SCM. Furthermore, SCM did not produce a shred of evidence that would weaken BrightPoint's case that the units sold had been allocated to SCM. On a balance of probabilities, I find that the units sold were the exact units allocated to SCM.

108 In any case, the prices at which BrightPoint sold the units to third parties could reasonably be taken to reflect the market value of the units at the point in time SCM ought to have accepted the units. Although each Blackberry unit bears a unique IMEI number, the units of a single model are all perfect substitutes of each other. With regard to Blackberry 9900, SCM ought to have accepted the units by 28 September 2013 (the end of week 39), given that the parties agreed to schedule the delivery of the 4200 units in week 39. BrightPoint sold the 4200 units to various third parties from 16 October 2013 to 29 January 2014 at prices which Sugianto testified to be the prevailing market price.[73] Thus, the prices at which they were sold can be taken to be their market value at the point in time SCM ought to have accepted them, and the damages is the difference between the contract price and the prices at which they were sold.

[73] NE Day 2 at p 109.

Mitigation – offer by the party in breach

109 In relation to Blackberry 9900, after SCM indicated that it would suspend all future shipments on 25 September 2013, there was some discussion between the parties about swapping 3000 out of the 4200 units of white Blackberry 9900 to black ones.[74] Subsequently, on 18 October 2013, SCM emailed BrightPoint requesting to take the remaining 4200 units at US$260 but BrightPoint refused.[75] SCM claims that it was unreasonable for BrightPoint not to have accepted its offer. The thrust of BrightPoint's reply is that it could not have accepted the offer because if it had done so, it might not have been able to claim damages from SCM.[76]

The law

110 The aggrieved party must take all reasonable steps to mitigate the loss consequent upon the defaulting party's breach. Explaining the mitigation principle, the Court of Appeal in *The "Asia Star"* [2010] 2 SLR 1154 ("*The "Asia Star"*") stated that there is a singular practical focus that lies at its heart – the inquiry into whether or not the aggrieved party acted reasonably to mitigate its loss. The central question which underpins this reasonableness inquiry is what a reasonable and prudent man would have done in the ordinary course of his business if he had been in the aggrieved party's shoes (*The "Asia Star"* at [30]). The inquiry amounts to common law's attempt to reflect commercial and fact-sensitive fairness at the remedial stage of a legal inquiry into the extent of liability on the defaulting party's part and embodies a fact-centric flexibility (*The "Asia Star"* at [32]). The principle of mitigation focuses on whether the mitigation measures taken by the aggrieved party were

74 NE Day 6 at p 74; 3AB at pp 1624 and 1658.

75 3AB at p 1658.

76 NE Day 3 at pp 130–134.

reasonable, and not whether it took the best possible measures to reduce its loss (*The "Asia Star"* at [44]). The burden of proof lies on the defaulting party to show that the post-breach actions are unreasonable and this burden is ordinarily one which is not easily discharged (*The "Asia Star"* at [24]).

111 In the present case, the post-breach offer originated from the defaulting party. This should not alter the central focus of the mitigation principle on the reasonableness of the actions taken by the aggrieved party. There is no rule relieving the aggrieved party from having to consider a post-breach offer from the defaulting party (see for example *Payzu Ltd v Saunders* [1919] 2 KB 581 ("*Payzu*") at 588–589). In *Payzu*, the Court of Appeal held unanimously that the plaintiff acted unreasonably in rejecting the defendant's post-breach offer. The plaintiff in that case had failed to make punctual payment for the first instalment, leading to the defendant's refusal to deliver any more of the goods under the contract. It was found that the defendant's refusal was a breach of the contract, but the plaintiff was unreasonable in rejecting the defendant's post-breach offer to deliver the same goods at the contract price if the plaintiff paid in cash at the time of the orders. Bankes LJ held at 589 that the conclusion was arrived at "on a consideration of all the circumstances of the case"; "each party was ready to accuse the other of conduct unworthy of a high commercial reputation, and there was nothing to justify the appellants in refusing to consider the respondent's offer". Scrutton LJ held at 589 that "in commercial contracts it is generally reasonable to accept an offer from the party in default". McCardie J, in the court below, whose judgment was upheld on appeal, opined that he felt "no inclination to allow in a mercantile dispute an unhappy indulgence in far-fetched resentment or an undue sensitiveness to slights or unfortunately worded letters", but in considering the offer by the defaulting party, the aggrieved party is "fully entitled to consider the terms in which the offer was made, its bona fides or otherwise, its relation to their business methods and financial position,

and all the circumstances of the case". McCardie J also held that "an acceptance of the offer would not preclude an action for damages for the actual loss sustained" (at 586).

112 In *obiter dicta*, Scrutton LJ and Bankes LJ opined that there might be a difference between mercantile and non-mercantile contracts. In the latter contracts, Scrutton LJ opined that in "certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him" (at 589). Bankes LJ was of the same view, that there "may be cases where as a matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant" (at 587). An example Bankes LJ gave was a situation where the plaintiff had been rendering personal services and been dismissed after being accused in the presence of others of being a thief. In a similar vein, Professor Tham Chee Ho, in *The Law of Contract in Singapore* (Andrew Phang Gen Ed) (Academy Publishing, 2012), at para 22.138, suggested that the prior existence of a high degree of trust and confidence between the parties which is lost through the breach is a factor affecting the reasonableness of a rejection of a post-breach offer.

113 Categorising the treatment of rejections of post-breach offers by the nature of contracts, such as mercantile contracts and contracts of personal service, is not desirable in my view, because it distracts from the core factual inquiry of the reasonableness of the actions of the aggrieved party in all the circumstances. Regardless of the types of contracts, all the circumstances of the case have to be carefully analysed to determine whether the aggrieved party acted unreasonably in rejecting a post-breach offer by the defaulting party. As elucidated by McCardie J (at [111] *supra*), the circumstances to be considered include the terms of the offer, its *bona fides* or otherwise, its relation to the

parties' business methods and financial position. A breach of trust may be an appropriate factor in a situation where there exists a high level of trust, one which is more often than not absent in mercantile contracts. The factors outlined here are non-exhaustive, and in the final analysis, as pronounced by the Court of Appeal in *The "Asia Star"* (see [110] *supra*), a fact-centric flexibility underpins the principle of mitigation, which aims to achieve fairness and commercial sensibility between the parties.

114 For completeness, I note that there have been criticisms levelled at *Payzu*, one of which was put forth by Michael Bridge in his article, "Mitigation of damages in contract and the meaning of avoidable loss" (1989) 105 LQR 398. Bridge argues that the outcome of *Payzu* does not make sense because the effect was to enrich the defaulting party at the expense of the innocent party. The market concerned in *Payzu* was rising at the time of the contractual breach by the seller. Thus, by holding that the buyer failed to mitigate, the seller in breach was permitted to recover the market rise. At the same time, the buyer bore the loss for not taking the goods at the below-market contract price, which appeared to be punishment for not accepting the seller's post-breach offer (at p 414). According to Bridge, the only decision the court has to make is which of two parties, the innocent buyer or the contract-breaking seller, is entitled to benefit from a market rise, and the court in *Payzu* came down firmly but perversely in favour of the contract-breaking seller (at p 420). Bridge's criticism does not arise on the facts of the present case, for the market was falling as at SCM's breach and the post-breach offer by SCM was at the prevailing market price. It is therefore appropriate to leave the criticism to be addressed in an appropriate case. My view is that the focus should be on the aggrieved party's action rather than the likely economic outcomes. The central inquiry is whether the buyer's rejection of the post-breach offer is reasonable and the economic outcome is merely a by-product. The reasonableness of the aggrieved party's

actions is assessed with regard to factors such as the prevailing market price and the offer price, and should be independent of the economic consequence of a finding on the duty to mitigate. Thus, the result in *Payzu* may very well have been correct in the light of the finding that the buyer had behaved unreasonably in not accepting the offer. Had the circumstances in *Payzu* been different, for example if the offer was at a price higher than the prevailing market rate, the inquiry as to the reasonableness of the buyer's rejection would have led to a different finding, which would then result in a different economic outcome.

Application of the law

115 The question is whether BrightPoint acted unreasonably in rejecting the offer from SCM, which is the defaulting party. On the facts, when SCM proposed the offer, BrightPoint had already sold 100 units each to two third parties on 16 October 2013, at US$258 per unit. At that time, there was no evidence that BrightPoint had promised any other units to third parties, given that the order dates in all the subsequent invoices were after 18 October 2013. BrightPoint rejected SCM's offer and sold the remaining units to various third parties. Out of the 4200 units, 3499 units were sold at US$258 per unit, 501 units were sold at US$260 per unit, 100 units were sold at US$261 per unit and 100 units were sold at US$262 per unit.

116 BrightPoint does not allege that the offer was made *mala fides*, and the facts do not suggest that it was so made. The reason given for rejecting the offer is that if it had accepted the offer, it might not have been able to claim damages from SCM. However, on the law, the issue of mitigation comes after the finding of a breach, and an acceptance of the offer would not preclude an action for damages for the loss sustained. Even if BrightPoint was unsure about its legal position, it could have stated, in its acceptance of SCM's offer, that the

acceptance was in mitigation. An email sent by Wong to Blackberry on 27 November 2013 shows that unhappiness could have contributed to the rejection. In the email, Wong expressed unhappiness at the fact that SCM was asking for goodwill money and at the same time asking to pick up stocks that it had already committed to at a much lower price.[77] More than just unhappiness, the business relationship was strained. SCM's actions, specifically with regard to the pick-ups of Blackberry 9900, likely caused BrightPoint to lose its confidence in SCM's further promises to pick up Blackberry 9900. First, although SCM sent a revised shipping schedule, which included the delivery of the 4200 units in week 39 (22 September 2013 to 28 September 2013), it changed its mind and decided to hold all shipments until the disputes between the parties were discussed (see [85] *supra*). Second, on the same day the offer was made SCM reneged on the verbal agreement to swap the white Blackberry 9900 units to black units. This recantation is evidenced by the email exchange immediately following SCM's request to pick up the 4200 units at US$260 per unit.[78]

117 Moreover, although the offer of US$260 per unit was better than the price at which BrightPoint had sold to the two third parties prior to the offer, the offer price was the same as the prevailing market price. This means that it was possible for BrightPoint to sell off the remaining units at the same price or at similar prices as that offered by SCM. The price offered by SCM did not make it unreasonable for BrightPoint to have rejected it, for it was not higher than the prevailing market price in any case.

118 In all the circumstances, I find that it was *not* unreasonable for BrightPoint to reject SCM's offer. The court has to judge the aggrieved party's actions from the standpoint of a reasonable person with the knowledge of the

77 4AB at p 2242.

78 3AB at p 1658.

aggrieved party at the time he had to make the decision, instead of criticising his actions with the benefit of hindsight. At the time BrightPoint had to make the decision whether to accept the offer from SCM, SCM had backed out of its agreement to take delivery in week 39 and subsequently also backed out of its verbal agreement to swap the white units for black units. In the light of BrightPoint's lack of confidence in SCM's promises to take delivery of Blackberry 9900, it was not unreasonable for BrightPoint to have rejected SCM's offer to take delivery at the prevailing market price.

Conclusion

119 To summarise, I dismiss SCM's claims in relation to the May Price Protection and the November Price Protection, and I dismiss BrightPoint's counterclaim in relation to the Blackberry 9720 units. I allow BrightPoint's counterclaim in relation to the non-acceptance of Blackberry 9900 units by SCM. Accordingly, I order that there be judgment in the sum of US$477,895 in favour of BrightPoint with interest thereon at the rate of 5.33% from 28 April 2016 to the date of the judgment. Overall, BrightPoint is clearly the successful party. As such, BrightPoint shall have the costs of the main action and the counterclaim to be taxed if not agreed.

120 I note that BrightPoint has accepted and agreed that the May Price Protection due to SCM is US$23,520. Strictly speaking, SCM has not claimed for this sum of US$23,520 and this sum cannot be granted in the judgment. I leave it to BrightPoint to honour its promise.

Belinda Ang Saw Ean J
Judge

S Selvam s/o Satanam, Jawharilal Balachandran, Choo Xiuhui Gladys and Daniel Li (Ramdas & Wong) for the plaintiff;
Jimmy Yim, Errol Joseph and Raeza Ibrahim (Drew & Napier LLC) for the defendant.
