IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 206

Suit No 860 of 2013 (Assessment of Damages No 16 of 2018)

Between

Aries Telecoms (M) Berhad

… *Plaintiff*

And

ViewQwest Pte Ltd

… *Defendant*

And

Fiberail Sdn Bhd

… *Third Party*

JUDGMENT

[Damages] — [Assessment]

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v
ViewQwest Pte Ltd
(Fiberail Sdn Bhd, third party)

[2019] SGHC 206

High Court — Suit No 860 of 2013 (Assessment of Damages No 16 of 2018)
Woo Bih Li J
25–26 July, 7–8 August, 17–18, 22, 24–25 October, 19, 20 November 2018, 13 February 2019; 21 March 2019

6 September 2019 Judgment reserved.

Woo Bih Li J:

Introduction

1 The main action was a claim by the plaintiff, Aries Telecoms (M) Bhd ("Aries"), against the defendant, ViewQwest Pte Ltd ("VQ"), for conversion arising from VQ's refusal to allow Aries to reclaim certain information technology equipment. The main action was commenced on 26 September 2013. Although the equipment was eventually returned to Aries on 2 September 2015, the legal proceedings continued. The initial trial commenced on 2 February 2016. This was a bifurcated trial in that it was to establish the liability of VQ with damages to be assessed separately.

2 Eventually, VQ consented on 11 October 2016 to an interlocutory judgment to be granted against it with damages to be assessed. I granted the interlocutory judgment that same day.

3 The present proceedings only concern the assessment of damages ("A/D") arising from VQ's conversion of the equipment. I set out below the background leading to the A/D.

Facts

Dramatis personae

4 Aries is a Malaysian-registered company in the business of providing internet and fibre optic connections. It was incorporated in 1996 and was formerly known as V Telecoms Berhad.[1] I have referred to the plaintiff as "Aries" in this judgment. Any references to "VTel" and "V-Tel" should also be taken to refer to the plaintiff.

5 VQ is a Singapore-incorporated company in the business of providing internet, connectivity and international private leased circuit ("IPLC") services in Singapore.[2] The proceedings concerned equipment located at two data centres in Singapore, which were referred to as "Equinix" and "Global Switch".[3]

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1 Wan Alias Bin Wan Ngah @ W Yahya's affidavit of evidence-in-chief ("AEIC") affirmed on 18 February 2015 ("Wan Alias's AEIC") at para 4.

2 Notes of Evidence ("NEs") (18 October 2018) at p 17 ln 25–28; NEs (13 February 2019) at p 9 ln 30; Defendant's Closing Submissions ("DCS") at para 2.

3 Kenneth Liew Jau Tze's AEIC affirmed on 16 February 2015 ("Liew's 1st AEIC") at para 7.

6 Fiberail Sdn Bhd ("Fiberail"), which was initially the third party in these proceedings, is a Malaysian company that provides services to telecommunication companies.[4]

7 The information technology equipment that was the subject of the conversion claim is a dense wavelength division multiplexing machine referred to as "DWDM-1" in the proceedings. For convenience I will use that description as well. It was placed at Equinix and Global Switch. The DWDM-1 equipment comprised 77 component parts and was used to provide IPLC services. It was agreed that the DWDM-1 equipment was capable of providing 10 gigabits per second ("Gbps")[5] of unprotected bandwidth and 20Gbps of protected subdivided bandwidth.[6] BTI Systems Inc ("BTI") was the vendor of the DWDM-1 equipment.[7]

8 I set out a table of *dramatis personae* of some of the persons involved at the material time and/or in these proceedings for easy reference:

Abbreviation	**Individual**
Aries	
Mustafa	Mr Sayed Mustafa Ali Zaminali, the Chief Technology Officer of Aries, and a factual witness in the A/D

4 Mohd Zuri Daud's AEIC affirmed on 16 February 2015 at para 4.

5 NEs (19 November 2018) at p 19 ln 29–32.

6 Defendant's Opening Statement at para 8; NEs (25 July 2018) at p 16 ln 19 – p 17 ln 2; NEs (26 July 2018) at p 41 ln 9–11.

7 Sayed Mustafa Ali Zaminali's AEIC affirmed on 26 June 2018 ("Mustafa's AEIC") at para 3.

Abbreviation	Individual
Suppiah	Mr Anthony Suppiah, the Executive Director of Aries at the material time
Wan Alias	Mr Wan Alias Bin Wan Ngah @ W Yahya, the Chief Operating Officer of Aries and a factual witness in the initial trial
VQ	
Liew	Mr Kenneth Liew Jau Tze, the Business Development Director of VQ, and a factual witness in the A/D
Lim	Mr Lim Hock Koon, the Senior Vice President of VQ, and a factual witness in the initial trial
Tan	Mr Tan Shao Yi, the Head of the Optical Transport Network department of VQ, and a factual witness in the A/D
Fiberail	
Norazmi	Mr Norazmi Bin Termuzi, the Head of International Alliance of Fiberail at the material time, and a factual witness in the A/D
Rossman	Mr Rossman Omar, the Chief Executive Officer of Fiberail at the material time
Suhaini	Mr Suhaini Bin Kasmuri, the Chief Financial Officer of Fiberail at the material time
BTI	
Fahim	Mr Fahim Sheikh, the Vice President, APAC Sales of BTI Systems Singapore Pte, a subsidiary of BTI

Background

9 VQ received the DWDM-1 equipment in separate batches beginning

from mid-2010. The last batch of DWDM-1 equipment was delivered to VQ in March 2011. Although VQ alleged that the DWDM-1 equipment was delivered pursuant to its contract with Fiberail, Aries' account was that the DWDM-1 equipment had been delivered pursuant to its own contract with VQ.

10 It was not disputed that VQ and Aries entered into three purchase orders (all dated 9 March 2011) for Aries to provide fibre network services to VQ. The first purchase order was issued on 9 March 2011, and the second and third purchase orders were issued on 25 April 2011 and 7 June 2011 respectively to reflect amendments made to the first purchase order.[8] The operative contract between Aries and VQ was constituted by the third and last purchase order issued on 7 June 2011.[9] I will use the term "Purchase Order" to refer to the contract between Aries and VQ.

11 On 30 July 2012, VQ informed Aries that it was terminating its contract with Aries with effect from 31 August 2012.[10] About six months later, Aries sent a letter to VQ dated 5 March 2013 ("the 5 March 2013 letter") that stated its intention to reclaim "the following items shipped directly from our vendor, [BTI], to [VQ]". Fiberail was copied on the letter.[11] It was undisputed that by the 5 March 2013 letter, Aries was seeking to reclaim the DWDM-1 equipment from VQ even though only 42 items were listed in an attachment to the letter. The letter was also sent by email dated 6 March 2013 from Aries to VQ.[12]

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8 Liew's 1st AEIC at paras 61, 77, 88–89.

9 Mustafa's AEIC at para 4 and p 32; Wan Alias's AEIC at paras 16, 18; *cf* Liew's 1st AEIC at para 88 and p 182.

10 Mustafa's AEIC at para 5 and p 34; Wan Alias's AEIC at p 113.

11 Wan Alias's AEIC at para 23 and pp 115–118; Liew's 1st AEIC at para 106.

12 Wan Alias's AEIC at para 23 and p 119.

12 On 20 March 2013, VQ sent an email rejecting Aries' request for the return of the DWDM-1 equipment, stating that Fiberail was the correct party to retrieve the equipment, and that if Fiberail so requested, VQ would return it to Fiberail.[13]

13 I will elaborate later on what transpired between the parties and Fiberail between 20 March 2013 and 26 September 2013, when Aries commenced legal action in Suit No 860 of 2013 against VQ for the return of the DWDM-1 equipment and various reliefs. But in brief, Aries followed up on VQ's reply by sending a letter on 20 March 2013 to Fiberail to request for Fiberail's consent to withdraw the DWDM-1 equipment.[14] Fiberail initially replied on 24 April 2013 by letter ("Fiberail's 24 April 2013 letter") to state that it did not have any record or evidence of any arrangement between Aries and VQ, and that it was not the right party to give any consent to VQ to release the DWDM-1 equipment "as they do not belong to us".[15] Although it was disputed whether a copy of Fiberail's 24 April 2013 letter was sent by Aries to VQ in May 2013, VQ accepted that it was handed a physical copy of the letter on 19 September 2013 by a legal counsel of Aries in Singapore.

14 In the meantime, VQ wrote to BTI on 10 April 2013 to enquire about the ownership of the DWDM-1 equipment. BTI replied on the same day via email, stating that the DWDM-1 equipment belonged to Aries. BTI qualified that it was unaware if the DWDM-1 equipment had been transferred from Aries to Fiberail.[16] However, VQ still did not release the DWDM-1 equipment to Aries

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13 Wan Alias's AEIC at para 24 and p 121; Liew's 1st AEIC at para 106 and p 195.

14 Wan Alias's AEIC at para 26 and pp 123–128.

15 Wan Alias's AEIC at para 27 and p 130.

16 Liew's 1st AEIC at para 108 and p 199.

as, according to Liew, BTI's records were contrary to VQ's records, which stated that Fiberail owned the DWDM-1 equipment.[17]

15 After a hard copy of Fiberail's 24 April 2013 letter was handed to VQ in Singapore on 19 September 2013, Liew arranged a meeting with Suhaini, Norazmi and another Fiberail employee to clarify Fiberail's 24 April 2013 letter.[18] Liew alleged that this meeting was held in September 2013 before Aries commenced the action in Singapore on 26 September 2013.[19]

16 On 3 October 2013, I granted Aries an Anton Piller order to access VQ's storage cabinets at the Equinix and Global Switch premises. Pursuant to that order, Aries could, *inter alia*, search and download the system logs, take records, video and take photographs of the DWDM-1 equipment.[20] Pursuant to that order, VQ's premises were searched on 7 and 9 October 2013.[21] The parties continued to correspond about the ownership of the DWDM-1 equipment over September and October 2013.

17 On 28 October 2013, Fiberail sent a letter to Aries offering to purchase the DWDM-1 equipment from Aries.[22] This letter was not copied to VQ, but it replicated a draft letter that Fiberail had sent to VQ via email on 23 October

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17 Liew's 1st AIEC at para 108.

18 Mustafa's AEIC at para 49; Suhaini's AEIC affirmed on 16 February 2015 ("Suhaini's AEIC") at para 12.

19 NEs (24 October 2018) at p 77 ln 8–19.

20 Order No 7404 of 2013; see Defendant's Chronology at pp 47–51.

21 Wan Alias's AEIC at pp 163–201.

22 Wan Alias's AEIC at para 35(2) and p 147; Mustafa's AEIC at para 49; Suhaini's AEIC at para 21 and p 56.

2013.[23]

18 VQ commenced a third party action against Fiberail on 29 October 2013. Fiberail filed a memorandum of appearance in the third party action on 13 November 2013.

19 According to VQ, VQ commenced a "migration" of the DWDM-1 equipment from late October 2013 to January 2014 to remove the DWDM-1 equipment from its systems.[24] The migration was completed on 24 January 2014.[25] VQ claimed that the DWDM-1 equipment was placed in storage thereafter.[26]

20 Fiberail filed its initial defence in the third party action on 14 May 2014, pleading that it did not own the DWDM-1 equipment and that it was not entitled to possession of the equipment.[27]

21 On 2 July 2014, VQ sent an email to its solicitors stating its intention to settle the suit.[28] Its solicitors sent a letter dated 19 August 2014 to Aries' solicitors to offer to return the DWDM-1 equipment. After various emails and letters, which included other proposals to return the DWDM-1 equipment, Aries agreed on 10 March 2015 in principle to accept the return of the DWDM-1 equipment, subject to the finalisation of the terms of BTI's appointment to

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23 Liew's AEIC affirmed on 26 June 2018 ("Liew's 2nd AEIC") at para 6 and pp 16–17.

24 Liew's Supplementary AEIC affirmed on 15 October 2018 ("Liew's Supplementary AEIC") at para 7.

25 Liew's 2nd AEIC at para 17.

26 Liew's Supplementary AEIC at para 7.

27 Fiberail's defence filed 14 May 2014 at paras 4(e) and 4(g).

28 Liew's Supplementary AEIC at para 8 and p 19; DCS at para 75.

supervise the return of the equipment.[29] The parties' solicitors corresponded between March and August 2015 on the terms of BTI's appointment. In the meantime, VQ discontinued the third party action against Fiberail on 5 June 2015.

22 The parties accepted that by 28 August 2015, they made final arrangements for Aries' collection of the DWDM-1 equipment.[30] The DWDM-1 equipment was collected by Aries on 2 September 2015.

Litigation history after 11 October 2016

23 After interlocutory judgment was granted on 11 October 2016 by consent, Aries filed Summons No 5786 of 2016 for the determination of a preliminary issue pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), as to the nature of relief it was entitled to claim.

24 I decided on 7 February 2017 that Aries was not entitled to claim an account of profits from VQ or an order for VQ to disgorge its profits from the use of the DWDM-1 equipment, and that Aries was entitled only to ordinary damages and not to punitive or aggravated damages ("the 7 February 2017 order"). This was based on the evidence available to the court then (see *Aries Telecoms (M) Bhd v ViewQwest Pte Ltd (Fiberail Sdn Bhd, third party)* [2018] 3 SLR 196).

25 Aries appealed against the 7 February 2017 order. VQ argued that Aries required leave to appeal, but I disagreed that leave was required (see *Aries*

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29 Defendant's 4th Supplementary Bundle of Documents ("AD/D4SBD") at pp 37–38.

30 AD/D4SBD pp 66–72.

Telecoms (M) Bhd v ViewQwest Pte Ltd (Fiberail Sdn Bhd, third party) [2017] 4 SLR 728).

26 Aries' appeal was heard in Civil Appeal No 33 of 2017. The Court of Appeal held that the determination in the 7 February 2017 order had involved factual determinations that were not appropriate in an O 14 r 12 application (see *Aries Telecoms (M) Bhd v ViewQwest Pte Ltd* [2018] 1 SLR 108 ("*Aries Telecoms (CA)*") at [7]–[8]). As the law on punitive and exemplary damages had been clearly set out in *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 ("*ACB*"), there was a factual question of whether the prerequisites for such reliefs were present on the evidence. The question was to be decided afresh in the course of the A/D (*Aries Telecoms (CA)* at [15]).

The parties' cases

Aries' case

27 Aries initially pleaded that it was entitled to ordinary damages, the disgorgement of VQ's profits and exemplary damages.[31] After the hearing of the A/D, it withdrew its disgorgement of profits claim, but continued to claim ordinary and punitive damages.[32]

28 Aries pleaded that the period of VQ's conversion of the DWDM-1 equipment extended from 31 August 2012 to September 2015.[33] It subsequently submitted that the conversion period ran from 5 March 2013 (the date it

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31 Statement of Claim (Assessment of Damages) (Amendment No 1) dated 3 April 2018 ("SOC (A/D)") at paras 11, 12 and 14.

32 Plaintiff's Closing Submissions (Assessment of Damages) ("PCS") at paras 5–7.

33 SOC (A/D) at para 3.

demanded the return of the DWDM-1 equipment) to 28 August 2015 (the date of the agreement on the final arrangements to return the DWDM-1 equipment).[34] It was therefore entitled to ordinary damages over the 30 months' conversion period, *ie*, US$81,000, which was based on an agreed sum of US$2,700 for rental of the DWDM-1 equipment multiplied by 30 months.[35]

29 Aries also sought punitive damages of S$500,000, as VQ had acted outrageously in retaining the DWDM-1 equipment.[36] Even if VQ had not known that the DWDM-1 equipment belonged to Aries when the 5 March 2013 letter was sent, Aries' ownership would have been clear by 10 April 2013 when BTI informed VQ of the same (see above at [14]) or by the time Liew met Norazmi in September 2013. VQ's conversion was motivated by a calculated desire to earn profits from the continued use of the DWDM-1 equipment to service VQ's contract with Fiberail.[37] VQ's insistence that Aries prove its ownership of the DWDM-1 equipment at the initial trial, when VQ knew by then that Aries was the owner, also constituted outrageous conduct justifying the award of punitive damages.[38]

VQ's case

30 VQ pleaded that the conversion period commenced on 14 May 2014, when Fiberail filed its initial defence to the third party claim categorically pleading that it did not own the DWDM-1 equipment. The conversion period

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34 PCS at para 7(a).

35 NEs (13 February 2019) at p 1 ln 25–32; PCS at para 106.

36 PCS at para 10.

37 PCS at paras 171–175.

38 PCS at paras 168–170.

ended on 19 August 2014, when VQ made its first offer to Aries for the return of the DWDM-1 equipment.[39]

31 VQ's case was that the DWDM-1 equipment had been supplied pursuant to a contract between Fiberail and VQ and not a contract between Aries and VQ.

32 VQ argued that the delay in returning the DWDM-1 equipment was attributable to Aries' conduct and BTI and Fiberail's confusion over the ownership of the equipment.[40] VQ only subsequently found out that the DWDM-1 equipment had been loaned to Fiberail through a loan arrangement between Fiberail and Aries, and it was Fiberail that had erred by informing Aries by its 24 April 2013 letter that the equipment did not belong to it.[41] In any event, VQ was in a position to return the DWDM-1 equipment to Aries from 24 January 2014, but it did not do so as Fiberail's position as to ownership had not been clear.[42] VQ had only been advised by its solicitors on 2 July 2014 that the DWDM-1 equipment should be returned, and accordingly the first offer on 19 August 2014 to return the equipment was made.[43] Aries refused this offer and only accepted another offer eventually, but caused further delays after 10 March 2015 which resulted in the DWDM-1 equipment being collected on 2 September 2015.[44]

33 Regarding the quantum of damages, VQ submitted that ordinary

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39 Defence (Assessment of Damages) dated 22 January 2018 ("Defence (A/D)") at para 4.

40 DCS at para 54.

41 Defence (A/D) at para 10; DCS at paras 26, 36.

42 DCS at paras 74, 101.

43 DCS at paras 75–76.

44 DCS at para 87.

damages should be calculated based on the agreed rental of US$2,700 payable over the 3 months' 4 days conversion period, *ie*, from 14 May to 19 August 2014.[45] The threshold for punitive damages had not been met as VQ's conduct had been reasonable throughout.[46]

Issues to be determined

34 As mentioned, interlocutory judgment on liability was entered against VQ on 11 October 2016 for conversion of the DWDM-1 equipment. I frame the issues to be determined in the A/D as follows:

(a) What is the period of conversion of the DWDM-1 equipment and what ordinary damages is Aries entitled to, based on the agreed rental of US$2,700 per month?

(b) Is Aries entitled to punitive damages, and if so, in what quantum?

Issue 1: The award of ordinary damages

35 I first set out the applicable law on conversion, before determining the length of the conversion period.

The applicable law on conversion

36 An act of conversion occurs when there is unauthorised dealing with the claimant's chattel so as to question or deny his title to it: *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 ("*Orix Leasing*") at [45]; *Clerk & Lindsell on Torts* (Michael Jones gen ed) (Sweet &

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45 DCS at para 105.

46 DCS at paras 110–111.

Maxwell, 22nd Ed, 2018) ("*Clerk & Lindsell*") at para 17–06. The gist of the action lies in the inconsistency of the defendant's deliberate dealing with the chattel with the rights of the owner (or party with immediate right to possession): *Orix Leasing* at [45]; *Clerk & Lindsell* at para 17–07.

37 The present case concerns conversion by detention. The usual mode of proof of conversion by detention is to show that the defendant in possession of the goods refused to surrender it on demand. The demand must be unconditional and for specific property, and the refusal to return must be unconditional: *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 2 SLR(R) 1010 ("*Comtech IT (CA)*") at [28]; *Clerk & Lindsell* at para 17–25; R F V Heuston and R A Buckley, *Salmond & Heuston on the Law of Torts* (Sweet & Maxwell, 21st Ed, 1996) ("*Salmond & Heuston*") at p 100. But the making of such a demand is not a prerequisite in every case, and the defendant's refusal to comply with the demand will also not necessarily constitute conversion: *Orix Leasing* at [69].

38 It follows that the mere retention of another's property on its own is not conversion: *Orix Leasing* at [69], citing *Clayton v Le Roy* [1911] 2 KB 1031 ("*Clayton*") at 1052. Some definite act or deliberate withholding is a necessary preliminary to the arising of the cause of action: *Clayton* at 1048. In *Clayton*, Farwell LJ expressed the relevant question as such: whether the true inference from the conduct of the defendant is sufficient to show a withholding such as to amount to a converting of the good to his use (at 1052–1053). The defendant need not be aware of or intend to interfere with the *claimant's* rights; the relevant intention relates to the chattel and must be to assert an interest inconsistent with those of the claimant's: Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2015) ("*Chan & Lee*") at paras 11.005 and 11.008.

Preliminary issue: The contract pursuant to which the DWDM-1 equipment was delivered

39 It was not disputed that VQ received the DWDM-1 equipment in batches in 2010 and 2011. What was in dispute was the exact contract the DWDM-1 equipment was delivered under. This issue is relevant to my finding as to when the conversion period commenced, which involves a determination of VQ's state of mind relative to the DWDM-1 equipment when Aries requested to reclaim it.

40 It was Aries' pleaded case that the DWDM-1 equipment was supplied across 2010 and 2011 pursuant to a contract between Aries and VQ.[47] The parties first met in mid-2010 to discuss Aries' provision of fibre optic network services to VQ. Fiberail was present at this first meeting.[48] Pursuant to this meeting, Aries purchased the DWDM-1 equipment from BTI and arranged for it to be delivered to VQ.[49] Wan Alias deposed in his affidavit of evidence-in-chief ("AEIC") that the DWDM-1 equipment was delivered because VQ had a contract with PCCW Limited ("PCCW") and Fiberail and VQ wanted a fibre optic network services system to be ready by mid-2011.[50] Aries and VQ subsequently adopted the Purchase Order that formed the basis under which IPLC services were to be provided to VQ's end-customer in Thailand, JasTel Network Co Ltd ("JasTel").[51]

41 VQ's argument was that it had believed that the DWDM-1 equipment

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47 See SOC (A/D) at para 2.

48 Wan Alias's AEIC at paras 6, 7.

49 Wan Alias's AEIC at paras 7–10, 13–14.

50 Wan Alias's AEIC at para 7.

51 Wan Alias's AEIC at paras 6, 10, 16, 19; Mustafa's AEIC at para 4 and p 32.

was supplied by Fiberail pursuant to Service Orders dated 28 and 29 June 2010 between Fiberail and VQ.[52] The DWDM-1 equipment was delivered to VQ by Fiberail through BTI, Fiberail's equipment vendor, on Fiberail's instructions.[53] VQ received part of the DWDM-1 equipment as early as July 2010. The details of VQ's receipt of the DWDM-1 equipment are discussed further at [47].

42 According to VQ, the first time it met a representative of Aries, *ie*, Suppiah, was at a conference in Kuala Lumpur on or around 2 November 2010.[54] In meetings from December 2010 to around February 2011, Aries and VQ verbally agreed to interconnect both companies' fibre optic networks.[55] VQ would use these interconnections to provide IPLC services to PCCW, which would in turn provide services to JasTel.[56] VQ subsequently issued the Purchase Order to Aries, providing that Aries would provide fibre network services to data centres near the Malaysia-Thailand border.[57] The first purchase order issued and dated 9 March 2011 ("the First PO") provided that VQ would provide equipment in Bangkok; in Menara Ansar; and at the data centres at Equinix and Global Switch.[58] To this end, VQ requested for a second set of DWDM equipment ("the DWDM-2 equipment") to be purchased from BTI and provided in the Menara Ansar data centre. Aries agreed to host the DWDM-2 equipment, as reflected in cl 1(c) of the First PO.[59]

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52 See DCS at para 35; Liew's 1st AEIC at para 14.

53 Liew's 1st AEIC at paras 15–18, 20.

54 Liew's 1st AEIC at para 54.

55 Liew's 1st AEIC at paras 55–57.

56 Liew's 1st AEIC at paras 57, 58.

57 Liew's 1st AEIC at paras 57, 61.

58 Liew's 1st AEIC at paras 7, 64 and p 155.

59 Liew's 1st AEIC at paras 65–66 and p 155.

43 After VQ came to learn that it was Aries, and not Fiberail, which had purchased the DWDM-1 equipment, VQ alleged that it had also learned that the DWDM-1 equipment had been obtained through a loan arrangement between Fiberail and Aries. Norazmi testified that the DWDM-1 equipment had been loaned from Aries pursuant to a favour that Rossman asked of Suppiah in May 2010.[60] Fiberail was supposed to replace the borrowed DWDM-1 equipment with its own equipment at a later date.[61] This arrangement had been urgently made as Fiberail had to provide IPLC services to Fiberail's customers by July 2010.[62]

44 There were difficulties with both parties' accounts.

45 From the invoices exhibited in Wan Alias's AEIC, Aries had purchased the DWDM-1 equipment from BTI at a sum of US$99,594.03 (but Tan said the discounted price was about US$94,000).[63] I agree with VQ[64] that it was unlikely that Aries would have been willing to arrange for BTI to deliver equipment to VQ from June to September 2010 on the basis of a mere oral agreement without charge and months before the Purchase Order was issued. Neither was there any previous course of dealing that would have made such an arrangement likely.

46 However, if VQ were correct that Fiberail had arranged for the DWDM-1 equipment to be delivered to VQ so that VQ could provide IPLC services to

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60 NEs (13 February 2019) at p 30 ln 12–25, p 31 ln 6–7, p 41 ln 4–11.

61 NEs (13 February 2019) at p 47 ln 1–13.

62 NEs (13 February 2019) at p 45 ln 22–32.

63 Wan Alias's AEIC at paras 9–10 and pp 39, 71; *cf* NEs (20 November 2018) at p 12 ln 1–7.

64 DCS at paras 21, 22.

Fiberail's customers, one would have expected Fiberail to object to Aries' request to reclaim the equipment. However, Fiberail took a contrary position regarding the continued use of the DWDM-1 equipment in its 24 April 2013 letter to Aries. As mentioned (see [13] above), Fiberail stated that it was not the right party to give any consent for VQ to release the DWDM-1 equipment. Norazmi and Tan attributed this confusion to a change in Fiberail's management.[65] However, there was also no prior written evidence that Fiberail had arranged for the DWDM-1 equipment to be delivered to VQ pursuant to a contract between Fiberail and VQ.

47 I turn to the objective evidence in the form of the waybills and packing slips detailing the delivery of the DWDM-1 equipment parts. Tan answered under cross-examination that the DWDM-1 equipment was shipped or delivered to VQ on the following dates: 2 July 2010,[66] 9 July 2010,[67] 25 August 2010,[68] 7 September 2010[69] and 11 March 2011.[70] Aries was listed as the billing party and the vendor on the packing slips (but its name did not appear on the delivery proofs and notifications). Tan explained that the bulk of the DWDM-1 equipment had been delivered to VQ in 2010, and only two pieces of the DWDM-1 equipment were received on 11 March 2011, pursuant to a request from one of Fiberail's customers:[71]

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65 NEs (19 November 2018) at p 111 ln 3–19; NEs (13 February 2019) at p 53 ln 18 – p 54 ln 1.

66 Wan Alias's AEIC at pp 46, 47; NEs (19 November 2018) at p 71 ln 15–19.

67 Wan Alias's AEIC at pp 42–44; NEs (19 November 2018) at p 71 ln 1–15.

68 Wan Alias's AEIC at pp 61, 63; NEs (19 November 2018) at p 62 ln 15–18.

69 Wan Alias's AEIC at p 51; NEs (19 November 2018) at p 63 ln 3–11.

70 Wan Alias's AEIC at p 60; NEs (19 November 2018) at p 63 ln 14–22.

71 NEs (19 November 2018) at p 63 ln 18 – p 64 ln 1, 24–25.

Witness:	… [A] 10 gig DTPR and an SFP1310 nanometre … were received by Mr Kevin Liew which is my colleague.
Court:	Where?
Witness:	[Received]---11th of March 2011.
…	
Court:	So I thought you told me [the DWDM-1 equipment was delivered] mainly around June 2010.
Witness:	So, yes. So the bulk of the equipment, you see, this was only two pieces of e---of equipment parts that came in 2011. This was because NTT, one of Fiberail's customers upgraded from an STM 16 to a 10 gig during that period. So Fiberail or what we thought of at that time sent us some equipment.
Court:	Is the equipment … part of the DWDM-1 equipment? Yes or no?
Witness:	Yes. It was part of the DWDM-1 as claimed.
…	
Witness:	… The bulk of the 77 minus two parts, 75 parts, all arrived in 2010.

48 Aries' counsel relied on the date of the March 2011 deliveries to put to Tan that the final deliveries coincided with the commencement of the IPLC services provided pursuant to the Purchase Order. Tan denied this.[72] I do not agree with Aries that this was the correct inference to be drawn from the date of the deliveries. The March 2011 delivery had to be considered together with the earlier deliveries. The fact that the bulk of the DWDM-1 equipment was delivered in 2010 supported VQ's case, especially since the date of the initial deliveries in July 2010 corresponded with the Service Orders between VQ and Fiberail that were dated 28 and 29 June 2010.

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72 NEs (19 November 2018) at p 75 ln 5–11.

49 Aries' case that it had a contractual relationship with VQ in mid-2010 also did not square with the email evidence supporting VQ's account that its representatives were only introduced to Aries in November 2010. Liew gave affidavit and oral evidence that he and Lim were introduced to Suppiah at a conference in Kuala Lumpur on 2 November 2010.[73] Aries' counsel did not cross-examine Liew on his allegation that this was the first time that the parties met.[74] Indeed, I find that the phrasing of the emails sent around this period supported this aspect of VQ's account. On 8 November 2010, Lim sent the following email to Suppiah, copying Fahim and Liew:[75]

> Dear Anthony,
>
> It was a very good meeting we have in KL during the Capacity Asia last week. As per our discussions, we are looking forward to *establish new partnership with V Telecom.*.
>
> We would like to *start the work* on *establishing* a physical fiber interconnection between Vtel and Viewqwest fiber termination box at the middle of the Causeway. If possible, can you arrange a site survey this week or next so we can sort out the physical interconnection details.. …
>
> … Once the physical Interconnect in place, we can get the traffic flow and working on more business opportunity between Singapore and Malaysia with out much delay…
>
> …
>
> [emphasis added]

Liew sent a similar email on 9 November 2010 to Suppiah, copying Lim:[76]

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73 Liew's affidavit affirmed on 7 November 2013 ("Liew's 2013 affidavit") at para 24; NEs (18 October 2018) at p 40 ln 1–13; NEs (24 October 2018) at p 104 ln 14–17.

74 NEs (18 October 2018) at p 40 ln 14–25; NEs (24 October 2018) at p 105 ln 24 – p 106 ln 19.

75 Liew's 2013 affidavit at para 25 and p 49; NEs (24 October 2018) at p 105.

76 Liew's 2013 affidavit at para 25 and p 50.

> Hi Anthony,
>
> As spoken the other day, can you provide me the buildings you cover in KL? Thanks.
>
> …

The tone and language of these emails indicated to me that an introductory meeting of sorts had taken place only in November 2010. In any event, no reference was made in these emails to any prior contract between Aries and VQ to connect their fibre networks.

50 Neither did correspondence from Fiberail support Aries' account. Wan Alias claimed that Fiberail had been involved in mid-2010 discussions between Aries, VQ and Fiberail.[77] As Aries explained in its email to VQ on 6 March 2013, a copy of the 5 March 2013 letter had been sent to Fiberail as Fiberail had been "part of the team in designing the connectivity".[78] But this was inconsistent with Fiberail's 24 April 2013 letter where Fiberail stated that it had no knowledge of any arrangement between Aries and VQ.[79]

51 Norazmi also gave evidence at the A/D that corroborated the key planks of VQ's case. He had worked for Fiberail at the material time, and claimed to have been personally involved in the negotiations with VQ about the 2010 delivery of the DWDM-1 equipment. He also testified that it was he who had introduced Suppiah to Liew at the November 2010 conference.[80] While he was arguably not an independent witness, his evidence did cast doubt on Aries' case.

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77 Wan Alias's AEIC at para 7.

78 Wan Alias's AEIC at p 119.

79 See Wan Alias's AEIC at p 130.

80 NEs (13 February 2013) at p 12 ln 31 – p 14 ln 11.

52 I also note that in the 5 March 2013 letter from Aries to VQ to reclaim the DWDM-1 equipment, Aries did not assert or mention that the equipment had been delivered to VQ pursuant to a contract between these two parties. Furthermore, the letter mentioned that based on the records of BTI, the DWDM-1 equipment rightfully belonged to Aries. If the DWDM-1 equipment had been delivered to VQ pursuant to a contract between these two parties, it would have been simple enough for Aries to say so, and to request to reclaim the equipment on that basis. Also, there would have been no need for Aries to try and persuade VQ that Aries was the rightful owner of the DWDM-1 equipment. The substantive parts of the letter are set out at [58] below.

53 It was Aries that bore the burden of proving that the DWDM-1 equipment was delivered pursuant to a contract between Aries and VQ and that, therefore, VQ knew that the DWDM-1 equipment belonged to Aries when the 5 March 2013 letter was issued. On the unsatisfactory state of the evidence before me, I find that Aries has failed to discharge this burden. Accordingly, VQ was entitled to question Aries' claim for the DWDM-1 equipment at least when the claim was initially made. I turn now to the conduct of the parties after 5 March 2013.

The length of the conversion period

The commencement of the conversion period

54 Aries pleaded that the conversion period commenced on 31 August 2012, but submitted that the conversion period commenced when it sent the 5 March 2013 letter informing VQ that it wished to reclaim the DWDM-1 equipment. If this demand was unconditional and specific, an unconditional refusal by VQ to return the DWDM-1 equipment within a reasonable time

would have evidenced a course of dealing with the equipment inconsistent with Aries' rights over it.

55 I first consider whether the demand in the 5 March 2013 letter was sufficiently unconditional and specific.

56 This issue was considered, by way of *obiter dicta*, in *Schwarzchild v Harrods Ltd* [2008] EWHC 521 (QB) ("*Schwarzchild*"). The claimant's mother had kept a safe deposit box on the defendant's premises. The claimant's private investigator wrote to the defendant making "a formal demand for an immediate commencement of the process to return [the claimant's] jewellery". The letter also stated that "failure to deal with [the] letter and to reply in a meaningful fashion" would be regarded as theft (at [8]). The defendant applied for the claim to be struck out, or alternatively that summary judgment be granted in the defendant's favour on the basis that the claim was time-barred. Summary judgment was granted against the claimant. The claimant's appeal against the summary judgment was allowed. At [30], Eady J considered that the demand in the letter appeared equivocal as it invited comment on a proposed procedure for the return of the equipment, and invited the recipient to "reply in a meaningful fashion". The demand was not specific as to the property being sought, since the contents of the safety deposit box had been removed and mixed with other property more than three years before.

57 The demand in *Schwarzchild* can be compared with that in *Antariksa Logistics Pte Ltd and others v McTrans Cargo (S) Pte Ltd* [2012] 4 SLR 250, where the letter of demand in question stated (at [91]):

> unless we receive your confirmation by 3.00 pm today (12 October 2009) that you will forthwith deliver up the Containers and their contents to our clients, our clients shall

> have no alternative [*sic*] but to commence legal proceedings to compel you to deliver up the same

This was held to be an unequivocal demand for delivery up (at [91]). It was also specific (at [92]): the first plaintiff claimed to be entitled to the goods in the containers pursuant to the "3 Bills of Lading", which expression was reasonably referable to the *pro forma* bills of lading enclosed in the letter of demand.

58 Aries' position was that the 5 March 2013 letter was an unconditional demand for the return of the DWDM-1 equipment. VQ disagreed. The letter stated:[81]

> …
>
> Kindly be informed that *we shall be reclaiming the following items shipped directly from our vendor, [BTI], to your goodself throughout June 2010* for the deployment & provisioning of IPLC service to your esteem company.
>
> As the service for Equinix to Padang Besar is terminated in August 2012, *we would like to arrange to decommission and withdraw the said inventories*. Based on the record provided by our vendor, the attached list of inventory are to be true and rightfully belongs to V Telecoms Berhad.
>
> *Please do not hesitate to contact myself … for arrangement of the above*. Alternatively you may also contact my colleague Mr Mustafa Ali …
>
> …
>
> [emphasis added]

As mentioned, the letter was also attached to an email of 6 March 2013 to VQ. The email stated:[82]

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81 Wan Alias's AEIC at p 115.

82 Wan Alias's AEIC at p 119.

> …
>
> We wish to reclaim our inventory that were installed at Equinix DC for commissioning of IPLC service to ViewQwest in 2011. Attached is our letter for the said purpose for your onward advice and action. The original of this letter is sent to you via postal service. …

59 VQ argued that the contents of the 5 March 2013 letter did not constitute a "demand" for the DWDM-1 equipment, as Aries only sent the letter to inform VQ that it would be reclaiming the equipment, but did not follow up on this matter.[83] I find that VQ only raised this argument in its submissions as an afterthought. The affidavit and objective evidence showed that VQ did understand Aries' 5 March 2013 letter to be a notice that it was reclaiming the DWDM-1 equipment. Liew, at para 106 of his AEIC affirmed on 16 February 2015, described himself as having received the 5 March 2013 letter "demanding the return of the DWDM 1 equipment supplied to [VQ]". VQ's reply to Aries dated 20 March 2013 also suggested that it understood Aries' letter to be a demand for the DWDM-1 equipment:[84]

> …
>
> Fiberail is the one that ship us all the equipment and all the equipment is registered under Fiberail when we do the import license. There is NO MENTION about Vtel in all document. So, only Fiberail is the correct party to retrieve these equipments. I have no idea what is your Vtel arrangement with Fiberail, and *according to paper work, you cannot take the equipment.* You have to ask Fiberail to *sent us letters and then we will surrender it to Fiberail.* Please talk to Fiberail. Thanks.
>
> This is similar to, lets say Vtel has a colocation at equinix. And if Vtel sent the equipment to equinix. And now if Fiberail claims that those equipment is theirs, can they go to equinix and ask equinix to surrender vtel equipment in equinix to fiberail? So, CANNOT.

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83 DCS at para 39.

84 Wan Alias's AEIC at p 121; Liew's 1st AEIC at p 195.

> …
>
> [emphasis added]

I therefore find that Aries' 5 March 2013 letter constituted an unconditional and specific demand for delivery up of the DWDM-1 equipment.

60 As VQ alleged that it did not initially know that it was Aries who had bought the DWDM-1 equipment, VQ argued that it was entitled to take a reasonable time to verify Aries' title:[85] see also *Clerk & Lindsell* at para 17–27; *Salmond & Heuston* at p 100; *Bristol Airport plc and another v Powdrill and others* [1990] 2 WLR 1362 at 1381. In the light of my finding at [53] that Aries has not proved that the DWDM-1 equipment was delivered pursuant to a 2010 contract with VQ, I am of the view that VQ would reasonably have been confused by Aries' 5 March 2013 letter and it was reasonable for it to decline to return the equipment to Aries initially, even though this might also be seen as an assertion of rights inconsistent with Aries'.

61 However, although VQ was entitled initially to decline to return the DWDM-1 equipment, it had to hand over the equipment once a reasonable time for making enquiries elapsed: *Clerk & Lindsell* at para 17–27. I agree with Aries' submissions that it is crucial that BTI's email to VQ on 10 April 2013 (see above at [13]) clearly identified Aries as owner of the DWDM-1 equipment:[86]

> … The equipment was ordered and paid for by V Telecoms and was shipped to VQ. As per our records the equipment belongs to V Telecoms. If there was a transfer of assets done between V Tel and Fiberail then I can not comment as I was not party to that arrangement.

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85 DCS at paras 39, 98, 99.

86 Liew's 1st AEIC at para 108 and p 199.

62 Importantly, Liew himself admitted in oral evidence that he knew that the DWDM-1 equipment belonged to Aries when he received BTI's email:[87]

> Court: So are you saying that as at 10th of April 2013, after receiving this email from Fahim Sheikh …, you realised that the DWDM-1 equipment belongs to V-Tel?
>
> Witness: Yes.

Liew repeated this answer three more times at the A/D.[88]

63 I also observe that Fiberail's 24 April 2013 letter to Aries would have reinforced that view. Fiberail's letter stated:[89]

> …
>
> … [A]fter [having] carried out an investigation with our team, [we] would like to draw your kind attention that we did not have any record or evidence to confirm of such arrangement made between your good office and Viewqwest Pte Ltd.
>
> In view of such circumstances, kindly be advised that Fiberail would not be in a right position to give confirmation or consent to Viewqwest Pte Ltd for the release of equipment *as they do not belong to us*.
>
> Hence, we would appreciate if you could liaise directly with Viewqwest Pte Ltd in order to reclaim such equipment which currently resides at the mentioned location.
>
> [emphasis added]

64 This letter was sent to Aries, who then appeared to send it to VQ via an email sent to Liew on 3 May 2013 which stated: "FYI. FSB Letter to VTel dated

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87 NEs (18 October 2018) at p 73 ln 18–21.

88 NEs (18 October 2018) at p 118 ln 31–32, p 124 ln 1–2; NEs (22 October 2018) at p 16 ln 12–14; see also PCS at paras 28, 29.

89 Wan Alias's AEIC at p 130.

24th April 2013."[90] Liew gave an unclear account under cross-examination as to whether he had received and read the letter:[91]

Witness:	… Then I saw that there is evidence saying that, … 'For your information, FSB letter to V-Tel, 24.'
…	
Witness:	But then I looked at … my email. There is no attachment. I don't even know … what is that. …
…	
Witness:	My point is: I did not see this letter.
…	
Witness:	… I know that Wan Alyas also try to forward me something, FSB, letter to V-Tel dated 24th April 2013. But I did not ask him what is that letter because there's no attachment. So I just thought it's just a---something there.
…	
Court:	… Did you receive this email?
Witness:	I received this email.
…	
Court:	Did you read it at that time, this email?
Witness:	I don't think I read it.
Court:	So an email was sent to your email address and you are telling this Court you did not read it.
Witness:	I---I cannot recall whether I read it or not but I try to find---find it and try to make reason. Sorry.
Court:	You tried to find what?
Witness:	This piece of email.
Court:	You mean this email was missing from your email?

90 Wan Alias's AEIC at p 132.

91 NEs (18 October 2018) at p 92 ln 13–30, p 93 ln 18 – p 94 ln 28.

> Witness: No. I found this email but there's no attachment of a letter.
>
> …
>
> Court: Is that still your evidence that you cannot remember whether you read this email?
>
> Witness: … Let me rephrase it. The letter from Fiberail to me … to Wan Alyas … I did not receive it. The email from Wan Alyas to me, I believe I did not read it.
>
> Court: Dated what?
>
> Witness: … [D]ated May 3rd, 2013.
>
> Court: Yes, and you believe what?
>
> Witness: I did not read it.
>
> Court: You did not read it, although you received it?
>
> Witness: Yes, but only when all this thing come out already then I go back and look at the---the email which is when---when the search order come in and all this thing, I looked at all the---all the things and try to go and find the email. I can't see the attachment on that.

65 Liew also testified that he was enquiring with Fiberail about Fiberail's interest in the DWDM-1 equipment during this period:[92]

> A … I received the [5 March 2013] letter. I---of course, I will … have some concern because why there is this list of equipment---
>
> …
>
> A ---that is now---is---was supposed to be the arrangement between V-Tel---V---ViewQwest and Fiberail suddenly become a V-Tel equipment. So that is why I need some time to go and find out while---from the Fiberail. And---but at that time, Fiberail has a change in management, … the CTO has changed, the CEO has changed, the CMO also changed. …

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92 NEs (18 October 2018) at p 78 ln 5 – p 79 ln 8.

> Court: What is CMO?
>
> Witness: Chief marketing officer. So he's the one that control the sales, which is, in our contacts, it's Mr Hisharudin(?). And then even the head of International Alliance also changed. Norazmi has---promoted to go into their parent company, Telecom Malaysia. …
>
> …
>
> Witness: … So we don't know anyone after this change of mana---management. So that's why I have to go back to Norazmi and Hisharudin or---or Rossman. So the first thing that I raised, I said that 'Hey, Norazmi, what is going on? Why now V-Tel come and claim that all these equipment that you sent in 2010 is---you know, they claim that it's theirs?'" So Norazmi tell me---he told me that these are some of the arrangement between their company, Fiberail, with V-Tel. So I would take it as I'd like to give them a chance to---to sort it out themself [*sic*] and try to resolve the---the---the equipment issue. So that is why I sent out the email back to Fiberail and asked them to---no, I sent back the email to---to V-Tel, asked them to talk to---to Fiberail. I was given the impression that they will sort it out themself[*sic*] and we must give them the time to---to sort it out.

66 Liew alleged that he spoke to Norazmi before he sent VQ's reply to Aries on 20 March 2013 (see above at [59]). If Liew were sincere about resolving the confusion over Fiberail's interest in the DWDM-1 equipment, it was unlikely that he would have missed the email from Aries on 3 May 2013. He did not dispute that he had received it. His evidence was that he did not remember reading it. It was also his evidence that there was no attachment to the email. In my view, it was likely that he did read the email. Furthermore, if there were indeed no attachment, he would have asked Aries to re-send it given that there was an outstanding issue to be resolved with Fiberail's assistance. I find that Liew did read and receive Aries' email on 3 May 2013 as well as Fiberail's 24 April 2013 letter.

67 In any event, regardless of whether Liew received and read Fiberail's 24 April 2013 letter on 3 May 2013, BTI's 10 April 2013 email had put him on notice that Aries' claim had a valid basis. Liew claimed that in the meantime he had spoken to Norazmi who was looking into the matter.[93] Yet, there was no subsequent confirmation from Norazmi or Fiberail that VQ need not return the DWDM-1 equipment to Aries.[94] Furthermore, on 19 September 2013, Aries' legal counsel handed a hard copy of Fiberail's 24 April 2013 letter (stating that the DWDM-1 equipment did not belong to it) to VQ's Chief Executive Officer, Mr Vignesa Moorthy ("Moorthy"), at VQ's premises in Singapore.[95] Yet VQ still did not inform Aries that it would return the DWDM-1 equipment to Aries. This suggested that VQ was not really waiting for Fiberail's response or only wanted a response which would allow it to continue using the DWDM-1 equipment.

68 I am of the view that in withholding the DWDM-1 equipment after 10 April 2013, VQ's detention of the equipment and refusal to return it amounted to a converting of Aries' equipment to its own use.

69 I also consider VQ's argument that, in any event, it needed time to migrate the DWDM-1 equipment from VQ's systems.[96]

70 Where there are physical difficulties with the delivery of converted goods, a *pro tanto* defence may be raised against the requirement that delivery be immediate: *Clerk & Lindsell* at para 17–27, citing *Metall Market OOO v*

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93 NEs (18 October 2018) at p 82 ln 10–23, p 85 ln 7–9, p 125 ln 29–30.

94 NEs (18 October 2018) at p 85 ln 10–12.

95 Liew's 2013 affidavit at para 67 and p 145.

96 NEs (18 October 2018) at p 70 ln 2–3; NEs (25 October 2018) at p 89 ln 17–28.

Vitorio Shipping Co Ltd [2014] 2 WLR 979 ("*Metall Market*"). In *Metall Market*, Sir Bernard Rix considered, by way of *obiter dicta*, that it is not clear that the impracticalities of separating 9% of a cargo from the properly liened remainder is a conversion, where the owner is perfectly willing otherwise to recognise the consignee's title (at [49]). To my mind, Sir Rix's qualification is crucial. Even if such a defence were to exist, for it to be successfully invoked, the quality of the defendant's conduct must not be inconsistent with the plaintiff's rights. The defendant must recognise the plaintiff's superior title.

71 Here, as at 10 April 2013 VQ had not reverted to Aries to say that Aries could reclaim the DWDM-1 equipment. It will be recalled that its only prior response (dated 20 March 2013) was to say that it would return the DWDM-1 equipment to Fiberail instead.[97] Any argument that it needed time after 10 April 2013 to properly extract the DWDM-1 equipment from its systems before returning it to Aries was therefore irrelevant as VQ did not, on its own account, begin the migration of the equipment until late October 2013 and did not acknowledge Aries' entitlement to the DWDM-1 equipment during the alleged period of migration.

72 I now address VQ's position that its conversion of the DWDM-1 equipment only began when Fiberail filed its initial defence on 14 May 2014 to "categorically" state that the DWDM-1 equipment did not belong to Fiberail.[98] This submission is without merit. As discussed above, VQ knew by 10 April 2013 that Aries, and not Fiberail, was the party that purchased the DWDM-1 equipment from BTI. It also knew by 3 May 2013 that Fiberail invoked no claim

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97 Wan Alias's AEIC at para 24 and p 121; Liew's 1st AEIC at para 106 and p 195.

98 DCS at paras 8, 102.

over the DWDM-1 equipment, when Fiberail's 24 April 2013 letter was sent by Aries to Liew via email as an attachment. This letter contained a clear statement on Fiberail's part that the DWDM-1 equipment did not belong to it. In any event, a hard copy of Fiberail's 24 April 2013 letter was handed to VQ on 19 September 2013. But VQ continued to maintain to Aries that the DWDM-1 equipment belonged to Fiberail, and sent an email to Aries on 2 October 2013 alleging that the DWDM-1 equipment had been sent by BTI to VQ pursuant to a partnership between Fiberail and VQ:[99]

> …
>
> We have spoken to Fiberail … These equipment mentioned in the letter on 5th March 2013 … are delivered to ViewQwest by BTI via UPS as per partnership between ViewQwest & Fiberail during the month of July 2010. …
>
> … *In our asset books, these equipment is registered to Fiberail under our care in Singapore*. In view of such circumstances, kindly be advised that ViewQwest would not be able to release these equipment to V-Telecom without any formal consent from Fiberail.
>
> Hence, we would appreciate if you could liaise directly with [Fiberail] in order to reclaim such equipment …
>
> …
>
> [emphasis in original removed, emphasis added]

73 VQ suggested that it had relied on what Norazmi said to make the above assertion that the DWDM-1 equipment had been sent pursuant to Fiberail's partnership with VQ.[100] However, there was no mention of any representation or assurance from Norazmi in VQ's email of 2 October 2013. In addition, VQ did not produce any of its books or records to support its allegation that the DWDM-1 equipment "is registered to Fiberail" even though Liew was

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99 Wan Alias's AEIC at para 31 and pp 138–139; Suhaini's AEIC at para 14 and p 39.

100 NEs (24 October 2018) at p 110 ln 18 – p 111 ln 8.

specifically asked for such evidence during the A/D hearing.[101] This was just a sweeping and unsubstantiated allegation.

74 On 7 October 2013, VQ sent an email to Fiberail to state that VQ's premises had been searched pursuant to the Anton Piller order I had granted on 3 October 2013 (see above at [16]).[102] VQ sent a second email on the same day to request that Fiberail write a clarification letter to Aries. The email stated:[103]

> …
>
> We have discussed [Fiberail's 24 April 2013 letter] last week during my visit to Kuala Lumpur, and we agreed that during July 2010, Fiberail initiated the partnership with ViewQwest where Fiberail agrees to ship the DWDM Equipments to Singapore in order to enable the first IPLC link interconnection between Fiberail and ViewQwest. …
>
> I appreciate if you can write a clarification letter … to confirm that 1) Fiberail are aware of the partnership of between Fiberail and ViewQwest, 2) V Telecoms to talk to Fiberail on the Reclaiming of the DWDM Machines issues. 3) Free ViewQwest out from this dispute. Basically Fiberail will need to make a decision … whether to instruct ViewQwest to return those claimed equipment to V Telecoms or not.
>
> Please help us to clear our name. Thanks.

Fiberail complied with this request on 11 October 2013, and sent a letter to Aries (copying VQ)[104] revising Fiberail's position as stated in its 24 April 2013 letter:[105]

> …

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101 NEs (18 October 2018) at p 118 ln 3–14, p 119 ln 4–8.

102 Mustafa's AEIC at para 49(d); Suhaini's AEIC at para 15 and pp 41–42.

103 Mustafa's AEIC at para 49(e); Suhaini's AEIC at para 16 and pp 48.

104 Liew's 1st AEIC at para 111 and p 209; Liew's 2nd AEIC at para 5.

105 Wan Alias's AIEIC at para 35 and p 149.

> We refer to our letter to your esteemed organisation dated 24 April 2013 … and your email dated 7th October 2013 regarding the above.
>
> Pursuant to queries made by Viewqwest to us over the same matter recently, we hereby wish to clarify to you that upon thorough investigation on the said matter, we have verified that BTI has actually shipped the said equipment for the purpose of establishment of initial interconnection between Fiberail and Viewqwest between May and July 2010.
>
> … [T]he said equipment was part of the business arrangement made between our former Business Manager while acting on behalf of Fiberail with VTel in procuring the interconnection equipment into Singapore … [T]he said business arrangement was committed without any documentary evidence … and hence was our unawareness of the ownership of the equipment and as such was the contrary reply to you via our letter dated 24th April 2013. … [N]either the arrangement nor information pertaining to the ownership of the said equipment was notified to Viewquest prior to the shipment for both parties' record.
>
> …

75 VQ insisted that the 11 October 2013 letter justified its withholding of the DWDM-1 equipment:[106]

> A … [The 11 October 2013 letter] is a great evidence that says that, you know, the equipment belongs to them. It's through our arrangement. And then they deny what they send to you on April 24th 2013.
>
> …
>
> A So of course this letter is very important.
>
> Court: So are you relying on this letter not to return the equipment to the plaintiff?
>
> Witness: … I rely on this letter because I still state them on my claims, 'Fiberail, you tell me what to do.' Because this letter ne---never tell---tell me that---Fiberail didn't tell me that, 'Oh, you return the V-Tel equipment', or 'You don't return the V-Tel equipment.'

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106 NEs (24 October 2018) at p 57 ln 30 – p 58 ln 23.

> …
>
> Court: … So were you relying on this letter not to return---to take the position that you don't have to return the equipment to the plaintiff?
>
> Witness: Yes.

But such reliance would be disingenuous. Although Fiberail claimed in the letter that BTI had sent the DWDM-1 equipment to VQ pursuant to a contract between Fiberail and VQ, Fiberail did not claim that the equipment belonged to it. Neither did it request VQ not to return the DWDM-1 equipment to Aries.

76 Moreover, even if Fiberail's letter on 11 October 2013 was silent as to who owned the DWDM-1 equipment, Fiberail's subsequent letter to VQ on 23 October 2013, which enclosed Fiberail's draft letter to Aries to purchase the DWDM-1 equipment from Aries,[107] unequivocally signalled that Fiberail recognised Aries' superior title because Fiberail was offering to purchase the equipment from Aries. The draft letter was engrossed and sent on 28 October 2013 by Fiberail to Aries, presumably with VQ's knowledge since VQ was sent the draft. The engrossed letter stated:[108]

> **PROPOSAL TO PURCHASE BTWI DWDM / PACKET SWITCH EQUIPMENT DEPLOYED AT EQUINIX DATA CENTER, SINGAPORE**
>
> …
>
> In view of our current business arrangement at the cross border, we hereby wish to explore on the opportunity to purchase the BTI DWDM / Packet Switch Equipment currently being placed in Singapore for our business need.
>
> We would be much obliged if we could be granted an appointment with your esteem organisation and management team to discuss further on our proposal to purchase the said

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107 Liew's 2nd AEIC at para 6 and pp 16–17.

108 Wan Alias's AEIC at para 34 and p 147.

> equipment if VTel wishes to accept this proposal and furtherance thereto we would also keen to explore further on new business opportunity that both parties can collaborate further in view of our long term business relationship.
>
> …

I thus do not accept VQ's claim that it only knew that Fiberail denied ownership of the DWDM-1 equipment when Fiberail filed its initial defence on 14 May 2014.

The end of the conversion period

77 Having found that the conversion period began on 10 April 2013, I now consider when VQ's conversion of the DWDM-1 equipment ended. Aries pleaded that the conversion period ended in September 2015,[109] but submitted that it ended on 28 August 2015, the date the parties made the final arrangements for Aries to collect the DWDM-1 equipment on 2 September 2015 from VQ.[110] VQ pleaded that the conversion period ended on 19 August 2014, when VQ made its first offer to return the DWDM-1 equipment.[111]

78 Where conversion occurs, the defendant's obligation is only to allow the claimant to collect the converted chattel; he is not bound, save by contract, to take the chattel to the owner: *Clerk & Lindsell* at para 17–23; *Chan & Lee* at para 11.011, citing *Capital Finance Company Ltd v Bray* [1964] 1 WLR 323 at 329. In *Comtech IT Pte Ltd v Chartered Electronics Industries Pte Ltd* [1997] SGHC 277 ("*Comtech IT (HC)*"), the High Court set out the law as follows (at [42]):

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109 SOC (A/D) at para 3.

110 PCS at paras 7(a) and 105; see AD/D4SBD at p 72.

111 Defence (A/D) at para 4.

> The defendant's refusal to return the chattel is in itself not conversion but only evidence of conversion. It is necessary to consider whether the refusal is unconditional or not and to decide whether in either case, the refusal is justified. If there is an unconditional/unjustifiable refusal, then the defendant is denying the title of the owner and can be made responsible for conversion. It should also be noted that a refusal does not cease to be unconditional if the defendant, while admittedly in possession of the goods and while not disputing the owner's right, claims time to do something to the goods other than taking steps towards their return.

The High Court held at [51] and [52] that the defendants' prolonged retention of printer material kits that were supplied by the plaintiffs was not unjustified and constituted an unconditional refusal. This was even though the defendants claimed that they retained the kits to prove that the kits were defective, so as to defend any claim the plaintiffs might bring against them. Even if their refusal to return the kits was considered a qualified refusal, after having had reasonable opportunity to examine the kits, the defendants had the duty to return them. This holding was not disturbed on appeal (see *Comtech IT (CA)* at [15]).

79 It emerges from the guidance above that the conversion period only ended when VQ could be said to have ceased to act inconsistently with Aries' rights as owner, and when VQ began to take steps to allow Aries to reclaim the DWDM-1 equipment (see *Comtech (HC)* at [42]). Accordingly, the conversion period did not necessarily end only on 28 August 2015, the date the parties made the final arrangements for Aries to collect the DWDM-1 equipment, or on 2 September 2015, the date Aries collected the equipment.

80 VQ pleaded in its defence that it continued to use the DWDM-1 equipment to service its contracts with Fiberail until January 2014.[112] It began

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112 Defence (A/D) at para 10.

to migrate circuits from the DWDM-1 equipment as a "precautionary measure" in October 2013, after the Anton Piller order was executed on 7 and 9 October 2013.[113] Such migration was completed in January 2014, and the DWDM-1 equipment was put into storage thereafter.[114]

81 I accept that references to the migration of the DWDM-1 equipment appeared in VQ and Fiberail's emails during this period. On 23 October 2013, emails were sent between Fiberail and VQ to state that Fiberail would "proceed with the Band 3 channel matching" and that VQ and Fiberail would "use Band 3 to migrate all existing circuits".[115] The completion of the migration was mentioned in VQ's email sent at 3.50pm on 24 January 2014 to thank the Fiberail team for its assistance "in migrating all circuits to the new platform". Fiberail responded at 4.04pm: "Thanks everyone! Mission accomplished…"[116] Aries disputed that any "migration" took place then.[117] However, even if the alleged migration had been completed in January 2014 and VQ had placed the DWDM-1 equipment in storage after that, the problem for VQ was that it still did not inform Aries that it was free to collect the equipment. This amounted to a continuing adverse detention of the DWDM-1 equipment and a wrongful assertion of dominion over it.

82 It was only on 19 August 2014, some seven months later, that VQ corresponded with Aries through solicitors to make an offer to return the DWDM-1 equipment ("the First Offer"). VQ pleaded that the conversion period

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113 DCS at para 55.

114 DCS at paras 74, 75.

115 Tan's AEIC affirmed on 14 June 2018 ("Tan's AEIC") at para 8 and pp 9–10.

116 Tan's AEIC at para 20 and p 159.

117 PCS at paras 118–122.

ended on this date.[118] I disagree. The First Offer was conditional in that it required that Aries agree to (a) certain terms and conditions and (b) issue a letter requiring it to indemnify VQ for any loss caused by the return of the DWDM-1 equipment.[119] Aries refused to accept the First Offer as it found that these terms were unreasonable.[120] I find that it was entitled to refuse to give an indemnity to VQ as the terms of the indemnity were too wide. For example, the letter of indemnity included an agreement by Aries to provide VQ with funds to defend proceedings taken against VQ in respect of losses caused by the return of the DWDM-1 equipment to Aries.[121] VQ was not entitled to dictate the terms on which Aries was to reclaim its own equipment. Thus, even though VQ made the First Offer, this did not end the conversion period as VQ had not unqualifiedly accepted Aries' title or superior possessory right over the DWDM-1 equipment.

83 On the other hand, Aries made various suggestions for VQ to unconditionally return the DWDM-1 equipment. This was between September and November 2014.[122] Aries first suggested that VQ return the DWDM-1 equipment on an unconditional basis on 15 September 2014, when it replied to the First Offer. Aries counter-proposed terms and conditions for settlement, but also stated that VQ could return the DWDM-1 equipment to Aries "strictly on a without prejudice basis" even if it did not accept Aries' terms.[123] In an email sent by its solicitors on 15 October 2014, Aries informed VQ that it could still return the DWDM-1 equipment to "mitigate damages" even if no settlement

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118 Defence (A/D) at para 4.

119 AD/D4SBD at pp 5–16.

120 PCS at paras 75–86.

121 AD/D4SBD at p 8, para 3.

122 See PCS at paras 89–94.

123 AD/D4SBD at pp 18–22.

was reached.[124] Aries' solicitors sent a further letter dated 10 November 2014 to repeat that Aries would accept the return of the DWDM-1 equipment "without any conditions and without prejudice to [Aries'] claim for damages".[125]

84 VQ's solicitors subsequently made another offer dated 25 February 2015 ("the Second Offer"). VQ proposed returning the DWDM-1 equipment "subject to agreement on the terms and methodology" of such return.[126] VQ also stated that "three party settlement negotiations" between VQ, Aries and Fiberail "should now be commenced without delay, to arrange for the return of the equipment".[127] Aries' solicitors replied by letter dated 3 March 2015 that Aries would accept the return of the DWDM-1 equipment once "access to the configuration file is completed by [Aries] to determine usage", but that "there [was] no reason for a meeting between all parties".[128] Regarding the reference to the "configuration file", Mustafa explained that Aries wanted at the time to use the configuration file to ascertain how much of the DWDM-1 equipment's capacity VQ had utilised.[129]

85 The Second Offer effectively made the return of the DWDM-1 equipment conditional upon Fiberail's consent. VQ's inclusion of this condition was inconsistent with Aries' rights over the DWDM-1 equipment. Fiberail's consent was not necessary for the return of the DWDM-1 equipment. Fiberail had not made a competing claim for the DWDM-1 equipment. I thus find that

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124 AD/D4SBD at p 23.

125 AD/D4SBD at p 26.

126 AD/D4SBD at pp 27–29.

127 AD/D4SBD at p 29.

128 AD/D4SBD at pp 30–31.

129 NEs (8 August 2018) at p 12 ln 15–25.

Aries was entitled to refuse the Second Offer and that the conversion period did not end on 25 February 2015.

86 VQ's solicitors sent another offer by email on 3 March 2015 at 3.07pm ("the Third Offer") to return the DWDM-1 equipment subject to "an agreement for a stock-take and condition assessment in Singapore, as well as the extraction of the configuration files". VQ proposed asking BTI to supervise the stocktake, condition assessment and file extraction, with BTI's charges to be borne equally by the parties.[130]

87 On 10 March 2015, Aries' solicitors sent a letter accepting the Third Offer on the condition that BTI would supervise the return and carry out the stocktake and condition assessment.[131]

88 Thereafter, Aries' solicitors emailed BTI on 28 March 2015 to set out the scope of the parties' joint request to engage BTI.[132] VQ's solicitors emailed Aries' solicitors on 30 March 2015, referencing this email to BTI and objecting to the inclusion of a term that BTI "ascertain that configuration files … are not tampered with", which VQ's solicitors had not agreed to.[133] Aries' solicitors' email to VQ's solicitors on 7 April 2015, which included the proposed terms for BTI's engagement, did not included this disputed term.[134] The terms proposed

130 AD/D4SBD at pp 32–33.

131 AD/D4SBD at pp 37–38.

132 Defendant's Chronology at pp 190–191.

133 See AD/D4SBD at p 39.

134 See AD/D4SBD at pp 42–43.

by VQ's solicitors via email on 17 April 2015 were accepted by Aries' solicitors on 20 May 2015.[135]

89 I am satisfied that VQ's Third Offer marked the end of the conversion period. By this time, VQ was no longer qualifying the return of the DWDM-1 equipment by suggesting terms inconsistent with an unqualified acknowledgment of Aries' right to the equipment. Offering to return the DWDM-1 equipment on the conditions that a stocktake, condition assessment and the downloading of system configuration files were to be carried out was not inconsistent with Aries' rights over the DWDM-1 equipment. Even if VQ had agreed to return the DWDM-1 equipment on 10 April 2013 such that no wrongful conversion was committed, a stocktake and condition assessment of the DWDM-1 equipment would have had to be carried out as part of the process of the equipment's return. There was also no suggestion that the condition requiring the configuration files to be downloaded was unreasonable in the circumstances. BTI's appointment as a neutral third party to conduct these steps was also reasonable, as Mustafa acknowledged at the A/D.[136]

90 Finally, I note that there was some delay regarding the parties' engagement of BTI as a supervising third party. The parties corresponded from 3 March 2015 to 28 August 2015 on the terms of BTI's engagement to supervise the return of the DWDM-1 equipment and to coordinate the actual collection of the equipment.[137] Aries submitted that the approximately six months' delay was not caused by its actions.[138] I disagree. Mustafa accepted at the A/D that both

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135 AD/D4SBD at pp 44, 52.

136 NEs (8 August 2018) at p 13 ln 9–13.

137 NEs (17 October 2018) at p 68 ln 32 – p 69 ln 10.

138 PCS at para 106.

parties were responsible for the delay.[139] Liew's supplementary AEIC also listed, at para 24, instances where Aries' solicitors took an unexplained amount of time to follow up on correspondence with BTI or VQ. For instance, Aries' solicitors took 33 days to reply to VQ's email regarding BTI's terms of reference. VQ had sent Aries an email containing VQ's proposed terms on 17 April 2015 and Aries replied only on 20 May 2015 to accept them (see above at [88]).

91 While Aries' solicitors need not immediately respond, the point is that VQ should not be held responsible for such delay or any other delay which would have advertently arisen after it acknowledged Aries' right to the DWDM-1 equipment. I am of the view that the delays were not a result of any conduct on VQ's part that was inconsistent with Aries' rights over the DWDM-1 equipment. The delay in the return of the DWDM-1 equipment is therefore not inconsistent with my finding that the conversion period ended on 3 March 2015. Thus the conversion period was from 10 April 2013 to 3 March 2015 and lasted 22 months and 22 days (inclusive of 3 March 2015) (the "Conversion Period" or "CP").

The quantum of ordinary damages

92 Broadly, the object of an award of damages for conversion is to compensate the plaintiff for the damage it has suffered. The usual approach is to equate the damage with the market value of the goods at the date of conversion: *Marco Polo Shipping Co Pte Ltd v Fairmacs Shipping & Transport Services Pte Ltd* [2015] 5 SLR 541 at [28]–[30]. The plaintiff may also recover consequential losses as a result of the conversion, including the loss of profits

139 NEs (17 October 2018) at p 78 ln 29 – p 79 ln 13.

and losses incurred by being deprived of the use of the goods, provided that the losses are not too remote: *Comtech IT (CA)* at [19].

93 Aries did not claim for any loss or damage arising from the unavailability of the DWDM-1 equipment for its own use during the CP. Instead, it claimed damages based on VQ's use of the DWDM-1 equipment during the CP. The parties agreed that the proper measure of ordinary damages, based on the user principle, is the rental value of the DWDM-1 equipment over the conversion period at a rate of US$2,700 per month. This fixed rental sum might not have accounted for the depreciation of the DWDM-1 equipment even before the 5 March 2013 letter was sent. However, I adopt this sum as it has been agreed by the parties.

94 I explain briefly the term "user principle" which Aries used in its submissions, where it cited *ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services)* [2013] 4 SLR 1317 ("*Yenty Lily (CA)*").[140] User damages are assessed by reference to the fee that the defendant would have reasonably had to pay for a licence by the plaintiff to act: *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club*") at [135] and [210]. The Court of Appeal in *Turf Club* clarified, by way of *obiter dicta*, that the juridical basis of the user principle is compensatory (at [212] and [213]).

95 Aries is entitled to ordinary damages of US$61,521.43 for the CP of 22 months and 22 days, calculated on the basis of the agreed monthly rental of

140 PCS at para 7.

US$2,700. This award comprises the rental of the DWDM-1 equipment for the following periods:

S/N	CP	Quantum (US$)
1	22 months from 10 April 2013 to 9 February 2015, for a sum of US$2,700 x 22 months	59,400.00
2	22 days from 10 February 2015 to 3 March 2015, for a sum of (US$2,700 / 28 days) x 22 days	2,121.43
	Total	61,521.43

96 Before leaving this section, I acknowledge that the quantum of my award of ordinary damages is premised on my finding at [53] that Aries has failed to prove that it had a contract with VQ in 2010 pursuant to which the DWDM-1 equipment was delivered. If Aries had succeeded in proving its case, I would have found that the conversion period began running from 5 March 2013 instead. This is because VQ would have known on 5 March 2013 that Aries was entitled to the DWDM-1 equipment, and its subsequent retention and use of the equipment after it received Aries' letter of demand would have amounted to conversion. But it suffices to note that even if I were wrong, the quantum of ordinary damages in this alternative scenario would differ from the present award by little more than a month's rent.

Issue 2: The award of punitive damages

Whether punitive damages should be awarded

97 As set out in *ACB*, punitive damages may be awarded in tort "where the totality of the defendant's conduct is so outrageous that it warrants punishment, deterrence, and condemnation". Such conduct must be beyond the pale and deserving of special condemnation (at [176]). Although used interchangeably

with the expression "exemplary damages", the expression "punitive damages" is to be preferred for consistency as it is the more commonly used term in Singapore (at [156]).

98 Punitive damages serve the needs of punishment, deterrence and condemnation, filling the interstitial space between "cases where the demands of justice are served purely by the award of a compensatory sum, and those cases which properly attract criminal sanction" (*ACB* at [172] and [173]). The Court of Appeal elaborated that punitive damages serve both to punish the defendant as well as promote societal welfare (at [200]):

> … When it performs its retributive function, a punitive award looks backwards at the conduct of the defendant and imposes a condign sanction; however, a punitive award also looks *forward* by making an example of the particular defendant to deter would-be tortfeasors from committing similar transgressions, influencing societal behaviour, and allowing the victim of the wrong an avenue to vindicate his/her rights. … [emphasis in original]

99 Punitive damages may be awarded even if a defendant's actions are technically only negligent (*ACB* at [201]):

> … Whilst it is true that the outrageous nature of the conduct often takes its colour from an intentional act on the part of the tortfeasor, and that, overwhelmingly, an award of punitive damages will only be appropriate where the defendant's wrongdoing was intentional or consciously reckless, one can never foresee every factual permutation that might arise. There may be situations where the defendant's conduct, though technically only negligent, was – "because of its quality or extent, or its duration or repetitiveness, or casualness or indifference, or any other reprehensible feature" (see *Bottrill v A* [2001] 3 NZLR 622 per Thomas J, dissenting) – so beyond the pale that it is properly characterised as outrageous. …

However, the single instance of negligence in *ACB* did not suffice to ground a finding of outrageous conduct (at [208]). The Court of Appeal found that *A v Bottrill* [2003] 1 AC 449 was instructive in this regard. While the High Court

of New Zealand had not been prepared to say that the defendant-pathologist's conduct crossed the threshold of outrageousness, this changed after a State-ordered inquiry revealed that the defendant had a record of "an alarming rate of false positives and a persistent pattern of incompetent performance" (at [208]).

Consideration of cases in other jurisdictions

100 Before turning to the present facts, I will discuss various cases decided in other jurisdictions where punitive damages were awarded. While the facts in these cases are not on all fours with the present case, they provide a sampling of the type of conduct which has been found to have crossed the threshold for an award of punitive damages.

(1) England

101 Aries highlighted two English Court of Appeal cases where punitive damages were awarded: *AXA Insurance UK plc v Financial Claims Solutions UK Limited and others* [2018] EWCA Civ 1330 ("*AXA*") and *Ramzan v Brookwide Ltd* [2012] 1 All ER 903 ("*Ramzan (CA)*").

102 *AXA* concerned the torts of deceit and unlawful means conspiracy. The respondents committed motor insurance fraud and sought to enforce default judgments for fictitious motor accidents against the appellant insurance company ("Axa") for a sum of approximately £85,000. At [32], the English Court of Appeal described the case as "a paradigm case for the award of exemplary damages":

> … This was a sophisticated and sustained fraud involving deceit and fraudulent misrepresentation from the outset. The accidents were faked. False documentation, such as the hire agreements and medical reports, was created. The claimants themselves may not have existed. The first respondent conducted proceedings on the basis that it was authorised to

> do so as a firm of solicitors when it was not, thereby committing a criminal offence. Its conduct of those proceedings was cynical and abusive and through its dishonest manipulation and misuse of the court process, falsely representing that court documents had been served when they had not, the fraud very nearly succeeded. There is little doubt that if the respondents had managed to enforce the judgments they obtained against Axa, Axa would never have seen its money again.

Deterrence was necessary given the seriousness of the respondent's conduct and the prevalence of "cash for crash" fraud, which affects policyholders who face increased insurance premiums (at [35]).

103 *Ramzan (CA)* was a case involving trespass to land. The claimant's father had owned a restaurant on the ground and first floor, with a function room on the first floor. A store room located on the first floor of an adjoining building formed part of the property owned by the claimant's father and provided access to a fire escape for the function room. In 1999, the defendant company ("Brookwide") subsumed the store room into a flat which it rented out. Brookwide also bricked up the entrance to the store room and severed the stairs of the fire escape, rendering the fire escape impossible to use. As a result, the function room of the restaurant could no longer be used, as regulations required the fire escape to be available to it. The claimant acquired the property in 2001. The trespass continued until judgment was handed down in 2010. The High Court found that this case was one of the "worst examples of its kind" where exemplary damages should be awarded because an order for the disgorgement of profits was unlikely to provide a sufficient deterrent in itself: *Ramzan v Brookwide Ltd* [2011] 2 All ER 38 ("*Ramzan (HC)*") at [69]. In determining that exemplary damages were required, the question was framed as follows (*Ramzan (HC)* at [72]):

> The starting point is whether the award of damages by way of compensation for the trespass and breach of trust (including the damages for consequential losses) is adequate to punish

> Brookwide for its conduct and to act as a sufficient deterrent. …

Geraldine Andrews QC, sitting as Deputy High Court Judge, continued at [73]:

> … My strong impression of Brookwide and the group to which it belongs, based on all the evidence in this case, is that they would not hesitate to do anything that would promote their own self-interest, even if occasionally it might mean having to pay someone significant compensation if they overstepped the line. The fact that they bricked up the dividing wall, cut through the fire alarm wires, and effectively made the expropriation of the store room a *fait accompli* before taking any steps to check the legal position with the Land Registry probably says everything that one needs to know about the attitude of the individuals behind Brookwide. The size of the compensation (and having to give up all its profits) would not in itself deter Brookwide from doing the same thing again if it felt it could get away with it. …

Brookwide appealed against the awards of damages. The award of exemplary damages was upheld on appeal but reduced by two-thirds from £60,000 to £20,000: *Ramzan (CA)* at [80]–[83] (discussed further below at [127]).

(2) Canada

104 The Supreme Court of Canada upheld an award of exemplary damages in *Royal Bank of Canada v W Got & Associates Electric Ltd* [1999] 3 SCR 408 at [26]. The appellant bank had been found liable for breach of contract and conversion of the respondent debtor's assets for failing to give notice when calling its loan and appointing a receiver. The bank's "egregious" conduct included the filing of a misleading affidavit to obtain a receivership order (at [12] and [26]). Although the Supreme Court had reservations about some of the factors that the trial judge relied upon to justify his award of exemplary damages, the bank's conduct was held to be a serious affront to the administration of justice; such conduct did not have to rise to the level of fraud, malicious prosecution or abuse of process to justify an award of exemplary

damages (at [28]). The Court nonetheless emphasised at [29] that an award for exemplary damages in commercial disputes remains an extraordinary remedy.

105 In *King v Gross* [2008] AJ No 333 ("*King*"), the Alberta Provincial Court awarded punitive damages against a plaintiff who had found and kept a breeder's dog. Having strong objections to dog breeding, the plaintiff used a false name to misrepresent herself as the dog's owner, and had the dog neutered. She also maintained that she did not have the dog for two weeks even when confronted by the defendants, the vets and the police. She became physically aggressive with a vet when she was not allowed to reclaim the dog. The court held at [158]:

> The exceptional and aggravating circumstances of this case created by Ms. King warrant the addition of punitive damages to compensatory damages in order to obtain the objectives of punishment (retribution), deterrence, and denunciation. Ms. King's conduct after taking control of [the dog] was highly reprehensible and clearly departed from ordinary standards of behaviour. It was planned and deliberate. At this point we are not concerned with compensation but punishment, deterrence and denunciation. The focus is on her behaviour. …

106 In *Klewchuk v Switzer* [2003] AJ No 785, the Alberta Court of Appeal allowed an appeal against an award of punitive damages where one business partner converted the property of another. The appellant ("Switzer") had seized the equipment belonging to the respondent ("Klewchuk") in his belief that Klewchuk did not have a valid lease. It was relevant that Switzer had been legally advised that the parties' prior written agreement had been frustrated by the enactment of new legislation and notified Klewchuk as such (at [11] and [69]). The trial judge found that frustration had not occurred, and that Switzer had carried out a secret plot to expropriate Klewchuk's business. The Alberta Court of Appeal disagreed, and held that trial judge had erred in finding that the agreement had not been frustrated (see [21], [67] and [70]). The confusion

between the parties about the nature of their business relationship meant that no intentional wrongdoing was established (at [71]).

107 The Ontario Court of Appeal also allowed an appeal against exemplary damages in *2105582 Ontario Ltd. (c.o.b. Performance Plus Golf Academy) v. 375445 Ontario Ltd. (c.o.b. Hydeaway Golf Club)* [2017] OJ No 6526 where the "exemplary" damages awarded amounted to double recovery by the respondent. As the respondent had wanted the return of the converted assets to sell them to a buyer, the damages awarded reflecting the market value of the assets had fully compensated the respondent. The respondent was not entitled to additional "exemplary" damages reflecting the purported benefits obtained by the appellant after the date of conversion (at [71]–[73]).

(3) New Zealand

108 The High Court of Wellington awarded exemplary damages for conversion of the respondents' car in *Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144. The appellant's tow company had been requested to tow the respondents' car away. One of the respondents ("Murray") sat in the driver's seat and applied the foot brake to prevent this. Citing *Taylor v Beere* [1982] 1 NZLR 81 and *Donselaar v Donselaar* [1982] 1 NZLR 97, the High Court held at 152 that exemplary damages could be awarded where the defendant acts in contumelious disregard of the plaintiff's rights, and compensatory and aggravated damages are insufficient to inflict proper punishment on the defendant. Two matters displayed the appellant's "arrogant disregard for any rights the respondents may have had". First, the appellant's employee rejected Murray's offer to remove the car, and towed it away notwithstanding that Murray was sitting in it. It ought to have been obvious that the employee should exercise some caution and make some inquiries as to his legal position and that

to continue to remove the car was likely to produce a reaction. Second, the appellant's employees interfered with the brake mechanism of the respondents' car. This demonstrated the length to which the appellant was prepared to go to protect the payment of NZ$18, which Murray had already indicated his willingness to pay. In any event, the amount did not justify such extreme behaviour.

109 In *McBride Street Cars Ltd v Rapana* [2006] NZAR 697, the High Court of Dunedin awarded exemplary damages for trespass. The first respondent, a bailiff, trespassed on the appellants' property after being told to leave. She drove her vehicle back onto the premises and parked the vehicle to prevent the vehicle from being removed. The High Court found that the first respondent's actions had not occurred because of her ignorance of the true legal position, but because of her determination to have her way regardless (at [23]). The trial judge's findings had established intentional behaviour with an element of flagrancy or cynicism (at [27]). John Hansen J held at [26]–[29] that:

> [26] In my view, … there was clearly reckless indifference on the part of the first respondent, who having checked that the registered cars were in the name of the appellant, must have been aware of the risks involved in her continued actions in refusing to listen to the rational and reasonable explanations being proffered.
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> …
>
> [28] … [T]his wilful refusal to consider explanations and the determination to have her way went beyond the irresponsible. It was deliberate, outrageous and high-handed. There was in the circumstances a "deliberately and outrageous" disregard for the appellant's rights. …
>
> [29] … It is hard to think of a worse example of actions by a public official who is invested with significant powers. The truth is the first respondent was determined to seize a car regardless of the circumstances, the explanations offered, or the propriety of her actions. …

110 More recently, the High Court of Wellington awarded exemplary damages in *Philip Moore & Company Ltd v Anne Josephine Surridge* [2018] NZHC 562 ("*Philip Moore*"). Exemplary damages were awarded in respect of the defendant's commission of the tort of intentional interference with a business by unlawful means (at [208] and [245]). In this case, the defendant was embroiled in a dispute with her brother and sister-in-law to control the business entities set up by their father. The defendant unlawfully issued trespass notices against her brother and sister-in-law to prevent their entry onto one of the business premises and tried to persuade the police that she was entitled to act on behalf of one of the companies (see [198] and [199]). This conduct made out the case for the awarding of exemplary damages (at [245]).

Whether VQ's conduct was outrageous

111 Aries' submissions extensively detailed the aspects of VQ's conduct which it argued met the threshold of outrageous conduct set out in *ACB* at [176]. According to Aries, VQ's outrageous conduct comprised the following.

112 Liew sent Aries an antagonistic email on 20 March 2013 in response to the 5 March 2013 letter.[141] VQ's email to BTI on 10 April 2013 also alluded to the use of the DWDM-1 equipment to service customers other than JasTel (the end-customer under the Purchase Order).[142] VQ insisted on an alleged transfer of assets from Aries to Fiberail even after receiving BTI's email on 10 April 2013. VQ also instigated Fiberail to write to Aries on 11 October 2013 to confirm an alleged arrangement between Fiberail and VQ.[143] Even assuming that

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141 PCS at para 152.

142 PCS at para 153–162.

143 PCS at paras 163, 166.

the migration of the DWDM-1 equipment occurred in January 2014, VQ omitted to return the equipment afterwards, and contrarily maintained in its pleadings that Fiberail owned the equipment.[144] VQ also insisted on making Aries prove its ownership of the DWDM-1 equipment at trial.[145] In all, VQ's actions were motivated by a calculated desire to earn profits from the continued use of the DWDM-1 equipment to service its contracts with Fiberail.[146]

113 VQ's response was that Aries should have accepted Fiberail's offer to purchase the DWDM-1 equipment on 28 October 2013 (see above at [17]).[147] Although VQ ought to have taken Aries' request for the return of the DWDM-1 equipment more seriously, Liew had been genuinely confused at the initial stages and had responded to Aries' actions timeously.[148] Punitive damages should not be awarded as VQ's conduct was reasonable throughout.[149]

114 First dealing with VQ's arguments, I am of the view that Aries was not obliged to accept Fiberail's offer to purchase the DWDM-1 equipment. In *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 918, the English Court of Appeal held that a claimant in conversion has a duty to minimise his losses (at [69]). Moore-Bick LJ explained the principle in the following terms (at [63]):

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144 PCS at para 167.

145 PCS at paras 168–170.

146 PCS at paras 171–174.

147 DCS at para 42; Defendant's Reply Closing Submissions ("DRS") at para 11.

148 DRS at para 12.

149 DCS at para 111.

> … [I]n many cases (of which the present is an example) the Claimant is deprived of his property *temporarily* rather than permanently. It has long been recognised that if the Claimant in conversion recovers his property or any part of it, he must give credit for the value of what he has recovered. That being the case, *it is difficult to see why a person who has been deprived of his property should not be expected to take reasonable steps to* ***recover it***, thereby reducing the loss that he would otherwise suffer. … [emphasis added]

In my view, the duty to mitigate does not mean that Aries was obliged to allow Fiberail to purchase the DWDM-1 equipment. Indeed, even though VQ pleaded that Aries had a duty to mitigate, VQ did not plead that this duty meant that Aries was obliged to sell the DWDM-1 equipment to Fiberail.

115 As for Aries' submissions, in the light of my finding that Aries has not proved that VQ was aware of any alleged contract between the parties as at 5 March 2013, VQ's reply on 20 March 2013 denying Aries' request to reclaim the DWDM-1 equipment was not outrageous. Any admission or allusion by VQ that the DWDM-1 equipment was in the meantime being used to service contracts or customers apart from those under the Purchase Order was also not outrageous in these circumstances.

116 However, I find that VQ had acted wilfully in withholding the DWDM-1 equipment after 10 April 2013, when BTI confirmed that it was Aries who had bought the equipment and Liew admitted that it was by then that VQ knew that Aries owned the equipment (and was entitled to reclaim it) (see above at [61] and [62]).

117 The facts show that VQ was aware of but ignored Aries' entitlement to the DWDM-1 equipment from an early stage. BTI's 10 April 2013 email to VQ confirmed Aries' ownership of the equipment, but VQ did not follow up with Aries on this email. VQ also did not accede to Aries' request for delivery up of

the DWDM-1 equipment when Aries sent VQ an email on 3 May 2013, attaching Fiberail's 24 April 2013 letter, where Fiberail disclaimed any interest in the equipment. Even though Liew claimed he did not receive this email and the attached letter, which I did not accept (see above at [66]), a hard copy of Fiberail's 24 April 2013 letter was physically delivered to VQ on 19 September 2013. VQ did not return the DWDM-1 equipment even after Fiberail sent its 11 October 2013 letter to Aries (copying VQ), where Fiberail affirmed the existence of the VQ-Fiberail agreement, but did not claim the equipment nor request that VQ retain it. VQ also did not acknowledge Aries' title to the DWDM-1 equipment and right to possession after Fiberail sent VQ its draft proposal to purchase the equipment from Aries on 23 October 2013, thereby acknowledging Aries' superior rights over the equipment.

118 VQ's conduct also comprised periods of inexplicable conduct. VQ claimed that it was motivated to migrate the DWDM-1 equipment after October 2013 to "mitigate" its risk.[150] But whether or not the DWDM-1 equipment was migrated by January 2014, VQ did not inform Aries that it could collect the equipment until August 2014. However, in fairness, I should mention that on 2 July 2014, VQ had written to its new solicitors to say that VQ could return the DWDM-1 equipment to Aries.[151] The delay between 2 July 2014 and 19 August 2014 when its new solicitors wrote to Aries' solicitors to offer to return the DWDM-1 equipment was perhaps due to some delay on the part of the new solicitors to act more promptly.

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150 NEs (19 November 2018) at p 114 ln 25–32.

151 Liew's Supplementary AEIC at para 8 and p 19.

119 In any event, a negative inference can be drawn from VQ's inaction in this regard. The first inference to be drawn is that VQ did not migrate the DWDM-1 equipment by January 2014, but at some other later time, in which case it lied to the court when it claimed to have done so. In the alternative, VQ did migrate the DWDM-1 equipment by January 2014 but continued to retain the equipment, with no reasonable explanation apart from a vague suggestion that VQ had been confused by the poor advice it received from its previous solicitors to retain the equipment to preserve evidence.[152] This explanation was unsatisfactory especially since no concrete evidence was adduced about the advice from its previous solicitors and its previous solicitors did not give evidence even though VQ appeared willing to waive privilege on this point.[153] In any case, when asked why Aries was not informed that the migration had taken place, Liew only stated that it never crossed his mind that he should have done so:[154]

> Witness: So the---the lawyer advised and say that since we are in the proceeding with Fiberail and our stand is always … that, you know, this equipment arranged from Fiberail, so we need to hold on to that equipment as a evidence.
>
> Court: Yes, but you need to hold on the equipment as evidence and then what, but still don't tell them that it's already migrated.
>
> Witness: I mean, it never come to my---my mind that, you know, that I need to tell the people who sue me about all this thing and say that---
>
> …
>
> Witness: I mean, the whole thing---

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152 NEs (22 October 2018) at p 58 ln 5–16; NEs (24 October 2018) at p 43 ln 19 – p 44 ln 16; see PCS at para 130; DCS at para 53; Liew's Supplementary AEIC at para 8.

153 NEs (22 October 2018) at p 59 ln 16–26.

154 NEs (22 October 2018) at p 59 ln 23 – p 60 ln 9.

…

Witness: ---all the collections of all these events, you know, so I'm not the only one that make this decision. So, I---I mean I---I---my boss are there to---to---to make a decision on all these things so---

120 Furthermore, although VQ suggested that there was no need for it to cling onto the DWDM-1 equipment as it could have replaced the equipment by taking replacement parts from stock from a related company[155] and/or by purchasing equipment parts from BTI, which would have taken two to three months and a week or two,[156] the fact remained that, firstly, it did not even begin the migration of the DWDM-1 equipment until late October 2013. Secondly, after the alleged completion of the migration on 24 January 2014, it still did not inform its own solicitors that it would return the DWDM-1 equipment until 2 July 2014.

121 In summary, this was a situation where Aries consistently asserted a claim over the DWDM-1 equipment. However, VQ refused to return the DWDM-1 equipment for the duration of the CP of 22 months and 22 days. VQ's conduct displayed a callous disregard for Aries' entitlement to its property and a lack of contrition. It went beyond mere negligence. VQ's conduct did not arise only from a lack of knowledge of Aries' claim, or from a genuine belief in Fiberail's entitlement to the DWDM-1 equipment. It is worth reiterating that not once did Fiberail inform VQ not to return the DWDM-1 equipment to Aries. The only logical inference that can be drawn is that VQ knowingly withheld the DWDM-1 equipment for its own purposes.

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155 NEs (19 November 2018) at p 33 ln 25 – p 34 ln 6, p 35 ln 1–11, p 42 ln 1–4.

156 NEs (18 October 2018) at p 68 ln 5–13.

122 In these circumstances, I find that VQ's cumulative actions amounted to a sustained and intentional withholding of the DWDM-1 equipment that was sufficiently outrageous such as to justify punitive damages being awarded to Aries. While my award of ordinary damages accounts for the *length* of VQ's conversion, it does not address the *character* of VQ's conduct. An award of compensation would neither adequately serve the function of sufficiently punishing and condemning VQ for wilfully and intentionally closing its mind to evidence of Aries' claim over the DWDM-1 equipment, nor deter such conduct from taking place in the future, whether by VQ or other parties.

123 I qualify that the period of VQ's outrageous conduct (the "Outrageous Conduct Period" or "OCP") was not identical to the length of the CP. The CP ended only on 3 March 2015 when VQ made the Third Offer to return the DWDM-1 equipment (see above at [86]–[89]). But I find that VQ's outrageous conduct ended prior to that date. Aries' Mustafa acknowledged at trial that VQ's conduct ceased to be "cynical" after the Second Offer was made on 25 February 2015.[157] Hence, in closing submissions, Aries did not seek to establish that VQ's offers constituted outrageous conduct justifying punitive damages. I take the view that VQ's outrageous conduct ended when it made the First Offer on 19 August 2014 to return the DWDM-1 equipment. Although the First Offer included certain terms and conditions and a request that Aries issue VQ a letter of indemnity, the First Offer did not continue VQ's outrageous conduct. I am of the view that the requirement of an indemnity was unwise and likely to be due to VQ's solicitors taking an overly cautious approach. There was no other claimant and, in any event, VQ would be protected if it allowed Aries to collect the DWDM-1 equipment pursuant to a court order or judgment. The

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157 NEs (17 October 2018) at p 76 ln 26 – p 77 ln 6.

requirement of an indemnity unduly prolonged VQ's delay in giving an unconditional acknowledgement that Aries was entitled to claim the DWDM-1 equipment. However, as mentioned, it was not outrageous to require an indemnity.

124 Therefore, the OCP extended from 10 April 2013 to 19 August 2014, and lasted for 16 months and 10 days (inclusive of 19 August 2014).

The quantum of punitive damages to be awarded

125 I turn now to the question of the quantum of punitive damages.

126 In England, the following criteria have been advanced and accepted as relevant to this calculation: *McGregor on Damages* (James Edelman gen ed) (Sweet & Maxwell, 20th Ed, 2018) ("*McGregor*") at para 13-031 *et seq*.

(a) In *Rookes v Barnard* [1964] AC 1129 ("*Rookes*") at 1227–1228, Lord Devlin set out three considerations that are relevant to awards of exemplary damages. First, the plaintiff must be the victim of the punishable behaviour. Second, the award must be moderate. Third, the means of the parties are material in the assessment.

(b) The conduct of the parties is also relevant. In *Ramzan (HC)* at [71], the High Court held that the defendant's conduct in deliberately expropriating the claimant's property, followed by no contrition, no apology and attempted cover-up by lying in evidence was relevant to the award of £60,000. This award of exemplary damages was reduced to £20,000 on appeal, as elaborated upon below at [127]. Conversely, a defendant's apology in the witness box may well make a difference in

his favour, as the Court of Appeal observed in *Loudon v Ryder* [1953] 2 QB 202 at 207.

(c) Fifth, the adequacy of the amount awarded as compensation is relevant. As Lord Reid held in *Cassell & Co Ltd v Broome and another* [1972] 2 WLR 645 ("*Broome*") at 686B, while compensatory damages are always part of the total punishment, if the sum awarded in compensation is insufficient as a punishment, the tribunal is to "add to it enough to bring it up to a sum sufficient as punishment".

(d) The possibility of criminal penalty is also relevant, as are the positions of joint wrongdoers and multiple claimants.

127 In *Ramzan (CA)* at [83], Arden LJ reduced the High Court's award of punitive damages by two-thirds after taking into account the following: the claimant had only acquired the property from his father in 2001 after Brookwide first expropriated the store room in 1999; the award must not be disproportionate; the High Court criticised Brookwide's conduct in very strong terms; and Brookwide was liable to pay "a very considerable sum by way of compensation …, namely £55,000 for the loss of the store room, £213,073.50 for the loss of profits and interest on both those sums". Arden LJ concluded that the reduced award of £20,000 in punitive damages remained a "significant sum" that marked the High Court's and her own conclusion that Brookwide's conduct was "a totally unacceptable way of resolving the issues as to the ownership of property in a democratic society subject to the rule of law". The commentary in *McGregor* at para 13-032 criticised the reasoning in *Ramzan (CA)* for failing to directly engage with the usual criteria for the assessment of punitive damages, apart from a "faulty reference to the relevance of a compensatory award".

128 Similar approaches have been taken in the other jurisdictions surveyed. In Canada, the defendant's conduct, whether a criminal conviction may be brought and the defendant's financial means are relevant: *King* at [159]–[160]. The New Zealand High Court in *Philip Moore* (at [246]) cited the New Zealand Court of Appeal's decision in *McDermott v Wallace* [2005] 3 NZLR 661 ("*McDermott*") at [94]–[102], which set out six principles relating to the assessment of quantum:

(a) the claimant must be the victim of punishable behaviour;

(b) the award should be moderate;

(c) the means of the parties should be considered;

(d) awards of compensation to the claimant, whether under the criminal law or in regulatory proceedings, are relevant;

(e) regard must be had to the imposition of any relevant criminal penalty; and

(f) the conduct of the parties up to the time of judgment is relevant.

129 As regards the principle that awards of exemplary damages should be moderate, I set out for illustration a number of English and New Zealand cases where punitive damages were awarded.

130 The commentary in *McGregor* at para 13-037 considered how the criteria of moderation applied in English cases:

(a) In *Drane v Evangelou and others* [1978] 1 WLR 455, the defendant-landlord invaded the maisonette he let to the plaintiff-tenant when the tenant and the woman he lived with were out. The tenant could

not re-enter the premises as the doors were bolted from the inside, and the landlord moved his own in-laws into the maisonette (at 457E–457H). The landlord and his in-laws did not comply with the injunctions that the tenant was granted and did not leave until there was an application to commit them for contempt. Lord Denning MR considered this a case in which it was necessary "to teach the defendant a lesson" and upheld the award of £1,000 in exemplary damages (at 460A).

(b) In *Design Progression Ltd v Thurloe Properties Ltd* [2005] 1 WLR 1, a landlord breached its duty under s 1(3) of the Landlord and Tenant Act 1988 (c 26) to decide whether to give consent for a tenant's assignment of the lease within a reasonable time. Exemplary damages of £25,000 were awarded against the landlord as it operated in a cynical way designed to frustrate the tenant in obtaining its legitimate expectation of an assignment of the premises in order to extract for itself the value of the property (at [144]).

(c) In *Daley v Mahmood* [2006] 1 P & CR DG10, the defendants harassed the claimants and unlawfully evicted them. The trial judge found that there had been a deliberate campaign of intimidation, harassment and threats designed to make the occupiers leave the property. Exemplary damages of £7,500 were awarded to each of the four claimants, to reflect "the seriousness and the attempt to make a speculative profit" (at D30).

131 In *McDermott* at [97], the New Zealand Court of Appeal reproduced a schedule tendered by counsel of awards in precedent cases for the benefit of practitioners. I reproduce the table here as well:

	Quantum	Case	Court	Year	Facts
NON-INJURY CASES					
Trimming trees	$1,000	*Napolcha v Nash*	High Court	1999	Neighbour trimming trees on boundary
	$2,500	*Cousins v Wilson*	High Court	1993	
	$1,000	*Percy v Le Heux*	High Court	1982	
Other	$5,000	*French v Dept of Corrections*	Employment	2003	Breach of employment contract
	$5,000	*Harding v Kummer*	High Court	1983	Rigging an auction
	$5,000	*Cook v Evatt*	High Court	1991	Breaching fiduciary duty
	$2,500	*Fahy v Schofield*	High Court	1990	Taking of car
	$1,500 (Delvin) $5,000 (Police)	*Shattock v Delvin*	High Court	1990	Removal of barn from property
	$750	*Brown v Neild*	District Court	2002	Breaching quiet enjoyment of a tenancy
	$500	*Jamieson's Tow & Salvage v Murray*	High Court	1983	Towing a car away
	$10,000	*McIntyre v Bianchi*	High Court	1992	Industrial relations

INJURY CASES					
Sexual abuse	$100,000	*M v L*	High Court	1998	
	$85,000	*G v G*	Family Court	1996	
	$40,000	*M v J*	District Court	2002	
	$20,000	*A v M*	High Court	1991	
	$25,000	*H v H*	High Court	2002	
	$35,000	*B v R*	High Court	1996	
	$10,000	*L v Robinson*	High Court	2000	
	$20,000	*H v R*	High Court	1996	
	$20,000	*AB v CD*	High Court	1992	
Police assault	$15,000	*Archbold v A-G*	High Court	2003	
False arrests	$30,000	*Harris v A-G*	High Court	1999	
	$7,500	*Hayward v O'Keefe*	High Court	1993	
		Craig v A-G	District Court	1986	
Other	$15,000	*McLaren Transport Ltd v Somerville*	High Court	1996	Exploding tyre while inflating
	$15,000	*Williams v Duvalier Investments*	District Court	1999	Bouncer assault

	$12,000	*Boyle v Newcomb*	District Court	1997	Burns from hairdressing treatment

The Court of Appeal in *McDermott* also noted the following cases at [98]:

Cropmark Seeds Ltd v Winchester International (NZ) Ltd	HC, Timaru, 28/09/04, CIV2003-476-00008, J Hansen J	intellectual property – breach of Plant Variety Rights Act – flagrant breach of owner's right	$5,000 v each def.
Bird v Hansen	[2004] DCR 936	contract – termination of licence – high-handed conduct	$5,000
Clapham v Russell & Finlayson	[2004] DCR 901; reversed [2004] NZAR 760	tort – trespass / loss of privacy – felling trees	$15,000
Hire Intelligence Solutions NZ Ltd v Cassin Enterprises Ltd	HC, Auckland 19/12/03 CIV2002-404-001797, R Hansen J	contract – deceptive conduct in relation to borrowed funds	$10,000
Powell v Koene	[2003] DCR 341	tort – conversion, including refusal to return chattels under order	$10,000 v 1st def, $5,000 v 2 others
Communications Art Ltd v Grant	EC, Auckland 13/12/01 AC 83/01, AEC 140/99, Judge Travis	employment – breach of confidentiality by departing employee	$10,000
Spotless Services (NZ) Ltd v Walters	[2001] ERNZ 236	employment – breach of confidentiality by departing employee	$10,000
Binnie v Pacific Health	EC, Auckland 05/03/01 AC 14/01, AEC 175/99, Judge Colgan	employment – breach of employer in relation to allegations of serious misconduct	$10,000

R v Eade	DC, Auckland 12/05/00 NP 3604/97, Judge M D Robinson	tort – fiduciary duty/negligence – sexual misconduct by therapist	$27,500

132 I turn to the position in Singapore as set out in *ACB*. As mentioned above at [97], the award of punitive damages should serve the function of punishment, deterrence or condemnation where the demands of justice are not served purely by an award of compensation (*ACB* at [172] and [173]). The court should consider the adequacy of any compensatory award and the existence and adequacy of any criminal and/or disciplinary sanctions that might have already been imposed (at [180]). As regards the former factor, the Court of Appeal at [178] and [179] endorsed Lord Devlin's statements in *Rookes* at 1228 and Lord Reid's statements in *Broome* at 685G–686B as follows:

> 178 In *Rookes* … Lord Devlin stressed that exemplary damages should only be awarded as a last resort, where the existing remedies are inadequate. He said that when assessing damages in a case where punitive damages are available, the jury should be directed that (at 1228):
>
> > … ***if but only if****, the sum which they have in mind to award as compensation* (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum. …
>
> 179 This restriction … has since come to be known as the 'if but only if' test … It has been widely accepted throughout the Commonwealth, … The principle behind it was lucidly set out by Lord Reid in *Broome (HL)* at 685G–686B, where he explained that one always had to bear in mind that the task of the court was not to devise *two sums* (one for compensation and one for punishment), but to decide on an appropriate sum which served *two purposes*: compensation and punishment. If the sum the court had in mind as compensation was already sufficient to serve the aim of punishment, then no more need be added. In our judgment, this is a sound principle and it should be followed.

[emphasis in original]

133 In the present case, Aries submitted that punitive damages of S$500,000 should be awarded.[158] VQ responded that an award of punitive damages should not exceed £20,000, being the amount in punitive damages awarded in both *AXA* and *Ramzan (CA)*.[159]

134 I considered the following factors in arriving at the appropriate quantum.

135 It is undisputed that Aries was the victim of VQ's punishable conduct.

136 VQ's wilful conversion of the DWDM-1 equipment was extended and VQ persisted in its actions in spite of clear evidence of the wrongfulness of its conduct. As mentioned, the OCP lasted for 16 months and 10 days (see above at [124]). In comparison, the CP did not end when the First Offer was made on 19 August 2014 and spanned 22 months and 22 days (see above at [95]). While the OCP was shorter than the CP, I considered that the OCP did not comprise a one-off incident but spanned a significant length of time.

137 VQ also acknowledged that it used the DWDM-1 equipment to service its contracts with Fiberail, albeit with the qualification that VQ migrated the equipment by January 2014 and had to augment the DWDM-1 equipment with other equipment parts.[160] The parties agreed that VQ's profit margin was 40% of its revenue.[161] Aries initially claimed an account of VQ's profits made as a

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158 PCS at paras 180 to 181.

159 DRS at para 15.

160 Tan's Supplementary AEIC affirmed on 2 October 2018 at para 24; NEs (20 November 2018) at p 2 ln 28 – p 3 ln 18; see PCS at para 7.

161 NEs (17 October 2018) at p 41 ln 29 – p 42 ln 15.

result of VQ's use of the DWDM-1 equipment during the conversion period,[162] and adduced expert evidence that VQ's revenue was $2,724,919.67 from 5 March 2013 to 28 August 2015.[163] Aries eventually dropped its claim for the disgorgement of VQ's profits (see above at [27]). Nonetheless, I am satisfied that VQ did profit at least in part from its continued use of the DWDM-1 equipment after 5 March 2013. I accordingly find that VQ's actions were not motivated solely by sheer intransigence. Rather, VQ had acted out of intransigence in combination with a desire to use the DWDM-1 equipment to make a profit. Such self-serving conduct for a commercial purpose would justify a reasonably sizeable award of punitive damages to deter VQ and others from similar conduct.

138 Turning to the adequacy of the compensation award, I did not consider that the compensatory award of US$61,521.43 (see above at [95]) sufficed to serve the two purposes of compensation *and* punishment. Solely awarding compensatory damages based on the user principle in this case would encourage VQ and others to treat compensatory damages as mere business and operating costs akin to rent, especially in similar cases where the conversion is prolonged, wilful and carried out for profit.

139 On the other hand, Aries' proposed quantum of S$500,000 appeared excessive as it was more than six times the ordinary damages awarded. At the same time, there was no suggestion on VQ's part that VQ was not in a position to pay damages of that quantum.

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162 SOC (A/D) at paras 12, 13.

163 See Tang Boon Sun's AEIC affirmed on 25 June 2018 at paras 1.2 and 4, pp 6 and 8.

140 In the circumstances, I award punitive damages in the sum of S$60,000, which I consider to be moderate. This sum is in addition to the award of US$61,521.43 in compensation damages, to reflect the court's disapprobation of VQ's conduct, the duration of the outrageous conduct and VQ's motive to retain the DWDM-1 equipment to make a profit. Although the awards of exemplary damages in the English and New Zealand cases set out at [130] and [131] appear mostly to be relatively lower in comparison, many of those cases were decided before 2000. Furthermore, it bears noting that the award of punitive damages should not be too low, or its deterrent value will be lost. An award of S$60,000 is necessary here to serve as a sufficient deterrent. Indeed, future cases may involve higher awards if the present award of S$60,000 is insufficient to deter similar conduct.

Conclusion

141 For the reasons above, I award Aries ordinary damages of US$61,521.43, calculated on the basis of the agreed monthly rental of US$2,700 over the CP of 22 months and 22 days, and punitive damages of S$60,000.

142 I will hear the parties on costs.

Woo Bih Li
Judge

Yeo Siew Chye Troy (M/s Chye Legal Practice) and Ong Pang Meng (M/s C K Tan & Partners) for the plaintiff;
Sze Kian Chuan John and Loh Hui Chen Nicola (Joseph Tan Jude

Benny LLP) for the defendant.
