IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 185

District Court Appeal No 3 of 2020

Between

(1) Star Group Est Pte Ltd

… *Appellant*

And

(1) Willsoon (FE) Pte Ltd

… *Respondent*

JUDGMENT

[Commercial Transactions] — [Sale of goods] — [Breach of contract]
[Contract] — [Breach]
[Contract] — [Breach] — [Waiver]
[Courts and Jurisdiction] — [Court judgments] — [Declaratory relief]

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Star Group Est Pte Ltd
v
Willsoon (FE) Pte Ltd

[2020] SGHC 185

High Court — District Court Appeal No 3 of 2020
Tan Lee Meng SJ
17 June 2020

2 September 2020 Judgment reserved.

Tan Lee Meng SJ:

1 The appellant, Star Group Est. Pte Ltd, ("Star Group"), a Singapore company, is in the business of building maintenance and landscaping works. The respondent, Willsoon (F.E.) Pte Ltd ("Willsoon"), another Singapore company, manufactures and assembles mechanical pumps. Star Group, which ordered a vacuum tanker from Willsoon for cleaning operations, rejected the tanker for a number of reasons, including a breach of the condition implied by s13(1) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SGA"). Star Group appealed against the decision of the District Judge ("DJ"), who held that it had no right to reject the said tanker and was not entitled to damages for Willsoon's alleged breach of contract.

Background

2 In July 2016, Star Group won a tender from the Public Utilities Board ("PUB") to provide services for the desilting of trunk sewers for 36 months, from 15 August 2016 to 14 August 2019.

3 To facilitate its work for the PUB, Star Group required a machine that dislodges silt and material clogging sewers and drains with high pressure jets of water, and then vacuums the waste into a storage tank for proper disposal at another location. Such a machine is usually mounted on a truck, which Star Group had to procure separately.

4 Star Group forwarded to Willsoon sample specifications of the machine that it required. On the basis of a Sales Quotation dated 17 September 2016, Star Group entered into a contract with Willsoon (the "Contract") to supply a vacuum tanker, known as the "Willsoon Super Combi Vacuum Tanker on Base Skid" (the "Combi"), for S$220,00 plus 7% GST. In the Contract, the "delivery lead time" was stated as "12-13 Working Weeks".[1] It was understood that the equipment would be constructed in China and shipped to Singapore.

5 In the Contract, it was stated under the heading "Descriptions" that the Combi to be supplied by Willsoon would have the following specifications in relation to the size of the debris/water tank and valves:[2]

> Debris/Water tank
>
> …

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1 Affidavit of Evidence-in-chief of Rafael Low at pp 138 to 141.

2 2CB at pp 63 to 66.

> Size: *15,000 Lit.*
>
> …
>
> Rear Door: Hydraulic powered opening *with two (2) manual hand wheels 6" gate valve for discharge and 4" ball valve for suction.*
> [emphasis added]

6 According to Star Group, the above-mentioned specifications, namely that the tank was to have a capacity of 15,000 litres and two valves, a 6-inch valve for discharge and a 4-inch valve for suction, are implied conditions of the Contract by virtue of s 13(1) of the SGA, which concerns the sale of goods by description.

7 Pursuant to the contract, Star Group made an advance payment of $110,000 to Willsoon.[3]

8 On 24 September 2016, Willsoon's Business Development Manager, Mr Rafael Low ("Rafael"), informed Star Group by email of some changes to the design of the Combi, one of which was the reduction of the capacity of the Combi's debris and water tank (the "tank") from 15,000 litres to 14,000 litres. A variation order was forwarded to Star Group but the latter did not sign it. The reduction of the capacity of the tank is one of the main issues in this case.

9 Despite not having received Star Group's confirmation that the change in the capacity of the tank from 15,000 litres to 14,000 litres was acceptable, Willsoon issued a purchase order to its manufacturer in China on 7 October 2016 to build a Combi with a tank capacity of only 14,000 litres.[4]

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3 Appellant's Written Submissions at [8].

4 1ABD at pp 8 to 14.

10 On 25 October 2017, Star Group's Mr Simon Lim ("Simon") emailed Willsoon and said he did not agree to changes in the specifications and "will not allow the specs to be changed at your discretion".[5]

11 On 26 October 2016, Simon emailed Willsoon to say that the tank should be able to hold either 15,000 litres of clean water or 15,000 litres of debris and pointed out that this was clearly spelt out in the Contract. He added that the outcome would be disastrous if Willsoon proceeded to build the Combi on the basis of the latter's own revised specifications.[6]

12 In October 2016, Willsoon's director, Mr Dave Low Swee Sang ("Dave") went to China to inspect the construction of the Combi, which was being built without a separate 4-inch suction valve as was required under the Contract. The absence of this 4-inch suction valve is another major issue in this case.

13 On 1 November 2016, Rafael emailed Star Group to state that the maximum physical size of the tank that could fit Star Group's truck, onto which the Combi was to be fitted, was 14,000 litres and that the truck, which was 8.5m long, would have to be 9m long to fit a tank of 15,000 litres.[7] It was stated in the Contract that the recommended vehicle for a Combi with a 15,000 litre tank was an "Isuzu CYH52T" with a Truck Bed Length of 8.5m.

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5 1ABD at p 84.

6 3BA at p 114.

7 3BA at p 121.

14 On 1 November 2016, Simon responded to Willsoon in an email, in which he complained about the variation of the Combi's tank capacity. He made it clear in the email that Star Group will deal with this "unilateral" variation in totality and will see the final product before deciding what steps to take against Willsoon.[8]

15 On 6 January 2017, the Combi arrived in Willsoon's warehouse in Singapore. After the first inspection by Star Group, Willsooon informed the former of the need to modify some parts before the official testing session, which took place on 14 February 2017.

16 On 16 February 2017, Simon emailed Rafael about various issues with the Combi.[9] These included problems relating to the high pressure gun, the remote control for the water hose-reel, the engine oil level indication, vibration problems with the Combi, the water pressure, and the positioning of the control valves and control box. Star Group also asked Willsoon to let it know how much water the Combi's tank could contain as this matter had not been brought up during the testing of the Combi.

17 On 17 February 2017, Willsoon emailed Star Group to say that it required 5 weeks to complete the required rectifications to the Combi and that while the water tank capacity was 14,000 litres, it would potentially be unsafe for Star Group to load more than 12,000 litres into the tank when it was mounted on the truck.[10]

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8 3BA at p 123.

9 1ABD at p 144.

10 1ABD at p 146.

18 On the same day, Simon emailed Willsoon stating that while Star Group agreed to the request of 5 weeks to rectify matters, it would, in the meantime, rent a Combi and claim the rental costs from Willsoon.[11]

19 On 16 March 2017, Willsoon informed Star Group that the Combi was ready for re-testing. This was done on 21 March 2017.[12]

20 On 6 April 2017, the Combi was tested again. On 10 April 2017, Simon emailed Willsoon to complain about the "serious fault of overheating" and to "implore" the latter to take the rectification works seriously as every additional day of delay had severe financial consequences for it.[13] Willsoon's position was that the overheating was caused by the "unreasonable" testing of the Combi for two hours. On 19 April 2017, Willsoon informed Star Group that it had installed a cooler and larger hydraulic tank.[14]

21 On 20 April 2017, there was a final testing of the Combi.[15] Willsoon claimed that as at this date, it was ready and willing to deliver the Combi to Star Group and that the latter breached the Contract by wrongfully refusing to pay the balance sum of S$125,400 despite multiple demands for payment. It claimed that Star Group refused to take delivery of the Combi by alleging that the equipment was riddled with a litany of defects, and that there was non-compliance with specifications in the Contract.

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11 1ABD at p 147.

12 1ABD at p 148.

13 1ABD at p 155.

14 1ABD at p 156.

15 1ABD at p 159.

22 Star Group's position was that while old faults had been rectified, new problems had surfaced, such as the oil press meter and voltmeter not working. Star Group contended that as Willsoon had been unable to rectify the faults in the Combi to its satisfaction, it had the right to reject the Combi and refused to pay the balance of the purchase price amounting to $125,400. On 20 April 2017, Simon emailed Willsoon as follows:[16]

> Hi Kim Meng, Rafael & Dave,
>
> For the testing today, we are extremely disappointed to see that while old faults have been rectified, new problems have surfaced.
>
> Today, the oil press meter and volt meter was not working.
>
> Despite repeated reminders from our side imploring your company to take the repair work seriously, all of which was clear documented via email, our advice was not taken seriously.
>
> In fact, other major and important parts of the Combi have yet to be tested, such as the process on the vacuuming part and sound test.
>
> The delay of the Combi is more than 4 months and by any standards, this is unreasonable and unjustifiable.
>
> Yet, today, your side has the cheek to ask for payment.
>
> Hence, we have no choice but to accept the fact that Willsoon FE Pte Ltd had grievously chosen to breach our agreement.
>
> Our losses will be considerable.
>
> We have made every effort to avoid a lengthy and costly litigation, including giving Willsoon ample opportunities and time to rectify the faults.
>
> *This matter, now as it is, we have no other choice but to proceed with legal proceedings.*
>
> [emphasis added]

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16 1ABD at p 159.

23 On 4 May 2017, Star Group's former solicitors, Rajah & Tann LLP ("Rajah & Tann"), wrote to Willsoon stating that the latter had breached a material term in the contract by failing to deliver the Combi within the period stipulated in the Contract, and that by virtue of "initial flaws" and "further flaws" in the Combi, including the fact that the suction points for the refilling of water to the Combi had not been installed, Willsoon had breached and repudiated the Contract.[17] Rajah & Tann added that Star Group accepted Willsoon's repudiation of the Contract and was no longer obliged to take delivery of the Combi. Rajah & Tann also claimed that Star Group was entitled to a refund of its deposit of $110,000, the cost of renting a substitute Combi from 6 April 2017 to 4 May 2017, the sum of $10,000 forfeited in relation to the bidding on 12 April 2017 for a Certificate of Entitlement for the lorry onto which the Combi was to be mounted, and loss of profits amounting to $136,500.

24 On 19 May 2017, Willsoon's former solicitors, Quahe Woo & Palmer LLC ("Quahe Woo & Palmer"), wrote to Rajah & Tann to deny that Willsoon had breached the contract and to demand payment of, *inter alia*, the sum of $125,400, which was allegedly due under the Contract, by the close of business on 26 May 2017. Quahe Woo & Palmer added that the Combi would be delivered to Star Group upon receipt of such payment.

25 As Star Group did not pay the sum demanded, Willsoon filed a suit against Star Group in the District Court in June 2017.

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17 1ABD from pp 161 to 165.

The District Court Trial

26 In its suit against Star Group, Willsoon claimed that it suffered losses totalling $167,490.75. This sum comprised the balance of the purchase price, which amounted to $125,400, and the cost of modifications to the Combi allegedly carried out at Star Group's request.

27 Star Group defended the claim against it on the basis that it was entitled, on account of, *inter alia*, Willsoon's breach of conditions implied under ss 13 and 14 of the SGA, to reject the Combi and terminate the Contract. Star Group's case was that Willsoon had breached the condition implied by s 13(1) of the SGA, which provides that there is an implied condition in contracts for the sale of goods by description that the goods will correspond with the description, in two respects. First, the Combi's tank capacity was not 15,000 litres, as stated in the Contract. Instead, it only had a maximum water volume capacity of 14,000 litres. This will be referred to as the "capacity issue". Second, the Combi did not have a 6-inch gate valve for discharge and a 4-inch ball valve for suction, as stated in the description of the Combi in the Contract. Instead, it only had a single 6-inch valve that was to be used for both discharge and suction purposes. This will be referred to as the "4-inch suction valve issue".

28 Star Group also contended that it had a right to terminate the Contract because of Willsoon's breach of s 14(2) of the SGA as the Combi was not fit for its purpose and was not of satisfactory quality. The question of the delayed delivery of the Combi was another issue raised by Star Group, which counterclaimed against Willsoon for the refund of the $110,000 advance payment that had been made to the latter, a sum of $10,000 that it paid as a

deposit for a truck on which the Combi was to be mounted, which was forfeited, and loss of profits.

29 It was agreed that the following issues required determination by the DJ:

(a) whether Star Group was in breach of the Contract in relation to the 4-inch suction valve issue and the capacity issue and whether the breach fell within the ambit of s 13(1) of the SGA;

(b) whether by reason of the alleged defects, the Combi was unfit for its purpose and was not of satisfactory quality. This involved a breach of terms implied under ss 14(3), 14(2), 14(2A) and 14(2B) of the SGA;

(c) whether Willsoon breached a material term in the Contract by virtue of the late delivery of the Combi;

(d) whether Star Group is entitled to reject the Combi by reason of the above-mentioned breaches; and

(e) whether Willsoon is entitled to the costs for modifications to the Combi.

30 The DJ upheld Willsoon's claim for $125,400 and dismissed its claim for modification costs. She also allowed Willsoon's claim for late payment interest at the contractual rate of 1% per month on remaining unpaid sums from the date of the writ to the date of judgment. Finally, she ordered Willsoon to deliver the Combi to Star Group within seven days from the date of full payment by Star Group.

31 On 22 January 2020, Star Group paid the sum of $163,647 to Willsoon. Although Star Group asked Willsoon to keep the Combi until the disposal of its appeal against the decision of the DJ, the latter insisted that Star Group take delivery of the Combi. On 10 February 2020, the Combi was delivered to Star Group. According to Star Group, the Combi has not been utilised and if its appeal against the DJ's decision succeeds, it is ready to return the Combi to Willsoon.

Issues in the Appeal

32 For the purposes of the appeal, the Star Group chose to rely only on Willsoon's breach of the condition implied by s 13(1) of the SGA to justify its termination of the Contract. As such, it no longer relied on the arguments raised in the court below that Willsoon had breached terms implied by s 14 of the SGA as the Combi was not fit for its purpose or of satisfactory quality, and that it was entitled to terminate the Contract by reason of the delayed delivery of the Combi.

The law on sale by description

33 In view of the position adopted by Star Group in this appeal, the issue before me is whether or not it was entitled to reject the Combi on the ground that Willsoon had breached the condition implied by s 13(1) of the SGA by failing to comply with the specifications in relation to the capacity issue and the 4-inch suction valve issue.

34 Section 13 of the SGA, which concerns contracts for the sale of goods by description, provides as follows:

> (1) Where there is a contract for the sale of goods by description there is an implied condition that the goods will correspond with the description.
>
> (2) If the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
>
> (3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.

35 The effect of s 13(1) of the SGA is to classify the relevant description of goods in a contract for a sale by description as an implied condition of the contract. In *Chai Cher Watt v SDL Technologies Pte ltd* [2012] 1 SLR 152 ("C*hai Cher Watt*"), the Court of Appeal explained (at [19]) in the following terms the effect of the implied condition in s 13(1) of the SGA:

> Under s 13(1) of the Sale of Goods Act ("the Act"), it is an "*implied condition*" that the goods will "correspond with the description". The fact that the wording of s 13(1) classifies every description of the contract categorically as a *condition* is of crucial significance…. *A breach of it, no matter how small, and regardless of the consequences, will entitle the innocent party to treat the contract concerned as discharged.*
>
> [emphasis added]

36 The strict application of s 13(1) of the SGA is mitigated by the *de minimis* rule, which is found in s 15A of the said Act, and provides as follows:

> 15A — (1) Where in the case of a contract of sale —
>
> > (*a*) The buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a condition implied by section 13, 14 or 15; but
> >
> > (*b*) The breach is so slight that it would be unreasonable for the buyer to reject them,
>
> then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

> (2) This section applies unless a contrary intention appears in, or is to be implied from, the contract
>
> (3) It is for the seller to show that a breach fell within subsection 1(*b*).

Whether sale of Combi was by description

37 As Star Group's appeal hinges on the application of s 13(1) of the SGA, it must first be determined whether the Contract involves a sale by description.

38 In *Varley v Whipp* [1900] 1 QB 513, Channel J pointed out (at p 516) that the phrase "sale by description" must apply to "all cases where the purchaser has not seen the goods but is relying on the description alone" and added that while the most usual application of s 13 of the English Sale of Goods Act 1893 is to the case of unascertained goods, "it must also be applied to cases … where there is no identification otherwise than by description. In *Culindo Livestock (1994) Pte Ltd v Ananda UK (China) Limited* [2014] SGHC 178, Tay Yong Kwang J, as he then was, reiterated (at [24]) that it has been recognised that where a contract is for the sale of unascertained goods, the sale must be by description as the buyer must have some means of knowing whether the goods supplied by the seller are the goods specified in the sale contract. In *Joseph Travers & Sons Ltd v Longel Ltd* [1947] TLR 150, Sellers J, as he then was, said (at p 153) that a sale must be by description if it is of future goods.

39 One would have thought that it is rather obvious that the sale of the Combi was a sale by description. Willsoon pleaded at paragraph 4(d) of its Statement of Claim that it was a term of the Contract that the "Combi shall be manufactured according to the specifications stated in the Contract". However, there seems to have been a misunderstanding of the DJ's position on whether

the sale of the Combi was one by description because she stated in paragraph 27 of her Grounds of Decision ("GD") as follows:

> I agree with Willsoon's contention that the contract in question is *not a sale by description* based on the specifications set out in the contract because the Combi was a bespoke equipment that was tailor-made for Star Group and parties discussed the various specifications before finalising the final product. I note that at the point of the Sale Quotation, parties were still in the initial stages of discussions. I also find that it is in the nature of such bespoke contracts that modifications to the specifications may be made and accepted by parties. Thus, it is not uncommon to encounter a situation where the eventual specifications of products vary from the original descriptions.
>
> [emphasis added]

40 Star Group pointed out that the DJ erred because there is no rule that bespoke contracts cannot fall within the ambit of s 13(1) of the SGA. However, a reading of the other parts of her GD illustrates that although the position could have been more clearly put, what the DJ was trying to say in connection with the 4-inch valve issue was not so much that the Contract was not one by description, but that it was a Contract which had its original specifications amended by agreement. She stated at paragraph 28 of her GD as follows:

> In cases involving bespoke products, the question as to whether there is a breach of section 13(1) of the Sale of Goods Act should be answered after taking into account the unique circumstances for such bespoke contracts. In this case, I am satisfied that the evidence shows that Star Group had *accepted the modification* in relation to the 4-inch suction vale. *Star Group should not be allowed to now resurface this as a breach of section 13(1) of the Sale of Goods Act that allows them to get out of the contract.*
>
> [emphasis added]

41 Of course, where contractual terms have been varied by mutual agreement, the contracting parties can no longer rely on terms agreed upon at the time of contract that have subsequently been varied by mutual consent.

However, the fact that variations to the original contractual specifications have been agreed does not mean that the Contract, as initially formed, is not one by description. During the hearing of the appeal, Willsoon's counsel, Mr Alfred Lim, confirmed that Willsoon accepted that the sale of the Combi involved a sale by description and stated that its position was that the description in the Contract of the capacity of the tank and the requirement of two valves, one for suction and another for discharge, cannot be relied upon by Star Group because the description in question has been superseded by agreed variations in relation to the capacity issue and the 4-inch suction valve issue.

42 As it was common ground that the Contract for the sale of the Combi is one of sale by description, and that Willsoon did not deliver a Combi that had a water tank capacity of 15,000 litres and a 4-inch suction valve, as required by the Contract, what has to be considered next is whether or not Star Group had, as alleged by Willsoon, agreed to the variations in relation to the capacity issue and the 4-inch suction valve issue, and if it did not, whether or not the breaches of the implied condition under s 13(1) of the SGA by Willsoon may be regarded as *de minimis* under s 15A of the said Act.

The capacity issue

43 As the Contract specified that the Combi's tank capacity was to be 15,000 litres, this specification must be complied with because it is an implied condition of the Contract by virtue of s 13(1) of the SGA.

44 Willsoon's case is that it was agreed between the parties that the Combi's tank capacity would be varied from 15,000 litres to 14,000 litres. On the other hand, Star Group insisted that it did not agree to any variation of the

Combi's tank capacity, and that Willsoon's failure to deliver to it a Combi with a tank capacity of 15,000 litres entitles it to reject the Combi.

45 Willsoon's position on Star Group's acceptance of the variation on the tank's capacity was put as follows in paragraph 26A of its Reply and Defence to Counterclaim (Amendment No. 2):

> …
>
> (d) On or around 28 September 2016, Rafael met with Simon at the Defendant's office premises to discuss the Proposal. Although no decision was made by Simon during the said meeting as regards the Proposal, Simon did not reject the Proposal and/or inform Rafael that the Defendant did not agree to any changes in the Specifications.
>
> (e) In the interest of time, the Plaintiff submitted the Specifications, with appropriate amendments based on the Proposal, to its supplier on or around 7 October 2016 so that manufacturing of the Combi could be carried out first, pending the Defendant's decision on the Proposal.
>
> (f) On or around 1 November 2016, the Plaintiff reiterated the Proposal to Simon, who accepted the same on behalf of the Defendant
>
> (g) In the premises, by way of the Defendant's Agreement, the Combi's tank capacity (as stated in the Contract) was varied to 14,000 litres.

46 Why Willsoon claimed that Star Group accepted its proposal to reduce the capacity of the Combi from 15,000 litres to 14,000 litres cannot be readily understood when, as the DJ rightly pointed out, Simon had expressly reserved Star Group's position on this matter in his email dated 1 November 2016. This email, which was sent at 5.14pm (the "1 November 5.14 pm email"), was worded as follows:

> Hi Nelson & Dave
>
> The case being as it is now, what choice do we have but to accept? Please advise. We think that you should have done a

> proper calculation before representing to us the water tank can hold 15,000 litres of water.
>
> A contract, once signed, is full and final.
>
> *However, we will deal with this unilateral variation in totality. This means we will see the final product first before deciding what redress to take.*
>
> It is therefore very important that nothing else goes wrong for this product. If we receive everything else in good order, then it will be easy to talk and compromise.
>
> You must have been aware that the new jetter fabricated by your side and delivered to us lately has so many problem. To our horror, we found old parts were being used in our new jetter. This is an unethical way to do business.
>
> I really cannot imagine if the same thing will to happen to this Combi. I will not be able to make-up for the loss even if I will to sell my house.
>
> I implore your side to take this very seriously and ensure that nothing else goes wrong.
>
> [emphasis added]

47 After receiving Simon's email, Rafael emailed him within one hour to explain why the tank capacity should only be 14,000 litres. Significantly, he gave the impression that Star Group could still have a tank with a capacity for 15,000 litres. The email was as follows:

> This was the recommendation given by the factory and also our recommendation.
>
> It would be worse off if we were to go ahead with 15,000 litres and you will have very little space for maintenance of the equipment….
>
> You still do have the choice to change your mind for 15,000 litres, but as a supplier and service/repair provider of your equipment, we do not recommend it.

48 On 3 November 2016, Simon emailed Rafael to reiterate that Star Group's stand remained the same as that stated in the 1 November 5.14 pm email, in which Star Group had reserved its position on the matter.

49 The DJ concluded that the evidence showed that Star Group did not unequivocally accept Willsoon's variation of the capacity of the tank on 1 November 2016. She described Star Group's response in the email of 1 November 2106 as a "conditional" acceptance that was subject to the final product being acceptable. Notably, the DJ pointed out that during the trial, Rafael accepted that there was no agreement in November 2016 between the parties on the reduction of the tank capacity of the Combi from 15,000 litres to 14,000 litres. When cross-examined on the 1 November 1.54pm email, he testified as follows:

> Q: Okay. Now my instructions [are] that … all this email really states is that Star Group is essentially reserving their rights and they will decide on this matter later, you agree?
>
> A: Agree.

50 In the light of the evidence before the court, the DJ concluded at paragraph 38 of her GD that "*prima facie* Willsoon has breached the agreement in supplying the Combi with a tank capacity of 14,000 litres instead of 15,000 litres". I agree with her conclusion.

51 Surprisingly, after having holding that Willsoon had *prima facie* breached the Contract by supplying a Combi with a tank capacity of only 14,000 litres and that there was no agreement for the variation from 15,000 litres to 14,000 litres, the DJ nonetheless held that Star Group was not entitled to reject the Combi on the ground of the said breach. She explained in the following three rather short paragraphs (paragraphs 39, 40, and 41) in her GD her basis for denying Star Group the right to reject the Combi:

> 39 Having said [that Willsoon is in breach], however, the evidence shows that the truck procured by Star Group could not have accommodated a water tank of 15,000 litres capacity

> and as explained by Willsoon's Rafael, supplying a water tank of 15,000 litres would render the Combi unsafe to use. I also note that the tank capacity issue was not listed as one of the issues in Star Group's email to Willsoon listing the issues with regard to the Combi after the first testing session.
>
> 40 Further, the capacity issue was also not raised in Star Group's letter of demand of 4 May 2017, whether as an issue under "initial flaws" or as an issue under "further flaws".
>
> 41 The fact is also that the capacity issue was not originally part of the pleaded case of Star Group. All of these go to show that the capacity issue was an afterthought. This also goes to show that, even if it did not comply with the specification in the Sales Quotation, this issue did not pose a serious defect. Other than the non-conformance with the specifications in relation to the water tank capacity and Star Group's non-acceptance of the change, there is no evidence that the capacity issue renders the Combi defective in any way. More importantly, there is no evidence to show that this non-conformance with the specifications would render the Combi so defective as to substantially deprive Star Group of the benefit of having the Combi.

52 The matters raised in paragraphs 39, 40 and 41 of the GD are not relevant to Star Group's right to rely on breach of the implied condition under s 13(1) of the SGA to reject the Combi.

53 To begin with, in relation to paragraph 39 of the GD, whether or not the truck could have safely accommodated a Combi with a tank capacity of 15,000 litres is not relevant to whether or not the condition under s 13(1) of the SGA was breached. If Willsoon's assertion that the size of the truck excused its breach in supplying a Combi with a tank with a capacity of only 14,000 litres is to be accepted, this would mean that a hypothetical supplier who delivers to a purchaser a smaller oven than that described in the contract can argue that he is excused because the bigger oven that was ordered by the purchaser could not have been safely fitted into the space allotted for it in the buyer's kitchen. This would be an absurd result. No evidence was furnished to indicate that Willsoon

had a responsibility under the Contract to ensure that Star Group's truck could carry the Combi if its tank capacity was 15,000 litres, and it is for Star Group to deal with the matter if there is a problem in relation to the mounting of the Combi with a tank that has a capacity of 15,000 litres onto its truck. The practicalities of Star Group's use of the Combi cannot be relied on to justify Willsoon's failure to comply with the terms of the Contract.

54 As for the DJ's statement in paragraph 40 of her GD that the capacity issue was not raised in Star Group's letter of demand of 4 May 2017 as an initial flaw or a further flaw, and in paragraph 41 that the capacity issue was not originally part of the pleaded case and was an afterthought, Star Group denied that the capacity issue was an afterthought. Star Group pointed out that due to a mistake, the issue of the capacity of the Combi's tank had been raised in another letter written by its solicitors, Allen & Gledhill, to Willsoon's solicitors, Quahe, Woo & Palmer, on 7 June 2017 in relation to another machine, a jetter, ordered by it from Willsoon. A jetter is a high-powered water jet that has no water tank, and the complaint about the capacity issue that had inadvertently been put in the said letter was worded as follows:

> Around the time, our client also discovered that the Jetter did not conform to the agreed specification. Instead, of supplying a drum of 15,000 litre volume, your client supplied a drum with only 14,000 litre volume.

55 Star Group asserted that as a jetter has no water tank, its complaint in the said letter of 7 June 2017 that a tank with a capacity of only 14,000 litres instead of 15,000 litres was supplied obviously related to the Combi. It thus submitted that the mistake made by it in its solicitors' said letter showed that it was untrue that it had not raised the capacity issue earlier on or that the capacity issue was an afterthought.

56 In any case, Star Group pointed out that it is entitled to rely on the capacity issue as a ground for terminating the contract *even if* it is a belated reason so long as it is a valid ground for termination. It is trite that a party who accepts the other party's repudiation of the contract may subsequently justify the termination on a different ground if that ground existed at the time of termination. Star Group relied on *Boston Deep Sea Fishing and Ice Co v Ansell* (1999) 39 ChD 339, where it was held that a company that was sued by its former managing director for wrongful dismissal could rely on gross misconduct by the latter that was discovered only *after* the dismissal even though the company did not know about the misconduct at the time of dismissal. Star Group also relied on *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos*) [1971] 1 QB 164, 200, where Lord Denning stated that the fact that a contracting party gives a bad reason for determining a contract does not prevent him from afterwards relying on a good one when he discovers it. Hence, the charterers in that case, who initially cancelled the charter of a vessel on the ground of *force majeure* when they had no cargo to load, were permitted to subsequently rely on another ground for terminating the charterparty, namely, that the shipowners had breached an expected ready to load clause because their vessel could not have reached the loading port by the date stated in that clause.

57 This general principle of contract law has been applied in Singapore in a number of cases. In the context of a contract for the sale of goods, in *Chuan Hiap Seng (1979) Pte ltd v Progress Manufacturing Pte Ltd* [1995] 1 SLR(R) 122, GP Selvam J reiterated (at [15]) that where a buyer rejects goods on the ground of non-conformity by giving no reason or by giving a wrong reason, he may subsequently justify his rejection on a fresh ground provided such ground did in fact exist at the time of rejection, although this would not apply if the

seller could have rectified the non-conformity and made another delivery within the contractual time. On the facts, it does not appear that Willsoon could have rectified the non-conformity and made another delivery within the contractual time, and no evidence was led on this point in any case.

58 Significantly, in her short grounds for holding that Star Group was not entitled to reject the Combi even though a tank with a capacity of 15,000 litres had not been supplied, the DJ stated in paragraph 41 that "[m]ore importantly, there is no evidence to show that this non-conformance with the specifications would render the Combo *so defective as to substantially deprive Star Group of the benefit of having the Combi*". It is clear from the decision of the Court of Appeal in *Chai Cher Watt* that whether there has been substantial deprivation of benefit is not a test for determining whether the condition under s 13(1) of the SGA has been breached. In that case, the appellant and respondent entered into a contract for the purchase and sale of a drilling and boring machine. The contract described the length of the machine as 11 m. The drilling and boring machine that was furnished to the appellant was in fact 13.5m in length. The respondent argued that the discrepancy in the length of the drilling machine made no difference to the operation of the machine and that the appellant was thus not substantially deprived of the benefit of the contract. Andrew Phang JA, who delivered the judgment of the Court of Appeal, rejected this line of argument and explained (at [25]) as follows:

> The Respondent sought, in this regard, to argue that this discrepancy in length made no difference in so far as the operation of the Drilling Machine was concerned and that the Appellant's workshop could easily accommodate a machine that was 13.5m in length. Indeed, from a technical perspective it would appear that the Drilling Machine had to be 13.5m in length in order for it to be able to carry out the Appellant's stipulated requirement of boring up to 4m in depth …. However, such an argument is, in our view, legally irrelevant in the

> context of the present appeal. If the *Hongkong Fir* approach were applicable, then the argument might have had more traction since the Respondent could then argue that this particular breach had not deprived the Appellant of substantially the whole benefit of the contract it was intended the latter should have. However, this is not the legal situation that is before this court. The contractual term specifying the length of the Drilling Machine is, as already noted, a *condition* and any breach of it, regardless of the consequences, entitles the Appellant to elect to treat the Drill Contract as discharged (see also the position at common law pursuant to the legal principles set out in *RDC Concrete*….
>
> [emphasis original]

59 I thus do not accept the DJ's conclusion that, for the reasons outlined above at [51], Star Group is not entitled to terminate the contract on the basis of Willsoon's failure to supply a Combi with a tank capacity of 15,000 litres. Willsoon has breached an implied condition of the Contract by supplying a tank with a capacity of only 14,000 litres.

Whether Willsoon's breach is excused by section 15A of the SGA

60 As Willsoon breached an implied condition in the Contract by supplying a tank with a capacity of only 14,000 litres, what has to be considered next is whether or not the discrepancy falls within the *de minimis* rule in s 15A of the SGA.

61 As is made clear by s 15A(3) of the SGA, it is for Willsoon to prove that its breach of the implied condition under s 13(1) of the SGA by not delivering a Combi with a tank capacity of 15,000 litres is so slight that it would be unreasonable for Star Group to reject the Combi. In *Chai Cher Watt*, the Court of Appeal pointed out (at [22]) that what s 15A of the SGA seeks to do is to limit the right to reject goods for breach of condition in non-consumer cases where the breach is slight and/or technical. Notably, in proposing that the United

Kingdom Sale of Goods Act 1979 be amended to incorporate the *de minimis* rule, the Law Commission and the Scottish Law Commission expressly noted that "the modification of the right to reject is not intended as a major alteration in the law but one which will apply only where the breach is slight and it is unreasonable for the buyer to reject the goods (Law Commission No 160, *Sale and Supply of Goods*, Cmnd 137 (1987), at para 4.21). Section 15A of the United Kingdom Sale of Goods Act 1979 is *in pari materia* with s 15A of the SGA.

62 Willsoon contended that as the tank capacity was reduced by only 1,000 litres, this resulted in a slight and not a substantial discrepancy. However, Rafael conceded that the difference of 1,000 litres amounts to a six to seven per cent difference in the capacity of the tank, and affects the jet blasting time by two to three minutes.

63 Star Group pointed out that the Combi's smaller tank reduces its operational efficiency and productivity. Simon stated in his 3rd Supplementary Affidavit of Evidence-in-chief ("AEIC") at paragraphs 38 and 39 as follows:

> 38 In respect of the Combi's tank capacity, Star Group was concerned by the difference of 1,000 litres of water/debris as it was not a small, insignificant deviation from the Description in the Sale Quotation, which formed the contractual specifications. The difference of 1,000 litres in the Combi's water/debris tank would impact various aspects of Star Group's work. For instance, Star Group's operational efficiency and productivity. If the Combi has insufficient capacity, the Combi would have to make more trips away from the work site to discharge waste or refill water, which is a waste of time, fuel and manpower on Star Group's part.
>
> 39. Further, depending on the conditions of the sewer line the Combi is assigned to wash, an additional 1,000 litres of water would mean that the Combi could achieve a greater washing mileage with a 15,000 litre water/debris tank, as opposed to a 14,000 litre water/debris tank.

64 In considering the capacity issue, it must be borne in mind that the requirement of 15,000 litres for the water tank concerns a measurement. In this context, it may be noted that in *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470, 479 ("*Arcos Ltd*"), Lord Atkin, who made it clear that if the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with, explained as follows :

> A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does $^1/_2$ inch mean about $^1/_2$ inch. If the seller wants a margin he must and in my experience does stipulate for it. Of course by recognized trade usage particular figures may be given a different meaning, as in a baker's dozen; or there may be even incorporated a definite margin more or less:

65 In *Chai Cher Watt*, where the length of a drilling machine was described as being 11m but the machine supplied was 13.5m, the Court of Appeal held that this was not a situation where the *de minimis* principle operated and pointed out the difference in the length of the drilling machine was some 2.5m, which was by no means a discrepancy that was merely *de minimis* in nature.

66 Willsoon relied on a decision of the English High Court in *Filobake Limited v Rondo Limited and Frampton International Ltd* [2004] EWHC 695 ("*Filobake*") and argued that it stands for the proposition that where minor defects can be easily cured, it is unreasonable for the buyer to reject the goods. However, the reliance on that decision, which was affirmed by the English Court of Appeal in *Filobake Ltd v Rondo Ltd & Anor* [2005] EWCA Civ 563 is misplaced. To begin with, apart from the fact that a difference of 1,000 litres in the Combi's water tank capacity is not a minor defect, it is quite evident that the shortage of 1,000 litres in the water tank capacity cannot be cured at all and there was no proposal by Willsoon to cure it. More importantly, there is nothing in the decision in *Filobake* that supports the proposition asserted by Willsoon.

Filobake concerned a complaint by the buyer of baking machines that were allegedly not of satisfactory quality and not reasonably fit for their intended purpose. The test for a breach of the implied condition under s 13(1), which concerns implied conditions in sales by description, is not the same as that for determining whether goods that have been purchased are of satisfactory quality or are fit for their purpose. In *Arcos Ltd*, Lord Buckmaster explained (at p 474) as follows:

> The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description … [t]he rights of the buyers under the contract are not so limited. If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought.

67 In *Arcos Ltd*, the appellants agreed to buy staves for making cement barrels. It was specified in the contract that the staves were to be half an inch thick. A large number of the staves exceeded the specified thickness. The arbitrator found in favour of the sellers as he was satisfied that the staves were "commercially" within and merchantable under the contract specification. Notwithstanding this finding, the House of Lords held that the buyers were entitled to reject the goods for breach of the implied condition under s 13(1) of the English Sale of Goods Act 1893 and were not bound to accept the tendered goods merely because they were merchantable under that description. Lord Buckmaster pointed out that by acting as he did, the arbitrator had added to the description in the contract a qualification to which the contracting parties had not agreed and which he was not entitled to add. As such, the arbitrator's award should be set aside as it was not suggested that this was a case in which the difference between the thickness of the goods tendered and the contractual thickness was so slight as to be negligible.

68 I find that the breach in relation to the capacity issue is not *de minimis* in nature or slight. In view of this, Willsoon is not entitled to rely on s 15A of the SGA to excuse its failure to provide Star Group with a Combi that had a tank capacity of 15,000 litres. Star Group is thus entitled to reject the Combi because of this breach of the implied condition under s 13(1) of the SGA, even if it is the only breach proven by it. This would, strictly speaking, suffice to dispose of this appeal, but I will also address the 4-inch suction valve issue for completeness.

The 4-inch suction valve issue

69 As has been mentioned, although the Contract required the Combi to have two separate valves, namely, a 6-inch valve for discharge and a 4-inch valve for suction, Willsoon entered into a contract with its Chinese manufacturer for a Combi with only a single 6-inch valve. Star Group contended that the lack of a 4-inch suction valve is another breach of the implied condition under s 13(1) of the SGA that entitled it to reject the Combi and terminate the Contract.

70 The DJ pointed out in her GD (at paragraph 11) that it was not disputed that Willsoon would have been aware that the Combi did not have a 4-inch ball valve for suction on the rear door when its director, Dave, went to China to inspect the building of the Combi in October 2016, and when the Combi arrived at its workshop in Singapore on 6 January 2017. However, the lack of the 4-inch suction valve was not disclosed by Willsoon to Star Group until 14 February 2017.

71 Willsoon insisted that on 14 February 2017, the day that Star Group first learnt that the Combi lacked a 4-inch suction valve, the latter accepted its

suggestion to resolve the matter by installing a 4-inch reducer flange on the existing 6-inch valve to convert it to a 4-inch suction valve (the "4-inch reducer modification"). In its Reply and Defence to Counterclaim (Amendment No. 2), Willsoon pleaded at paragraph 26D as follows:

> (a) During the testing session on 14 February 2017, the Defendant's representative, Simon requested that the 6-inch such point be changed to a 4-inch suction point.
>
> (b) In response to the above, the Plaintiff's representative, Rafael suggested that a 4-inch reducer flange be installed to convert the 6-inch suction point to a 4-inch suction point.
>
> *(c) Simon agreed and accepted Rafael's suggestion.*
>
> (d) During the testing session on 21 March 2017, it was shown to Simon that *as per his agreement and acceptance*, the 4-inch reducer flange was installed onto the Combi's 6-inch suction point.
>
> *(e) Simon, as the Defendant's representative, accepted the above.*
>
> (f) *By reason of Simon's acceptance,* parties had, by agreement, varied the term of the Contract such that the Combi's debris/water tank was to be supplied with a 6-inch discharge point/valve which may be converted to a 4-inch suction point/ valve by installing the 4-inch reduce flange on the 6-inch discharge point/valve.
>
> [emphasis added]

72 Star Group's case is that after learning that the Combi did not have a 4-inch suction valve on 14 February 2017, it did not accept the 4-inch reducer modification proposed by Willsoon.

73 Interestingly, when Willsoon's former solicitors, Quahe, Woo & Palmer, replied on 19 May 2017 to Star Group's former solicitors' letter of 4 May 2017, where it was alleged in paragraph 10(f) that the suction point required for the refilling of water was not installed, the former replied at

paragraph 3(f) of its letter that Star Group's allegation was untrue as suction points were installed on the Combi. No reference was made to the 4-inch reducer modification or to any acceptance of this modification by Star Group.

74 Willsoon accepted that there was no email confirmation by Star Group of the latter's alleged acceptance of the 4-inch reducer modification. With no other written confirmation by Star Group furnished to the court, the alleged acceptance on 14 February 2017 could only have been oral. However, I am not persuaded that such an alleged oral agreement was made, and especially so after taking into consideration the communications between the parties in the few days after 14 February 2017.

75 On 15 February 2017, just one day after the oral agreement was allegedly made, Willsoon's representative, Mr Chai Kian Meng, sent a WhatsApp message to Star Group, in which he stated as follows:[18]

> I would like to *check with you* regarding the 4" connector …. *Can we* connect a reducer from 6" … to 4" with quick coupling?
>
> [emphasis added)

76 The words "Can we" indicate that Willsoon was still awaiting Star Group's authorisation to proceed with the proposed modification as a solution to the 4-inch suction valve problem.

77 Crucially, on 16 February 2017, Simon insisted in an email to Rafael on the *addition* of a 4-inch suction valve, and there was no indication that the

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18 2CB at p 95.

problem had already been resolved by an oral agreement on 14 February 2107. Part of this email is as follows:[19]

> [W]e are summarising the problems regarding the Combi during the testing held at your workshop on 14 February 2017:
>
> ….
>
> 11) Suction point – 4" suction point to be *added* for refilling of water.
>
> Our original intention was to put you in repudiation of the contract agreement upon seeing the conditions of the Combi.
>
> But our lawyers advise us that SMA should give Willsooon another chance to rectify the errors/problems.
>
> We hope Willsoon will take the delay of the Combi seriously and not waster another day in rectifying the errors/problems.
>
> [emphasis added]

78 Star Group's insistence on 16 February 2017 on the addition of a 4-inch suction valve to the Combi contradicts Willsoon's pleaded case that Star Group had "accepted" the 4-inch reducer modification at the testing session on 14 February 2017. The DJ rightly noted at paragraph 17 of her GD that on 16 February 2017, Star Group still considered the lack of a 4-inch suction valve as an outstanding problem. Notwithstanding this, she went beyond Willsoon's pleaded case that the modification had been accepted on 14 February 2017 and held that Star Group *eventually* accepted the said modification at a later date. If this is so, Star Group must have accepted the 4-inch reducer modification at some point after Simon's email of 16 February 2017. The DJ pointed out that after the 4-inch reducer modification was shown to Simon on 21 March 2017, the issue did not surface in Simon's subsequent emails. As the DJ did not make a finding that Star Group orally accepted the 4-inch reducer modification

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19 2CB at pp 76 and 77.

offered by Willsoon on 14 February 2017 and there was no written confirmation that Star Group accepted the said modification, she, in essence, held that Star Group's alleged "silence" in the face of the 4-inch reducer modification evidenced its "acceptance" of the said modification. This is the only possible explanation for the DJ's finding that the modification was eventually accepted given that the DJ never found, and Willsoon never pleaded, that there was any oral acceptance of the modification *after* 21 March 2017.

79 The problem with the DJ's stance is that Willsoon did not plead that Star Group had, by its silence, accepted the 4-inch reducer modification. Faced with Star Group's arguments during the appeal that the DJ erred in finding that there was an acceptance of the said modification by silence, Willsoon clarified that its case had nothing to do with acceptance by silence by stating in paragraph 25 of the Respondent's Case as follows:

> To be clear, Willsoon's pleaded position is that the Reducer Agreement was made orally during the 1st Testing Session. It is not Willsoon's position that the Reducer Agreement was crystallised by way of Simon's "silence" during the 2nd Testing Session. Accordingly, Star Group's contention with regard to "silence" not constituting "acceptance" at the 2nd Testing Session is a non-starter as the Reducer Agreement was already formed by then.

80 In view of Willsoon's position that Star Group orally accepted its 4-inch reducer modification on 14 February 2017, there is no basis for the DJ to go beyond Willsoon's pleadings and find that there was acceptance of the 4-inch reducer modification by Star Group's silence.

81 As for the DJ's point in paragraphs 24 and 25 of her GD that there is no evidence to suggest that Willsoon's proposed modification was something that could not implemented, there is no reason why a contracting party should,

without more, be required to accept a modification when the other party ought to have complied with the description in the contract. Thus, whether or not Willsoon's modification was workable, Star Group was entitled to stand its ground and demand that the terms of its contract with Willsoon were met.

82 Finally, the DJ's view in paragraph 29 of her GD that Star Group has not adduced any evidence to show that the lack of a 4-inch suction valve is a material breach that renders the Combi so defective or unusable as to substantially deprive Star Group of the benefit of having the Combi such that Star Group is entitled to treat the breach as a repudiation of the Contract by Willsoon, is, as has been explained in relation to the capacity issue, not relevant to Star Group's rights under s 13(1) of the SGA.

83 Willsoon submitted that the DJ's comments in paragraph [29] of the GD in relation to substantial benefit were meant to address Star Group's argument that the valve issue rendered the Combi unfit for its purpose and was of unsatisfactory quality. This cannot be right as the DJ stated at paragraph 9 of her GD that she would first make her findings on the capacity issue and the 4-inch valve issue "that Star Group is relying on to say that the Combi did not correspond to its description in the agreement *before addressing the other issues*" (emphasis added).

84 I now turn to Willsoon's alternative case that Star Group had "acquiesced" to the alleged breach and waived its rights to reject the Combi on the basis that it lacked a 4-inch suction valve.[20]

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20 Respondent's Written Submissions at [10] and [11].

85 Willsoon's alternative case on waiver lacked clarity and depth. The issue of waiver was dealt with rather cursorily in all its submissions. The essence of Willsoon's case on waiver is that Simon knew during the testing of the Combi on 21 March 2017 that Willsoon had not installed the 4-inch suction valve demanded by him in his email on 16 February 2017 to be "added" to the Combi, and that he said nothing more about the 4-inch suction valve issue in his subsequent emails after the second testing of the Combi. The alternative case of waiver put forward by Willsoon can be dismissed on a number of grounds.

86 To begin with, the DJ made no finding that Star Group had "waived" the breach by its silence. All she stated (at para 26 of her GD) was that the proposal for a 4-inch reducer modification was "*eventually* accepted by Star Group" (emphasis added). For reasons already stated, this conclusion is unsupportable.

87 It may be recalled that for the purpose of the appeal, Willsoon clarified that it is not relying on any acceptance of the 4-inch reduction modification by silence and reiterated that its case is that Star Group orally accepted the said modification on 14 February 2017. If there was no "acceptance" of the said modification by silence after 14 February 2017, it is odd that Willsoon is now saying that there was "acceptance" of the said modification by waiver in the light of Star Group's alleged silence after 21 March 2017.

88 What Willsoon is in fact saying is that in the short period of around one month between 21 March 2017, when Simon allegedly saw the 4-inch reducer modification, and 20 April 2017, the day Simon emailed Willsoon to say that the latter had "grievously" breached the Contract, Star Group had waived its rights in relation to the 4-inch suction issue. It is clear from the Court of Appeal's decision in *Audi Construction Pte Ltd v Kian Hiap Construction Pte*

Ltd [2018] 1 SLR 317 ("*Audi Construction*") at [58] that mere silence or inaction will not normally amount to an unequivocal representation required to support a case on waiver unless there is a duty on the party to speak up. Willsoon's alternative case on waiver, which does not show that Simon had any such duty to voice his objections, or that he unequivocally elected to waive Star Group's rights, has no leg to stand on.

89 In any case, for there to be a waiver, Star Group must have had knowledge of the 4-inch reducer modification: *Audi Construction* at [54]. Simon contended that he was not shown the 4-inch reducer on 21 March 2017. He stated in his third supplementary AEIC at paragraph 32 as follows:

> At the Third Inspection on 21 March 2017, I was not shown a separate 4-inch suction point on the Combi. I was also not informed that Willsoon had installed the Reducer on the 6-inch discharge valve and/or shown the same. In any event, my email of 16 February at 10.03 pm was clear enough – there was no agreement by Star Group to accept Willsoon's suggestion of using the Reducer.

90 Simon's evidence that he was not shown the 4-inch reducer modification was not challenged when he was cross-examined. In the absence of any cross-examination of Simon on his knowledge of the 4-inch reducer modification, Willsoon sought to rely on Rafael's testimony that Simon was shown the said modification to contradict Simon's evidence. Star Group submitted that Rafael's testimony, apart from being inconsistent, cannot be used to contradict Simon's assertion that he was not shown the 4-inch reducer modification on 21 March 2017 because of the rule in *Browne v Dunn* (1893) 6 R 67 ("*Browne v Dunn*").

91 The rule in *Browne v Dunn* has been considered in many local decisions, including that of the Court of Appeal in *Ong Jane Rebecca v Lim Lie Hoa and*

Others [2005] 3 SLR(R) 116, where Judith Prakash J, as she then was, reiterated (at [49]) that the said rule "provides that the matter upon which it is proposed to contradict the evidence-in-chief given by a witness must generally be put to him so that he may have an opportunity to explain the contradiction". Willsoon submitted that this rule does not apply to the case at hand because "the present facts fall within one of the exceptions to the rule, which operates where the witness has been given full notice of the cross-examiner's position on the matter". Willsoon also argued that Star Group had the opportunity to call other witnesses to corroborate Simon's affidavit but failed to do so. The calling of witnesses to corroborate Simon's evidence had nothing to do with the failure to cross-examine him on his evidence that he was not shown the 4-inch reducer. As for Willsoon's final point that if cross-examined, Simon would merely have denied one more time that he was shown the 4-inch reducer modification, it is not for Willsoon to assume that if confronted with Rafael's testimony, Simon would not give useful testimony on the matter. While I am mindful that the rule in *Browne v Dunn* should not be unthinkingly and rigidly applied, I agree that Simon should have been given the opportunity to deal with the evidence that is being used to contradict his evidence.

92 For the reasons stated, Willsoon's argument that Star Group had waived its right to reject the Combi cannot be accepted.

93 The parties spent considerable time addressing whether there is a PUB requirement that renders Willsoon's proposed modification totally unworkable. Star Group's position was explained by Simon as follows in his 1st Supplementary AEIC at paragraphs 10 and 11:

> 10. The Combi needs to have both a 6-inch discharge valve and a 4-inch suction valve, as specified in the Sales Quotation.

> 11. At NEA/PUB's designated rubbish dumping zones, the Defendant's workers would collect a seal from a PUB officer and would seal the discharge valve after discharging waste and before the Combi leaves NEA/PUB's premises. The sealing of the discharge valve is to prevent contractors from discharging/disposing any waste at locations which are not designated and approved by NEA/PUB. The seal can only be removed by PUB when the Combi next enters NEA/PUB's designated premises for the disposal/discharge of waste. With the discharge valve sealed, there Is no way for us to top up water in the tank without another valve for suction….

94 The DJ took Star Group to task for producing no evidence of the said PUB requirement, while Willsoon pointed out that Star Group's assertion that the suction valve cannot be used for the refilling of water because PUB requires the discharge valve to be sealed after discharging was a requirement that was not mentioned to it, and was one that surfaced only after the Defence and Counterclaim had been amended. Whether or not there is a PUB regulation requiring the sealing of the 6-inch discharge valve is not relevant to whether or not Willsoon has breached the implied condition under s 13 of the SGA. When a buyer orders a Combi with two valves, one for discharge and one for suction, it is not for the seller to unilaterally alter the specifications described in the Contract and demand that the buyer prove that it cannot use one suction with an attachment to compensate for its failure to provide two valves.

95 As Willsoon failed to prove that the requirement of having two valves in the Combi had been varied by agreement between the parties on 14 February 2017, the only issue left to be considered in relation to this matter is whether or not this breach of the implied condition under s 13(1) of the SGA can be excused by the *de minimis* rule embodied in s 15A of the SGA.

Whether the breach is excused by section 15A of the SGA

96 Willsoon contended that if it has breached an implied term by failing to provide the Combi with a 4-inch suction valve, the breach is slight as it can be remedied by use of a 4-inch reducer. Rafael testified that converting the 6-inch discharge valve by using a 4-inch reducer with a coupling is something that can easily be done in a matter of 30 seconds. Rafael also testified that if Simon had objected to the 4-inch reducer, Willsoon "could have … easily welded another [valve]" by procuring the 4-inch suction point or valve from a hardware shop". Finally, Willsoon submitted that it had adduced sufficient evidence to demonstrate that the Combi could be refilled with water using the suction boom arm if the 6-inch valve had to be sealed, and that it follows that the lack of a separate 4-inch suction value made no practical difference to the operation of the Combi and could only amount to a slight breach of the implied condition under s 13(1) of the SGA.

97 Two points may be made about Willsoon's submissions on the *de minimis* position. First, Simon did insist in his email of 16 February 2017 that the 4-inch valve be *added* to the Combi. Second, if the installation of a separate 4-inch suction valve was as easy as claimed, Willsoon should have procured the 4-inch valve from a hardware shop and welded it onto the Combi instead of proposing the use of a 4-inch reducer with a coupling as a solution the problem. This was all the more so given that Simon had insisted on 16 February 2017 that the 4-inch valve be added to the Combi.

98 It appears to me that having two separate valves, one for suction and another for discharge, is more convenient than having one valve to serve these two functions. I thus hold that Willsoon has not proven that its failure to provide

a Combi with two valves falls within the ambit of the *de minimis* rule. Star Group rightly submitted that Willsoon is in fact saying that it is entitled to unilaterally decide what should be fixed onto the Combi, and for that matter, what capacity the Combi's tank should have, instead of complying with the contractual descriptions that the parties had freely agreed on. This cannot be countenanced. Given my findings above, Star Group is also entitled to terminate the Contract on the basis of the 4-inch suction valve issue.

Whether or not Star Group is Entitled to the Declaration Sought

99 In its counterclaim, Star Group sought a declaration that it had rightfully terminated the Contract and is not obliged to take delivery of the Combi. The declaration sought is unnecessary as all that is required by Star Group is that the claim against it by Willsoon be dismissed. In *Ong Keh Choo v Paul Huntington Bernado and another* [2020] SGCA 69, the Court of Appeal pointed out (at [131]) that where a claim is made on a contract, a counterclaim seeking a declaration that the contract is void or unenforceable is, as a general rule, meaningless as all that is needed by the defendant in such a case is a dismissal of the plaintiff's claim. In the present case, the dismissal of Willsoon's claims against Star Group on the ground that Willsoon had breached the implied condition under s 13 of the SGA shows that Star Group was entitled to terminate the Contract in the way that it did and was not obliged to take delivery of a Combi that did not comply with the agreed description in the Contract. As such, there is no need for the court to grant the declaration sought by Star Group.

Star Group's Claim for a Refund of its Advance Payment

100 Star Group also contends that if it is entitled to reject the Combi, the advance payment of $110,000 that it paid to Willsoon must be refunded to it.

101 Where a buyer has a right to repudiate a contract for the sale of goods, he is not required to pay the price for the goods. If the buyer has already paid for the goods, he can recover the amount paid to the seller. Willsoon asserted that it need not refund the advance payment made by Star Group because the Contract contained the following term:

> Cancellation Charge:
>
> 50% of the purchase value will be the cancellation charge if order is cancelled after order confirmation.
>
> 70% of the of the purchase value if cancellation is made after production has started.

102 Willsoon contended that it is clear from the cancellation charge clause that if Star Group cancels the order for the Combi after production has started, it is entitled to claim from the latter 70% of the Combi's purchase price of $220,000. However, it is clear that the cancellation charge clause in the Contract is applicable only when Willsoon has not breached the Contract in a way that entitles Star Group to reject the Combi. Willsoon cannot take advantage of its own wrongdoing in breaching the implied condition under s 13(1) of the SGA to demand that Star Group pay it 70% of the purchase price. As such, I hold that the $110,000 that Star Group paid in advance to Willsoon for the Combi is to be returned to the former. I note that Star Group has indicated that it will return the unused Combi to Willsoon if it is held that it is entitled to terminate the Contract with Willsoon. The parties are to make arrangements for the return of the Combi to Willsoon.

Whether Star Group is Entitled to Claim the $10,000 Deposit on the Truck

103 As has been mentioned, the Combi was intended to be fitted on a truck. Star Group had ordered an Isuzu truck from Triangle Auto Pte Ltd ("T Auto")

for this purpose on 30 August 2016, and paid a deposit of $10,000 for it. After the Contract was terminated, Star Group cancelled the purchase of the truck and unsuccessfully sought a refund of the deposit. Star Group claimed the forfeited deposit from Willsoon as a consequential loss arising from the latter's breach of the implied condition under s 13(1) of the SGA. It relied on s 51(2) of the SGA, which provides that the damages to which a buyer who justifiably rejects goods is entitled to claim from the seller include "the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract".

104 Willsoon pointed out that Star Group failed to cancel the purchase of the truck from Triangle Auto in a timely manner. Star Group made up its mind to terminate the Contract by 20 April 2017 when Simon emailed Willsoon to say that his company had no choice but to accept the fact that Willsoon had "grievously chosen to breach" the Contract and that Star Group's former solicitors, Rajah & Tann, would be commencing legal proceedings. Although Star Group terminated the Contract in the earlier part of 2017, it was only more than six months later that it emailed T Auto, on 15 November 2017, to cancel its order of the truck. In this email, Star Group stated that its parent company is a keen supporter of Isuzu vehicles and that it hoped that T Auto would allow it to cancel the purchase of the truck without having to suffer any penalties.

105 T Auto's reply to Star Group on 22 November 2017 was rather telling about the consequences of the delayed cancellation of the order for the Isuzu truck. The relevant part of the letter is as follows:

> Only after about a year, you now wish to cancel this contract due to the vehicle not suitable for your use as a vacuum tanker. As you know this vehicle being a Euro 5 emission standard, it

> has to be registered by end Dec 2017, thus you have left us with very limited time to liquidate.
>
> Your request for cancellation has resulted us in the loss of an opportunity of sales and the limited time that we need to liquidate this vehicle. Nevertheless, we will proceed to cancel your contract … and under the Terms and Conditions of the sales contract, clause 5, deposit will not be refunded.

106 Simon accepted that Star Group had no use for the truck as at 20 April 2017. The relevant part of his cross-examination is as follows:[21]

> Q: [A]s of 20th April 2017, Star Group have decided to reject Wilson's combi.
>
> A: Yes.
>
> Q: And claim compensation.
>
> A: Yes.
>
> Q: So as of 20th April 2017, there was no need for the truck from Triangle Auto.
>
> A: Yes,
>
> Q: Because they have to be used together.
>
> A: Yes.

107 Simon also accepted that Star Group's late cancellation of the order was the reason given by T Auto for forfeiting the $10,000 deposit for the truck. Notably, there was no explanation in the AEICs filed on behalf of Star Group as to why Star Group took so long to cancel the order for the truck. When cross-examined, Simon stated that Star Group had not cancelled the order for the truck as early as possible because there was a possibility that it may be able to use the truck. However, he conceded that this explanation was not found in any of his

[21] NE, 4 September 2019, p 72, lines 2 – 16.

affidavits and that this, being important, should have been disclosed in the said affidavits.

108 As a result of Star Group's unexplained delay in cancelling the contract for the purchase of the truck only more than six months after it had terminated the Contract with Willsoon, T Auto was given very little time to try and resell the truck. The truck had to be sold and registered by December 2017, a little over one month away, because different emission standards would be in force after that date. T Auto therefore insisted on retaining the deposit Star Group had paid.

109 I find that the evidence presented did not show that Star Group had acted reasonably in cancelling its order for the truck so late in the day, and did not establish that Willsoon should pay Star Group the S$10,000 deposit for the truck.

Conclusion and Costs

110 My findings may be summarised as follows:

(a) Star Group is entitled to reject the Combi on the ground that Willsoon breached the implied condition under s 13(1) of the SGA because the Combi had a tank with a capacity of 14,000 litres instead of the agreed capacity of 15,000 litres described in the Contract. Star Group did not waive this breach and the breach is not excused by the *de minimis* rule in s 15A of the SGA.

(b) Star Group is also entitled to reject the Combi on the ground that the implied condition under s 13(1) of the SGA was breached because the Combi did not have a separate 4-inch suction valve as required under

the Contract. This breach was also not waived by Star Group and is also not excused by the *de minimis* rule in s 15A of the SGA;

(c) Star Group is entitled to a refund of the $110,000 that it paid to Willsoon for the Combi;

(d) Star Group is not entitled to claim the $10,000 deposit for the Isuzu truck from Willsoon; and

(e) The Combi is to be returned to Willsoon.

111 As for costs, Star Group is entitled to the costs of the appeal, to be agreed or taxed.

112 As for costs in relation to the trial in the District Court, it may be noted that much time was spent on issues that were no longer pursued by Star Group in the appeal. The abandoned issues included Star Group's assertions in the court below that the Combi was not of satisfactory quality, that it was not fit for its purpose, and that Willsoon breached the contract by its delayed delivery of the Combi. As such, Star Group is awarded 50 per cent of the costs in the court below, to be agreed or taxed.

Tan Lee Meng
Senior Judge

Vincent Leow, Xu Jiaxiong, Daryl, and Toh Jia Jing, Vivian (Allen & Gledhill LLP) for the appellant;

Lim Tahn Lin Alfred and Lye May-Yee, Jaime (Fullerton Law Chambers LLC) for the respondent.
