IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 138

Suit No 178 of 2018

Between

Apex Energy International Pte Ltd

… *Plaintiff*

And

Wanxiang Resources (Singapore) Pte Ltd

… *Defendant*

JUDGMENT

[Contract] — [Formation]
[Contract] — [Breach]
[Contract] — [Remedies] — [Damages] — [Mitigation of damage]

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Apex Energy International Pte Ltd
v
Wanxiang Resources (Singapore) Pte Ltd

[2020] SGHC 138

High Court — Suit No 178 of 2018
Hoo Sheau Peng J
10–14 February, 26–27 February 2020, 18 May 2020

6 July 2020 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 In this suit, the plaintiff, Apex Energy International Pte Ltd ("Apex"), claims against the defendant, Wanxiang Resources (Singapore) Pte Ltd ("Wanxiang"), for breach of contract in refusing to proceed under a *disputed* agreement for the sale and purchase of a cargo of Light Cycle Oil ("LCO").

2 On the strength of emails and text messages on handphones, Apex asserts that the parties entered into such a contract, and that Wanxiang is liable for the loss caused by its refusal to perform its obligations (including loss caused by mitigating steps taken by Apex). Wanxiang contends that the parties did not enter into any such contract, and that, in any case, Apex's mitigating steps were unreasonable.

3 Having considered the evidence, and the closing and reply submissions of the parties, I now give my judgment.

Background

The parties

4 Apex and Wanxiang are both Singapore-incorporated companies engaged in the business of oil trading.

5 Mr Park Jaehwan ("Park") and Mr Shin Bumjin ("Shin") were traders employed by Apex and Wanxiang respectively who handled the disputed transaction. They communicated mainly by emails and text messages on their handphones. The text messages in the Korean language were exchanged via the KakaoTalk instant messaging platform.

The disputed transaction

6 On or around 16, 17 and 20 November 2017, Park and Shin engaged in a series of text messages about Apex participating in an anticipated tender by S-Oil Corporation ("S-Oil").[1] S-Oil, a major South Korean oil refinery, is a producer of LCO.[2] On a monthly basis, S-Oil invites reputable companies to participate in its tenders for cargoes of LCO.[3] Apex is one such company.[4]

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[1] Park Jaehwan's Affidavit of Evidence-in-Chief ("AEIC") at para 7; Agreed Bundle ("AB") at p 14 to 15.

[2] Choe Won Chun's AEIC at paras 6 to 8.

[3] Shin Bumjin's AEIC at para 39(a).

[4] Choe's AEIC at para 13.

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7 On 22 November 2017, Apex received the S-Oil invitation to tender for cargoes for delivery in December 2017 (the "S-Oil tender"). On the same day, Park forwarded the S-Oil tender to Shin by email. This email formed Apex's invitation to tender ("Apex's tender").[5] The parties then discussed the possibility of back-to-back bids *ie,* by Apex to S-Oil and Wanxiang to Apex.[6] Apex would make a profit from the onward sale to Wanxiang.

8 The key portions of Apex's tender (which incorporated the S-Oil tender) are as follows:[7]

> Dear [Shin]
>
> Please find below tender by *S-Oil*.
>
> [Park]
>
> [Apex]
>
> …
>
> Notice to invite LCO bidding for Dec 2017 (S-Oil) – Closing 15:00 (KST) Nov 23, 2017
>
> This is to notify that *S-OIL shall offer LCO for Dec 2017 lifting*, and please provide us with your bid idea, including the loading schedule / nomination vessel size / *your best prices in each case by return.*
>
> 1. Delivery:
>
> 1) 10~12 Dec
>
> 2) 20~22 Dec
>
> 2. Q'ty
>
> *1)10~12 Dec: 300 KB +/- 5% at Operational Tolerance*
>
> *2) 20~22 Dec: 300 KB +/- 5% at Operational Tolerance*

[5] Park's AEIC at para 13.

[6] Park's AEIC at para 12; Shin's AEIC at para 47.

[7] AB at pp 66 to 68.

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> 3. Pricing: FOB Onsan, *whole month average of MOPS GO 500p in Dec 2017 + alpha($/B)*
>
> …
>
> 7. Demurrage: As per actual C/P, *but Max 15,000 $/Day* for MR size
>
> …
>
> …
>
> [emphasis added]

9 On these key portions, I make a few points:

(a) While the email read that "*S-OIL shall offer LCO for Dec 2017 lifting* [emphasis added]", this was treated by parties as the basis for Apex's tender.

(b) Under cl 2, there were two quantities comprising 300,000 barrels of LCO each, with different delivery dates as set out under cl 1. In these proceedings, Wanxiang contends that the tender is concerned with *one* cargo of 600,000 barrels (and that any bid should relate to the *entire* cargo). Apex, however, contends that the tender provided for *two* cargoes each of 300,000 barrels (and that bids may be submitted for any one or both cargoes). For convenience, I shall refer to these as the "First LCO Cargo" and the "Second LCO Cargo" respectively, and collectively as the "LCO Cargoes".[8]

(c) Under cl 3, the price per barrel of LCO consisted of two components, namely, a fixed (and non-negotiable) component, set at the whole month average of the MOPS GO (*ie* gasoil) 500p price index in December 2017, and a price premium. In effect, the latter was the

[8] Park's AEIC at para 14; Shin's AEIC at para 51; AB at p 16.

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biddable portion of the tender.[9] I shall refer to the whole month average of the MOPS GO 500p price index for the relevant months as the "Dec 2017 Indexed Price", "Jan 2018 Indexed Price" *etc*.

(d) As for demurrage under cl 7, a maximum cap of US$15,000 per day was provided for.

10 On 23 November 2016, at 1.46 pm, Shin sent Park an email containing Wanxiang's "firm bid" for the LCO Cargoes (the "Firm Bid").[10] Wanxiang set its price premium for the First LCO Cargo at US$12 per barrel, and that for the Second LCO Cargo at US$11.50 per barrel. The other terms of the Firm Bid mirrored that of the Apex tender, *except* the demurrage clause. Wanxiang increased the demurrage cap to US$17,500 per day[11] (from the US$15,000 stated in the S-Oil and Apex tenders[12]). Specifically, the portion on pricing read:

> 3. Pricing: FOB Onsan, whole month average of MOPS GO 500p in Dec 2017 with 1) 10~12 Dec: plus $12/bbl *and* 2) 20~22 Dec: plus $11.5/bbl
>
> [emphasis added]

11 After Shin had sent the Firm Bid to Park, a series of text messages were exchanged at 2.03pm. Park asked Shin for his permission to increase Apex's bid to US$12.30 per barrel as the price premium of the First LCO Cargo and US$11.70 per barrel as the price premium for the Second LCO Cargo. Apex contemplated making a US$0.10 profit per barrel for itself from on-selling the

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[9] Choe's AEIC, Exh CWC-1 ("Expert Report") at p 3 para 16.

[10] AB at p 65.

[11] AB at p 65.

[12] AB at p 67.

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LCO Cargoes to Wanxiang.[13] Shin assented to the increase.[14] Effectively, this pushed up the price premium at which Apex would agree to sell the same to Wanxiang (*ie,* US$12.40 for the First LCO Cargo and US$11.80 for the Second LCO Cargo).

12 I shall now set out some critical text messages from 3.10pm to 3.17pm, which shall be referred to as the "Deal Done messages":[15]

Park	:	Deal done
Park	:	Apex & S-Oil : 11.80$ fob
Park	:	Wanxiang & Apex : 11.90$ fob
Park	:	Ok?
Shin	:	Yes

13 According to Apex, the exchange meant that a deal was done with Apex having bid US$11.80 per barrel for the Second LCO Cargo. The cargo would be sold on to Wanxiang at US$11.90 per barrel. Park then asked Shin whether he was agreeable, and Shin agreed to the deal. Indeed, at 4.54pm, Shin instructed Park to keep "the deal that is done today" private and confidential. To this, Park readily replied "Certainly".[16] Wanxiang, however, disputes that any deal was reached in relation to the Second LCO Cargo only. The Firm Bid was in relation to both the LCO Cargoes. It had to be accepted in relation to the entire cargo.

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[13] AB at p 17, Messages at 23 November 2017, 14:03.

[14] AB at p 17, Message at 23 November 2017, 14:03; Shin's AEIC at para 77.

[15] AB at p 18.

[16] AB at p 19, Messages at 23 November 2017, 16:54; Park's AEIC at para 21.

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14 At 5.49 pm, Park sent Shin a "Deal Recap" by email.[17] He informed Shin by way of a text message that the email had been sent.[18] The Deal Recap purported to set out the terms of the deal struck that day, for a cargo of "300KB +/-5% at Operational Tolerance" to be delivered "20-22 December 2017". The demurrage cap stated in the Deal Recap had reverted back to the original sum of US$15,000 per day (as *per* the S-Oil and Apex tenders), and not the revised sum of US$17,500 per day (as *per* the Firm Bid).[19]

15 At 5.56pm, Park asked Shin to formally confirm the Deal Recap, and Shin replied "yes".[20] Park sent nine text messages on 24 November 2017, as well as one on 27 November 2017, requesting for a formal confirmation of the Deal Recap. However, Shin did not respond to Park's repeated requests to do so.

16 It appears that Wanxiang's potential buyer was unwilling to purchase the Second LCO Cargo only.[21] Both parties explored various ways of resolving the situation.[22] On 28 November 2017, by way of an email at 5.15pm, Shin asked Park for his position on the modification of two terms relating to the laycan and the delivery deadline in the Firm Bid.[23] By way of two emails on 29 November 2017 at 10.35am and 11.17am, Park responded to say that Apex was agreeable

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[17] AB at p 69.

[18] AB at p 19, Message at 23 November 2017, 17:49.

[19] Shin's AEIC at para 107; AB at p 69.

[20] AB at p 19, Message at 23 November 2017, 17:56.

[21] Park's AEIC at para 23; Shin's AEIC at para 88.

[22] AB at p 19 to 28.

[23] AB at p 80.

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to these modifications. However, Park made further alterations to these modifications. I shall refer to these as the "28-29 November 2017 emails".[24]

Subsequent events

17 Shin, however, did not respond to any more of Park's communications thereafter.[25] Instead, on 29 November 2017, at 4.32pm, Mr Xu Zhiyu ("Xu"), Wanxiang's General Manager of Petroleum Products, sent an email to Park, formally denying that Apex and Wanxiang had ever entered into any contract, and pointing out, *inter alia,* that the Firm Bid was a bid for *both* the LCO Cargoes.[26]

18 At 6.29pm, Park responded to Xu, stating that a deal was reached by way of communications with Shin. Apex would be holding Wanxiang responsible for all expenses and costs incurred in reselling the Second LCO Cargo.[27]

19 On 1 December 2017, at 3.17pm, Xu replied by email, stating that Wanxiang maintained "the same position in respect of the matter".[28]

20 On 1 December 2017, Apex reached an agreement with Shanghai Rui Run Petrochemistry Pte Ltd ("Shanghai Rui Run") for the Second LCO Cargo.

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[24] Park's AEIC at para 31; AB at p 79.

[25] AB at p 28.

[26] Park's AEIC at para 32; AB at p 85.

[27] Park's AEIC at para 33; AB at p 85.

[28] AB at p 82.

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The deal recap sent by email at 6.02pm from Apex to Shanghai Rui Run provided as follows:[29]

> 6. DELIVERY LAYCAN: 26-30 Dec 2017 (Loading will be 18-22, Dec 2017 at Onsan Korea)
>
> 7. PRICE: CFR, Mops Gasoil 0.05% (*December WMA*) plus US$9/bbl.
>
> [emphasis added]

On 4 December 2017, Shanghai Rui Run confirmed the deal recap.[30]

21 On 5 December 2017, Shanghai Rui Run nominated the counterparty for the contract to be Ningbo Youngor International Trade and Transportation Co Ltd ("Youngor").[31] On 6 December 2017, the formal contract was entered into between Apex and Youngor at the Jan 2018 Indexed Price with a premium of US$9 per barrel[32] (the "Alternative Sale") with loading dates of 18 to 22 December 2017 in Onsan, South Korea for delivery "CFR to Zhoushan, China".[33]

22 According to Apex, while the deal recap sent to Shanghai Rui Run mentioned the Dec 2017 Indexed Price *ie, the December WMA,* the correct reference should have been the Jan 2018 Indexed Price as the delivery was scheduled for January 2018.[34] This meant that Apex was exposed to potential adverse price movements in the MOPS GO 500p index *ie,* between the Dec

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[29] AB at p 88.

[30] AB at p 88.

[31] AB at pp 91 to 92.

[32] Park's AEIC at paras 40 and 43; AB at p 94.

[33] Park's AEIC at para 40; AB at p 95.

[34] Park's AEIC at para 41.

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2017 Indexed Price (at which it had purchased the Second LCO Cargo from S-Oil) and the Jan 2018 Indexed Price (at which it had entered into the Alternative Sale).[35] To limit its potential downside, on 6 December 2017, Apex entered into a gasoil hedging arrangement ("Hedging Arrangement") with the Intercontinental Exchange ("ICE").[36] The effect of this Hedging Arrangement was to guarantee a loss of US$0.40 per barrel of gasoil hedged. However, this would completely remove Apex's exposure to *any* price movements (positive or negative) in the MOPS GO 500p index between December 2017 and January 2018 for the hedged quantities of gasoil.[37]

23 To recover its loss, Apex commenced these proceedings on 20 February 2018.

The parties' cases

24 As pleaded, Apex's case is that there was a contract between the parties for the Second LCO Cargo on the terms of the Firm Bid, as modified by Park as to price and accepted by Shin on 23 November 2017, *ie*, the Deal Done messages referred to at [12], with the Deal Recap being only evidence of that agreement.[38] Alternatively, Apex contends that the parties entered into an agreement on the terms of the Deal Recap as Wanxiang had, by conduct, agreed to be bound by those terms.[39] In the further alternative, Apex argued that a contract was entered into by reason of Park's acceptance of Shin's modified

[35] Park's AEIC at para 49.

[36] Lee Youngjoo's AEIC at para 13.

[37] Lee's AEIC at para 16.

[38] Statement of Claim (Amendment No. 4) ("SOC4") at para 3.

[39] SOC4 at para 5B.

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conditions in the 28-29 November 2017 emails.[40] Apex contends that Wanxiang had breached its obligations under such a contract by stating that it had no intention to fulfil its obligations,[41] and that it had taken reasonable steps to mitigate its loss by pursuing the Alternative Sale and the Hedging Arrangement.[42]

25 Wanxiang's pleaded case consists of a denial that it entered into a contract with Apex for the Second LCO Cargo only.[43] It contends that the Firm Bid was for *both* the LCO Cargoes, and that Apex was not entitled to accept only one part of the bid for the Second Cargo.[44] On various grounds, Wanxiang also contends, in the alternative, that Apex did not fulfil its duty of reasonable mitigation.[45] First, Apex failed to explore a more favourable deal with LinkOil Petroleum and Chemicals Pte Ltd ("LinkOil").[46] Second, Wanxiang disputed the Alternative Sale to Youngor (based on the Jan 2018 Indexed Price). Instead, the mitigating sale was that captured in the deal recap with Shanghai Rui Run (which was based on the Dec 17 Indexed Price). The Alternative Sale, in and of itself, contained unreasonable terms.[47] Third, and in any event, entering into the Hedging Arrangement was also not reasonable.[48]

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[40] SOC4 at para 6.

[41] SOC4 at para 9.

[42] SOC4 at para 12.

[43] Defence (Amendment No. 3) ("D3") at para 4.

[44] D3 at paras 8 and 11.

[45] D3 at para 36.

[46] D3 at para 36B.

[47] D3 at para 36A to 36E.

[48] D3 at para 37A.

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Issues to be determined

26 There are three main issues for determination:

(a) Whether the parties entered into a contract for the Second LCO Cargo on the terms of the Firm Bid (with modification as to the price) as per the Deal Done messages. Alternatively, whether the parties entered into a contract on the terms of the Deal Recap (based on Wanxiang's acceptance by conduct), or alternatively, by way of the 28-29 November 2017 emails;

(b) If there was a contract between the parties for the Second LCO Cargo, whether Wanxiang breached the contract; and

(c) If there was a breach of the contract for the Second LCO Cargo by Wanxiang, the quantum of damages that Wanxiang would be liable for. In this connection, the sub-issues are whether Apex's attempts to mitigate its loss by way of the Alternative Sale and Hedging Arrangement were reasonable.

27 I shall deal with each in turn.

Issue 1: Whether the parties entered into a contract for the Second LCO Cargo

28 To determine whether a contract has been formed, the law adopts an objective approach. The court seeks to ascertain the parties' objective intentions, gleaned from the *correspondence* and *conduc*t in light of the *relevant background as disclosed by the evidence*. The relevant background includes the industry the parties are in, the character of the document which contains the terms and the course of dealings between the parties: *R1 International Pte Ltd*

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v Lonstroff AG [2015] 1 SLR 521 ("*R1 International*") at [51]. Further, the court may take the parties' *conduct* before and subsequent to the formation of the contract into account: *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [78].

29 Turning to the evidence, I begin with the Firm Bid. On 23 November 2017, at 1.46pm, in response to the Apex tender, Shin sent the Firm Bid to Park. It is not disputed that the Firm Bid constituted an *offer* by Wanxiang. This Firm Bid set out the various terms on which an agreement for the purchase of LCO by Wanxiang from Apex was to be made, *ie*, delivery dates, terms of payment, pricing (with separate prices quoted for the First LCO Cargo and Second LCO Cargo), quantities (with the First LCO Cargo and Second LCO Cargo listed separately), laytime, loadport designation, demurrage (capped at US$17,500 per day) and quality. As an offer, it could either have been accepted or be subject to a counter-offer by Park. Had Park unconditionally accepted the Firm Bid without more, undoubtedly, there would have been a complete and certain agreement between Apex and Wanxiang for *both* LCO Cargoes.

30 The main disagreement was whether the Firm Bid could only be accepted with regard to both, and not one, of the LCO Cargoes. Wanxiang's case is, of course, that the Firm Bid was only capable of acceptance with regard to *both* the LCO Cargoes.[49] In fact, Wanxiang makes the prior point that the Apex tender was an invitation to bid for the entire cargo of LCO.[50] However, curiously, Shin's evidence was that "[w]hile a tender for S-Oil is for 1 cargo, comprising the various parcels under it, it is also open for an offeror to make an

[49] Defendant's Written Submissions ("DWS") at para 70.

[50] Shin's AEIC at para 55.

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offer for part of the cargo without offering for the whole if it wished to".[51] As the Apex tender incorporated the S-Oil tender, this undermined Wanxiang's position on the Apex tender. Furthermore, in cross-examination, when asked if the Apex tender allowed for the offeror to make a bid for just one parcel in the tender, Shin indicated that it did.[52] I should add that Shin had submitted an offer to Apex for one out of two parcels in a tender issued by S-Oil/Apex in early November 2017.[53] It seems to me that Shin knew that the Apex tender allowed for the separate treatment of the First and Second LCO Cargoes.

31 Returning to the Firm Bid, to support the contention that it was an offer for both the LCO Cargoes, Wanxiang made much of the fact that the conjunctive word "*and*" was used in cl 3 of the Firm Bid (which set out the bid price for the LCO Cargoes) *ie,* "…[the Dec 2017 Indexed Price] with 1) 10~12 Dec: plus $12/bbl *and* 2) 20~22 Dec: plus $11.5/bbl" [emphasis added]: see [10] above. Wanxiang submitted that had Shin intended to make an offer for either of the cargoes, he would have used the word "or". Further, Shin would have used "and/or" to make an offer for either of or both the cargoes.[54]

32 In my view, this is according far too much weight on the sole word "and". To begin with, the Firm Bid listed the First LCO Cargo and the Second LCO Cargo separately, quoted independent prices and quoted delivery dates for each one. The objective interpretation of Shin's use of the word "and", in my

[51] Shin's AEIC at para 45(a).

[52] NEs, 26 February 2020, p 28 line 21 to p 29 line 3.

[53] Shin's AEIC at para 49.

[54] DWS at para 70.

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view, is that it was used to underscore the fact that cl 3 of the Firm Bid contained two different prices – one for each of the two LCO Cargoes.

33 If Shin had intended to use the word "and" to state that the Firm Bid was for both the LCO Cargoes, it would have made far more sense for him to have included the word "and" in respect of the LCO Cargoes as identified in cl 2 of the Firm Bid so that it would read as follows:

> Qty:
>
> 1) 10-12 Dec: 300KB +/-5% at Operational Tolerance
>
> [***and***]
>
> 2) 20-22 Dec: 300KB +/-5% at Operational Tolerance

However, Shin did not do so. Instead, he was content for cl 2 of the Firm Bid to follow the format set out in the Apex tender (which as I have found above permitted separate bids for the two parcels of LCO). In my judgment, therefore, the use of the word "and" in cl 3 of the Firm Bid was at best a neutral factor. The Firm Bid was capable of acceptance with regards to either of or both the LCO Cargoes.

34 While the Firm Bid was, in my view, capable of acceptance with regards to the Second LCO Cargo only (without the First LCO Cargo), it was not unconditionally accepted by Park. In this connection, I turn to the Deal Done messages *ie,* exchanged from 3.10pm to 3.17pm on 23 November 2017: see [12] above. From these, it seems to me that Park intended to close a deal with Shin at a price of US$11.90 per barrel for the Second LCO Cargo, for which Apex had placed a bid to S-Oil at a price of US$11.80 per barrel. As an aside, although the cargo was not specified in these messages, in my view, Park could not have been referring to anything other than the Second LCO Cargo. This was because

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the price quoted by him was higher than Apex's original bid to S-Oil for the Second LCO Cargo (at US$11.70 per barrel), but lower than that for the First LCO Cargo (at US$12.30 per barrel). It would be absurd for Park to *reduce* the bid price of the First LCO Cargo as that would reduce, not increase, the competitiveness of its bid. On the other hand, it would make complete sense for Park to be referring to the Second LCO Cargo only, as he would have had to increase his original bid to S-Oil in order to secure it. In any event, it is not Wanxiang's position that the text messages related to the First LCO Cargo or both the LCO Cargoes.

35 More importantly, based on the Deal Done messages, I find that Park intended to *modify* the price quoted in the Firm Bid in relation to the Second LCO Cargo. By seeking Shin's approval for the modified price, Park had effectively *counter-offered* for a deal to be done for the Second LCO Cargo on the terms of the Firm Bid, save as to price (which was changed to US$11.90 per barrel). This counter-offer had been accepted unequivocally by Shin, by his unqualified affirmative response ("Yes") to Park's "deal done" message quoting the revised price. In this connection, I note that an offer can be accepted in any manner that is a "final and unqualified expression of assent to the terms of an offer": *Treitel on The Law of Contract* (Edwin Peel, Sweet & Maxwell, 2015 Ed) at para 2-016. *A legally-binding, certain and complete agreement came into being at that point.* I shall refer to this as the "Apex-Wanxiang Contract".

36 I address Wanxiang's position that there was no agreement by way of the Deal Done messages. Wanxiang relied on Park's alleged concession at trial that on 23 November 2017 at 3.17pm, all that had been agreed was the laycan and the price of the Second LCO Cargo and that the other terms in the Firm Bid had not been the subject of any discussion or agreement between the parties up

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to that point.[55] On this basis, Wanxiang submitted that there was in fact no binding agreement between the parties for the Second LCO Cargo.[56] The relevant portion of Park's cross-examination is reproduced below:[57]

> Q. When he [Shin] said okay at 15:17 hours, … he was saying okay to the increase in price. He wouldn't know – sorry. There is no mention of the other terms in respect of the second parcel, agree?
>
> A. I agree and that is because we had reached an agreement about the price and laycan and, consistent with the general industry practice, we do not – *it is not necessary to talk about the other terms at this point.*
>
> …
>
> Q. I will move on to my next question. So far as you are concerned, the moment price and loading laycan terms, the window, has been agreed upon, there is a contract; forget the other terms, correct? That is what you are saying?
>
> A. Correct, and I say "correct" *because as for the rest of the terms, I believe that as market practice, both parties have sufficiently exchanged information as to how to draft the rest of the terms, so both parties are aware of what the terms are going to be.*
>
> Q. So even if Wanxiang agrees – sorry, insists on 17,500 in these negotiations that you talk about and Apex insists on 15,000, on your view, it doesn't impact *the earlier agreement reached?*
>
> A. That is correct.
>
> [emphasis added]

37 From the cited portion of his cross-examination, Park did *not*, in my view, concede that *no* agreement had been reached in this case on any terms other than the price and the loading laycan. It appears to me that he was merely

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[55] DWS at para 44.

[56] DWS at paras 44 and 45.

[57] NE, 10 February 2020, p 75 line 24 to p 76 line 8; p 90 lines 10 to 25.

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underscoring the fact that no deal could be concluded without agreement on those two terms and emphasising the significance of the parties having agreed on the same. This showed that Park was of the opinion that in order for a deal to be done, no agreement needed to be reached on the other terms. This, in fact, is the correct position in law. Parties may intend to be contractually bound as soon as they reach agreement on a set of terms (which are certain and complete), even though they go on to discuss and negotiate additional terms: *R1 International* at [52]. Certainly, Park did *not* mean that no such agreement was reached in the present case.

38 Accordingly, I do not agree with Wanxiang that this exchange in cross-examination undermined a finding that the parties had concluded the Apex-Wanxiang Contract. I should add that according to Apex's expert, Mr Choe Won Chun, most negotiations in the LCO trading industry are done through instant messages or telephone conversations, and it is common for parties to reach an agreement on the main terms of a trade by message or telephone, with a follow-up email to record what was agreed.[58] The evidence of Wanxiang's expert, Mr Ong Teck Chye ("Ong"), was to the same effect.[59]

39 In support of the finding that the Apex-Wanxiang Contract was formed by way of the Deal Done messages, I turn to the subsequent conduct of the parties. I note that at 4.54pm, Shin sent Park a text message requesting that "the deal that is done today" be kept private and confidential, and Park's assent to the same: see [13] above. Shin's reference to a "deal" being done clearly indicates the presence of the earlier agreement reached between both Park and

[58] Choe's AEIC at para 23.

[59] Ong Teck Chye's AEIC at Exh OTC-2 (expert report) p 35, paras 42 to 43.

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Shin (and that the parties intended to be legally bound by it). Furthermore, subsequently, the Deal Recap prepared by Park to record the deal (before any hint of a dispute between the parties arose) materially mirrored the terms in the Firm Bid for the Second LCO Cargo only (save with the *modified* price as agreed by Shin). I pause to note that the Deal Recap varied the demurrage term downwards from US$17,500 per day as proposed in the Firm Bid to US$15,000 per day as contained in the Apex tender. I shall deal with the significance of this at [42] below.

40 Given my finding that there was a contract between the parties in respect of the Second LCO Cargo, I do not have to deal with Apex's alternative cases. However, I should address the question of the legal effect, if any, of the Deal Recap (containing the changed demurrage cap) on the contract between the parties. To begin with, I reiterate that despite repeated reminders, the Deal Recap was not *confirmed* by Shin or Wanxiang. In *G-Fuel Pte Ltd v Gulf Petrochem Pte Ltd* [2016] SGHC 62 ("*G-Fuel*"), the High Court observed at [23]–[24] that:

> 23 As with the first and second contracts under the sleeving arrangement, there was no written contract for the *Joaquim* cargo and no discussion between the parties as to whether a deal recap is required for there to be a binding contract.
>
> 24 Often enough, an agreement is formed at an earlier stage and a deal recap merely recapitulates the terms of the agreement. In *TTMI Sarl v Statoil ASA ("The Sibohelle")* [2011] EWHC 1150 (Comm); [2011] 2 Lloyd's Rep 220, Beatson J pointed out (at [27]) in the context of shipping contracts that "*it is common for charterparties to be concluded by an exchange of emails or faxes, with the terms being recapitulated in a fixture recap, and they can be concluded orally and recapitulated" [emphasis added]*. In the present case, the deal recap sent by Gulf to G-Fuel for the first two contracts under the sleeving arrangement recapitulated the essence of what had already been agreed upon between James Lim and Gary Chew, namely

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> that the sellers and buyers were G-Fuel and Gulf respectively, the quantity of MFO required and the unit price. …
>
> [emphasis in original]

41 There was no evidence before me that the parties had agreed that the issuance of a deal recap would be *necessary* to form a binding agreement. Certainly, there is no requirement in law for this. The parties' failure to issue a "deal recap" which accurately reflects all the terms of the binding agreement, and *a fortiori*, the failure of the confirming party *ie,* Wanxiang to do so, did not stand in the way of the formation of a binding agreement between them: *G-Fuel* at [37]. Indeed, Ong gave evidence that in the industry, a "recap" is "evidence of an earlier agreement made between the parties in respect of a trade",[60] and that it was only if there was no prior agreement reached between the parties that a "deal recap" could, in itself, serve as the contract, provided that it was confirmed by the counterparty.[61] Accordingly, the Deal Recap is nothing more than evidence of the Apex-Wanxiang Contract.

42 For these reasons, the fact that the Deal Recap contained a demurrage term different from that in the Firm Bid likely meant that the Deal Recap was an *inaccurate* record of what was agreed between the parties in respect of the demurrage cap. Indeed, Mr Park was unable to recall or explain the difference in the demurrage caps stated in the Firm Bid and in the Deal Recap.[62] Such an inaccuracy, however, did not detract from the legal validity of the Apex-Wanxiang Contract. In this connection, *Mena Energy DMCC v Hascol*

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[60] Ong's AEIC at para 42.

[61] Ong's AEIC at para 43.

[62] NE, 10 February 2020, p 65 line 17 to p 66 line 9.

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Petroleum Ltd (2017) [2017] EWHC 262 (Comm) ("*Mena Energy*") is instructive.

43 In that case, one of the disputed transactions concerned a contract for the sale of gasoil which the plaintiff, Mena, contended was concluded orally and confirmed in an email described as a "deal recap" on the same day. The defendant, Hascol, contended that no contract was ever concluded because the parties had failed to agree on the date by which a confirmed letter of credit financing the trade was to be opened. Males J (as he then was) observed, at [169], that:

> I do not accept that it was necessary for the oral agreement reached on the telephone to be confirmed in writing. As in all the parties' previous dealings, an oral agreement was binding. *The deal recap was a record of that agreement. It was of course important that it should be accurate and, if it had not been, it would have needed to be corrected.* But Mr Soomro's recap was an accurate record in the case of the gasoil contract, just as it had been in every previous case …
>
> [emphasis added]

The fact that the Deal Recap was not a fully accurate record of the agreement meant that it should have been corrected with regards demurrage. However, it did not mean that it was of no corroborative value to show that there was a deal struck between Park and Shin for the Second LCO Cargo.

44 I should add that in my analysis, Shin's further conduct (after receipt of the Deal Recap) is also corroborative of the fact that parties had arrived at a binding agreement. In *Mena Energy*, Males J observed, at [166], that:

> If the issue [of the date by which a confirmed letter of credit was to be opened] had indeed been raised in the telephone conversation and the conversation had ended with no agreement being reached, it is inconceivable that Mr Soomro would have sent his deal recap, either in the terms which he did or at all. He and Mr Lavaro would have known that it had

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> not been agreed that a letter of credit would "be issued at least 5 working days before first day of loading laycan" and that, as a result, no contract had been concluded. *To have stated that a contract had been concluded on these terms would have been both dishonest and pointless – dishonest because Mena would have known that it was not true and pointless because it would invite immediate contradiction.*
>
> [emphasis added]

45 Thus, where a "deal recap" is sent to a contracting counterparty when no deal had in fact been concluded, some form of protest would be expected as to that fact, particularly in a situation (such as the present) where the parties remained in constant communication after the Deal Recap was sent. The fact that no protest was received from Shin would, in my view, be persuasive evidence in favour of the existence of such a deal.

46 In the present case, it was not disputed that the Deal Recap referred to the Second LCO Cargo only. Despite Shin having sight of this Deal Recap, it is telling that there is *no documentary evidence* of him ever having protested to Park that a deal could not have been struck on the Second LCO Cargo only. In this regard, Shin's evidence was that he was "surprised and perplexed" by the Deal Recap because it only recorded a deal reached on the Second LCO Cargo.[63] In my judgment, his evidence is unbelievable given his deafening silence on these points by way of text messages or emails. In particular, the lack of any text message to express any concern about the Deal Recap was significant, when juxtaposed against the stream of text messages exchanged between them at the material time. In my view, Shin fully understood that he *had* reached a deal with Park on the Second LCO Cargo only.

[63] Shin's AEIC at para 106.

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47 Of course, Shin explained that there were purported telephone calls between Park and himself around 2.45pm and between 8pm to 9pm on 23 November 2017. In these conversations, he had allegedly made it clear to Park that Wanxiang would only accept a deal on both the LCO Cargoes.[64] However, once again, there was no mention at all of these purported conversations, even tangentially, in *any* of the emails or text messages between Park and Shin. Again, I find it incredible that having allegedly made his position so clearly to Park in the telephone calls on the critical issue of the subject-matter of any possible deal, Shin did not bother to set down the contents of the conversations in any email or text message to Park. Instead, Shin was supposedly content to allow Park to continually (in Shin's own words) "hound"[65] him for a confirmation to the Deal Recap on the basis that there was a deal done between them on the Second LCO Cargo only.

48 More significantly, Shin did not even contradict Park when Apex's agreement with Wanxiang was raised in the following text message exchange in the morning of 27 November 2017 as follows:[66]

> Park : Our only present solution is to maintain the contract with Wanxiang while the price remains the same at what is presently agreed.
>
> Park : For now, both companies are pursuing reselling and so on. Therefore let us update each other on the progress of the situation by the morning and discuss on the way to proceed either with the original plan or with the plan that is similar to the original plan.
>
> Shin : For now, if there is any idea with the buyer, APEX, please let me know by this morning and discuss about it.

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[64] Shin's AEIC at para 114.

[65] Shin's AEIC at para 119.

[66] AB at p 22, Messages at 27 November 2017, 10:16 to 10:25.

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49 This exchange, in my opinion, showed that at the material time, Shin did not think that Apex and Wanxiang could not conclude a deal on the Second LCO Cargo. This is further buttressed by the fact that, shortly after the abovementioned exchange, Shin told Park that he was "frustrated" at his inability to find a satisfactory solution since his attempts to plead with Wanxiang's original buyer for the LCO Cargoes to accept the Second LCO Cargo by improving their price had not borne fruit, to the point where he had thoughts of leaving Wanxiang's employ:[67]

> Shin : I think it is best for you to seek kind understanding of the oil refinery company telling them the problems attributed by the risk pursuant to year end cargo (system reform risk) in addition to the general risk to reduce the loss.
>
> Park : Please stop talking nonsense.
>
> Park : Please persuade the original buyer quickly.
>
> Shin : I am doing it. *I am saying it because I am frustrated. I am telling you this with the thought to leave the company any day (today or tomorrow) in mind.*
>
> Shin : I have been *pleading them* [*sic*] *to improve all weekend long, even if it is just for a few dozen cents.*
>
> [emphasis added]

50 This demonstrated an unusual commitment on Shin's part to a disputed transaction. It is inconsistent with Shin purportedly having made it clear to Park that there was no deal at all with regards to the Second LCO Cargo. I therefore do not find Shin's assertions with regards to the telephone conversations credible. On an objective assessment, the conduct of the parties strengthens a finding of the existence of the Apex-Wanxiang Contract.

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[67] AB at p 23, Messages on 27 November 2017 at 10:37 to 10:39.

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51 For completeness, I also consider whether the Apex-Wanxiang Contract was varied in any way by the 28-29 November 2017 emails – which sought to modify the laycan and delivery terms from those stated in the Firm Bid.[68] It was undisputed that on 28 November 2017, Shin, referencing a "long discussion" that he had with Park, sent Park an email asking for his "stance" on the following matters:[69]

(a) Amendment of the latest loading laycan date to 18 to 20 December 2017; and

(b) The fixing of the "FOB delivery deadline" at 22 December 2017 "as long as vessel NOR at load port before or within laycan, which is to be defined in LC, or otherwise to the same effect."

52 By this point, a dispute had arisen between the parties, with Shin contending that there was no contract between Apex and Wanxiang. Plainly, both Shin and Park were still trying to resolve the dispute by attempting to re-negotiate the terms. Park responded to Shin's email on 29 November 2017 at 10.35am by purporting to accept the two conditions, with certain slight modifications to the second condition.[70] Thereafter, however, Shin ceased to reply to Park's email or his text messages. As mentioned above, shortly after, Xu sent Park an email formally denying that Wanxiang and Apex had entered into a contract for the Second LCO Cargo (see [17] above).

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[68] SOC4 at para 7.

[69] AB at p 80.

[70] AB at p 79.

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53 The question, then, is whether Shin's email, and Park's purported acceptance of the same, varied the contract. For a variation to an existing contract to be effective, it must possess the characteristics of a valid contract: *Fiscal Consultants Pte Ltd v Asia Commercial Finance Ltd* [1981-1982] SLR(R) 149 at [14]. Thus, not only must there be an offer to vary the contract and unconditional acceptance of the same, the variation of the contract must be supported by fresh consideration: *S Pacific Resources Ltd v Tomolugen Holdings Ltd* [2016] 3 SLR 1049 from [13] to [17]; *Ma Hongjin v SCP Holdings Pte Ltd and another* [2019] SGHC 277 at [99].

54 The issue in play here is whether Shin had indeed offered to vary the Apex-Wanxiang Contract or had just requested for information regarding the potential variations to that contract which Apex would be willing to accept.[71] In my view, the language used by Shin in his 28 November 2017 email was not capable of constituting an offer to vary the contract on the two conditions stated therein. He had simply written to Park to request Apex's stance on those two conditions. This is simply a request for information which was exploratory in nature, not an offer to be bound by those two conditions. As such, I find that the Apex-Wanxiang Contract was not varied by these subsequent communications.

Issue 2: Whether Wanxiang breached the contract

55 Having found that the Apex-Wanxiang Contract comprised of the terms of the Firm Bid save as to price, I agree with Apex's contention that Wanxiang had breached the contract on 29 November 2017 by expressly denying that such a contract even existed.[72] This was a clear case of renunciation of contract on

[71] DWS at para 121; Plaintiff's Written Submissions ("PWS") at para 145.

[72] PWS at para 149.

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Wanxiang's part. Accordingly, this entitled Apex to terminate the contract and claim for damages: *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [93]. With this, I now turn to assess Apex's claim for damages.

Issue 3: Whether Wanxiang is liable for Apex's loss

The amounts claimed

56 Apex's claim is for a total sum of US$1,211,778.60 in damages. The breakdown is as follows:[73]

(a) The difference in the price premium between the Apex-Wanxiang Contract (at US$11.90 per barrel) and that under the Alternative Sale (at US$9 per barrel), *ie,* US$2.90 per barrel applied to 270,084.50 barrels of LCO delivered[74], giving rise to a sum of US$783,245.05.[75]

(b) Freight costs incurred by Apex in performing the Alternative Sale at US$297,500.[76]

(c) A sum of US$102,586.35, which represents the costs incurred by Apex of procuring extensions of the credit period in respect of the Letter of Credit which it had obtained to finance the S-Oil purchase. Originally, no such extensions would have been necessary as the credit terms of the S-Oil purchase (*ie* 30 days) mirrored that under the Apex-Wanxiang

[73] SOC4 at para 13, as revised in PWS at para 175.

[74] Lee's Supplemental AEIC at para 7.

[75] Lee's Supplemental AEIC at para 6.

[76] Lee's AEIC at paras 13 and p 26.

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Contract. The credit period under the Alternative Sale, however, was 90 days. 60 days' worth of credit period extensions were required.[77]

(d) The cost of entering into the Hedging Arrangement to remove Apex's exposure to the volatility in the MOPS GO 500p index which amounted to US$21,330.[78]

(e) The commissions paid in respect of the Hedging Arrangement, comprising US$5,092.20 paid to BNP Paribas Commodity Futures Ltd[79] and US$2,025 paid to Ginga Global Markets Pte Ltd.[80]

Quantification of loss

57 It is well-settled that damages for breach of contract are awarded to put the innocent party in as good a position as if the contract had been performed: *Gunac Enterprises (Pte) Ltd v Utraco Pte Ltd* [1994] 3 SLR(R) 889 at [11]. In this regard, Wanxiang submitted that where a contract for the sale of goods has been breached, the applicable statutory provision governing the quantification of damages is s 50 of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SOGA").[81] The provision reads:

> **Damages for non-acceptance**
>
> **50.** — (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

[77] Lee's AEIC at paras 17 to 20.

[78] Lee's Supplemental AEIC at para 8; NE of 13 Feb 2020 at p 60 line 4 to p 61 line 10.

[79] Lee's Supplemental AEIC at para 24.

[80] Lee's Supplemental AEIC at para 23.

[81] DWS at para 127.

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> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
>
> (3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.

58 Applying s 50(3) of the SOGA, Wanxiang argued that Apex had not proven that the Alternative Sale was made on an "available market" price.[82] In response, Apex argued that s 50(3) of the SOGA did not apply because there was no available market for the Second LCO Cargo:[83]

(a) There was uncertainty around the pricing of LCO at the end of the year due to market rumours;

(b) It was undisputed that the Second LCO Cargo was "less popular" than the First LCO cargo; and

(c) It was undisputed that Park or Shin were not able to find a firm buyer for the Second LCO Cargo.

59 However, I do not accept these arguments. It was undisputed that there was an available market for LCO and that there existed potential buyers for the Second LCO Cargo. The fact that Apex could make the Alternative Sale makes this clear. The mere fact that Apex and Wanxiang encountered difficulties in finding a firm buyer for the Second LCO Cargo on certain terms as to price,

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[82] DWS at para 130.

[83] Plaintiff's Reply Submissions ("PRS") at para 54.

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delivery, *etc* did not mean that there was no available market (*ie* demand) for the Second LCO Cargo.

60 Thus, where, as here, there is an available market for the subject-matter of the contract, s 50(3) of the SOGA applies. The principal issue concerning the assessment of damages under s 50(3) of the SOGA is the market price of the goods. In this connection, Apex relied on *Bunge SA v Nidera BV (formerly Nidera Handelscompagnie BV)* [2015] Bus LR 987, [2015] UKSC 43 at [17], where Lord Sumption JSC (writing for the majority of the UK Supreme Court) said (with reference to s 51(3) of the English Sale of Goods Act 1979, which is *in pari materia* with s 50(3) of the SOGA):

> … [W]here there is an available market for the goods, the market price is determined as at the contractual date of delivery, *unless the buyer should have mitigated by going into the market and entering into a substitute contract at some earlier stage*: *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130, 1168 and *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91, 102. Normally, however, the injured party will be required to mitigate his loss by going into the market for a substitute contract as soon as is reasonable after the original contract was terminated. *Damages will then be assessed by reference to the price which he obtained. If he chooses not to do so, damages will generally be assessed by reference to the market price at the time when he should have done*: *Koch Marine Inc v d'Amica Societa di Navigazione (The Elena d'Amico)* [1980] 1 Lloyd's 75, 87, 89. *The result is that in practice where there is a renunciation and an available market, the relevant market price for the purposes of assessing damages will generally be determined not by the prima facie measure but by the principles of mitigation.*
>
> [emphasis added]

61 As the present case concerns a renunciation of contract by Wanxiang, whether the Alternative Sale is a valid basis for quantifying Apex's loss under s 50(3) of the SOGA accordingly depends on whether Apex had reasonably mitigated its loss by entering into the Alternative Sale. If that question is

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answered in the affirmative, the loss would be computed by reference to the difference between the amount which would have been recovered under the Apex-Wanxiang Contract and what was in fact recovered under the Alternative Sale. In effect, this question can be folded into the inquiry over the reasonableness of entering into the Alternative Sale. Indeed, Ong's view was that "the industry norm" is to claim the "price difference between the disputed contract between Apex and Wanxiang and the [Alternative Sale]".[84] A further question, however, is whether entering into the Hedging Arrangement was reasonable.

62 The Alternative Sale has been set out above. I now set out in detail the factual background for the Hedging Arrangement. Apex pleads that it had purchased the Second LCO Cargo from S-Oil at a price per barrel equal to the Dec 2017 Indexed Price plus a premium of US$11.80. Under the Apex-Wanxiang Contract, the sale of the Second LCO Cargo was on the basis of the Dec 2017 Indexed Price, plus a premium of US$11.90 per barrel. However, under the Alternative Sale, the Second LCO Cargo was sold based on the Jan 2018 Indexed Price plus a premium of US$9 per barrel. As I observed at [22] above, this meant that as a result of the Alternative Sale, Apex was exposed to potential adverse price movements in the MOPS GO 500p index from December 2017 to January 2018. To limit the impact of these price movements, Apex entered into the Hedging Arrangement with ICE.

63 According to Apex, the Hedging Arrangement worked as follows.[85] By three contracts,[86] ICE contracted to sell to Apex 70,000, 100,000 and 100,000

[84] Ong's Supplemental AEIC, Exh OTC-6, at p 20 para 46(f).

[85] Lee's Supplemental AEIC at paras 15 to 17.

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barrels of Singapore Gasoil at US$73.60, US$73.40 and US$73.60 per barrel respectively. Apex would sell the same back to ICE at *the Dec 2017 Indexed Price*. By another three contracts,[87] ICE contracted to purchase from Apex 70,000, 100,000 and 100,000 barrels of Singapore Gasoil at US$73.20, US$73.00 and US$73.20 per barrel respectively. In return, Apex would purchase the same back from ICE at the Jan 2018 Indexed Price. The cumulative effect of these six contracts is that Apex would incur a fixed loss of US$0.40 per barrel for 270,000 barrels of Singapore Gasoil (*ie,* a total of US$108,000) but would not be exposed to any price movements in the MOPS GO 500p index. On the other side, ICE would be obligated to purchase 270,000 barrels of Singapore Gasoil at the Dec 2017 Indexed Price and sell the same quantities of Singapore Gasoil at the Jan 2018 Indexed Price. ICE, and not Apex, therefore bore the risk and reward of the price movements in the MOPS GO 500p index. Ultimately, this meant that Apex had effectively paid US$108,000 to cap its potential loss, but also prevented itself from benefitting from any potential rise in the MOPS GO 500p index from December 2017 to January 2018.

64 While not conceding its liability for the cost of the Hedging Arrangement, Wanxiang contended that there was a factual error in the above, and that there should be a reduction in the cost of hedging. Based on the relevant documents, Apex's sale back to ICE was not based on the *Dec 2017 Indexed Price*. It was based on *the average of the daily published gasoil prices from 6 to 31 December 2017 (*the *"Balance Dec 2017 Price").* The *Balance Dec 2017 Price* of US$75.632 per barrel happened to be higher than the *Dec 2017 Indexed Price* of US$75.311 per barrel. This is because the market was on an upward

[86] AB at pp 10, 12 and 14.

[87] AB at pp 16, 18 and 20.

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trend. Thus, this "leg" of the Hedging Arrangement yielded a sum of US$20,420,640 for Apex, which is *more* than the sum of US$20,333,970 which Apex had to pay to S-Oil (which was based on the *Dec 2017 Indexed Price*). Wanxiang should be given the benefit of the difference of US$86,670. Thus, the cost of hedging of US$108,000 should be reduced by the sum of US$86,670 to arrive at US$21,330.[88] Having reviewed Ong's comments and computation, in the course of the trial, Apex revised its claim downwards to US$21,330.

65 I should add that as it transpired, there was a rise in the indexed price from US$75.311 in December 2017 to US$80.745 in January 2018. Without the Hedging Arrangement, Apex would have made a handsome profit of US$711,180 on the Alternative Sale compared to the Apex-Wanxiang Contract.[89] With that, I turn to the parties' arguments on the reasonableness of Apex's mitigating measures.

The reasonableness of mitigating steps taken by Apex

66 The reasonableness of entering into the Alternative Sale and the Hedging Arrangement is disputed by Wanxiang on the following main grounds as follows:

(a) That the Alternative Sale was unreasonable, as the price premium of US$9 per barrel was unreasonably low, and the mitigating sale should have been based on the Dec 2017 Indexed Price;

[88] Ong's Supplemental AEIC, Exh OTC-6, at pp 12 to 13 paras 22 to 27.

[89] Ong's Supplemental AEIC, Exh OTC-6, at p 19 at para 45(d)(v).

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(b) In any event, Apex had unreasonably rejected the opportunity to pursue an alternative sale of the Second LCO Cargo to LinkOil on superior terms than what it eventually obtained with Youngor; and

(c) The Hedging Arrangement was wholly unnecessary and unreasonable as an exercise in reducing the damages claimable from Wanxiang for its breach of contract because Apex could simply claim the unhedged loss from Wanxiang. Furthermore, Apex had not informed Wanxiang that it was hedging the loss. The Hedging Arrangement was therefore a deliberate speculation on the Gasoil market on Apex's part.

The applicable law

67 Before considering the merits of Wanxiang's contentions, I turn to the applicable law. In *The "Asia Star"* [2010] 2 SLR 1154 ("*The Asia Star*"), the three basic rules relating to mitigation are set out by the Court of Appeal as follows (at [24]):

> First, the aggrieved party must take all reasonable steps to mitigate the loss consequent on the defaulting party's breach, and cannot recover damages for any loss which it could have avoided but failed to avoid due to its own unreasonable action or inaction (see Harvey McGregor, *McGregor on Damages* (Thomson Reuters (Legal) Limited, 18th Ed, 2009) at para 7-004 and *British Westinghouse Electric and Manufacturing Company, Limited v Underground Electric Railways Company of London, Limited* [1912] AC 673 ("*British Westinghouse Electric*") at 689). Second, the aggrieved party who goes beyond what the law requires of it and avoids incurring any loss at all will not be entitled to recover any damages (see *McGregor on Damages* at para 7-097 and *British Westinghouse Electric* at 689–690). In such a case, the aggrieved party's efforts will in effect confer a gratuitous benefit on the defaulting party. *Third, the aggrieved party may recover any expenses incurred in the course of taking reasonable steps to mitigate its loss* (see *McGregor on Damages* at para 7-091). *In short, the aggrieved party cannot recover avoidable or avoided loss; it may, however, recover expenses reasonably incurred in the course of taking mitigation measures.*

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[emphasis added]

68 The third rule of mitigation as set out above *ie,* that a claimant can recover *expenses* reasonably incurred in the course of taking mitigation measures, is pertinent. Indeed, the recovery of expenses incurred in the course of mitigation is not controversial: see for example *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 1 SLR(R) 701. From the above, it is plain that once the course of mitigation taken by Apex is found to have been reasonable, it is entitled to recover its *loss*, as well as its *expenses* incurred in the course of mitigation.

69 The reasonableness of mitigation is assessed objectively, taking into account subjective circumstances such as the aggrieved party's financial position. Ultimately, the reasonableness inquiry reflects commercial and fact-sensitive fairness at the remedial stage of a legal inquiry into the extent of liability on the defaulting party's part, and bars an aggrieved party from profiting or behaving unreasonably at the expense of the defaulting party. The court has considerable discretion in evaluating the facts of the case in arriving at a commercially just determination: *The Asia Star* at [31]–[32].

70 Further, the evaluation of a claimant's conduct in mitigation ought to start from the date of the defaulting party's breach, and the burden of proving that the claimant has failed to fulfil its duty to mitigate falls on the defaulting party: *The Asia Star* at [24]. With that, I turn to the facts.

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Whether the Alternative Sale was unreasonable

71 Apex reached a deal with Shanghai Rui Run on 1 December 2017. It formally concluded the Alternative Sale on 6 December 2017 with Youngor,[90] which was approximately a week after Wanxiang had renounced the Apex-Wanxiang Contract on 29 November 2017. In my view, this took place within a reasonable period of time post-breach in which Apex had to mitigate its loss by selling the Second LCO Cargo to alternative buyers. It was also not seriously disputed that the sale of the Second LCO Cargo to alternative buyers would be effective in mitigating Apex's loss.

72 I turn to Wanxiang's contention that the price premium of US$9 per barrel was well below the prevailing market rate at the time of US$11 to US$12.[91] It relied on evidence of a sale of a cargo of 230,000 barrels of LCO from North Petroleum International Company Limited to Zhejiang Metals and Materials Co, which was done at the Jan 2018 Indexed Price with a price premium of US$10.71 per barrel for 30,000 barrels and US$12.10 per barrel for the remaining 200,000 barrels.[92]

73 I would first observe that Apex was under no obligation to make any effort to obtain the best price available for the Second LCO Cargo. It is not open to a party in breach of contract to be astute in criticizing the adequacy of mitigating steps taken by the innocent party: *Tan Soo Leng David v Lim Thian Chai Charles and another* [1998] 1 SLR(R) 880 at [38], which was recently cited in *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd* [2019] SGHC

[90] AB at p 94.

[91] Shin's AEIC at para 150.

[92] DWS at para 134; Shin's AEIC at paras 151 to 152; page 166.

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286 at [82]. Indeed, as the Court of Appeal observed in *China Resources Purchasing Co Ltd v Yue Xiu Enterprises (S) Pte Ltd and another* [1996] 1 SLR(R) 397 at [24]:

> If, notwithstanding the particular facts of this case, there was a duty to mitigate then the standard of reasonableness to be applied to the decision of the innocent buyer is not a high one. "The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him could have been taken." See *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 506. It is a question of fact, depending on the circumstances of the particular case, whether the plaintiff acted reasonably. See *Payzu Ltd v Saunders* [1919] 2 KB 581 at 588-589. See also *Benjamin's Sale of Goods* at p 853 para 17-025.

74 The inquiry, therefore, is not whether other transactions done at better prices exist, but whether the mitigating sale in question was a reasonable one in the circumstances. In my view, there are many factors influencing the price which may be obtained for goods, not least among which is the balance of the bargaining powers between the parties. It is not unreasonable for potential buyers to drive a hard bargain to extract lower prices from a seller (*especially* one in Apex's position, *ie* a trader of commodities which generally plays an intermediate role) who has unexpected inventory. In the present case the premium of US$9 was not, in my opinion, so low that it would have been unreasonable for Apex to take it. The Alternative Sale to Youngor was made between two commercial parties dealing at arms' length. Had Apex failed in the present suit, it would have had to bear the consequences of any below-market sale. There was therefore no reason for it to have taken the risk of agreeing to prices well below what it could reasonably get in the circumstances, and no such reason was put forward by Wanxiang.

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75 I now consider Wanxiang's argument that the mitigating sale should have been based on the Dec 2017 Indexed Price,[93] as captured in the deal recap with Shanghai Rui Run,[94] instead of the formal contract between Apex and Youngor for the Alternative Sale which was based on the Jan 2018 Indexed Price.

76 As stated at [22], Apex explained that the deal recap made a wrong reference to the Dec 2017 Indexed Price, and that the deal was in fact done on the Jan 2018 Indexed Price given that the delivery of the cargo was scheduled for January 2018.[95] Wanxiang did not accept this explanation. It contended that Apex had in fact done a deal with Youngor at the Jan 2018 Indexed Price in order to take a position (*ie*, speculate) in the gasoil market.[96]

77 I note that in the Alternative Sale, while the loading dates of 18 to 22 December 2017 in Onsan, South Korea remained (as per the deal recap),[97] the delivery laycan period is not stated. I accept the explanation that the delivery of the cargo was scheduled for January 2018. As such, I do not think that Apex had deliberately entered into the Alternative Sale on the Jan 2018 Indexed Price with a view to speculating on the gasoil market. The pricing terms were a direct consequence of the possibility that the cargo might be delivered in January 2018. In any event, I do not think that closing the deal based on the Jan 2018 Indexed Price could be considered unreasonable (especially in light of the further efforts to address this issue by entering into the Hedging Arrangement).

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[93] DWS at para 140(a) to (b). Ong's Supplemental AEIC, OTC-6, p 17 at para 40.

[94] AB at p 88.

[95] Park's AEIC at para 41.

[96] DWS at para 140(d).

[97] AB at p 95.

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In this connection, I also rely on my comments in relation to the price premium of US$9 per barrel above, and my views on speculation below at [87] below.

78 I am therefore of the view that the Alternative Sale was not on unreasonable terms.

Whether Apex unreasonably ignored the possibility of an alternative sale to LinkOil

79 Wanxiang alleged that it was unreasonable for Apex to have rejected the possibility of mitigating its loss to a greater extent by pursuing an earlier deal opportunity with LinkOil. It relied on Shin's evidence that on or about 12 pm on 28 November 2017, he had communicated to Park an offer made by LinkOil for the Second LCO Cargo at the Dec 2017 Indexed Price plus a premium of US$12 per barrel on a "CFR" basis, which Park chose not to explore.[98]

80 The possibility of an alternative sale to LinkOil was raised in the course of Shin and Park's text messages on 28 November 2017 at around 12pm:[99]

> Park : It is judged that the company and trader continue to shift responsibility in Wanxiang, as far as my company is concerned, Apex can extend its only consideration to resell with the condition that Wanxiang bears the loss. Please reply to me promptly. This is the matter that I too have to decide within 1-2 hours. In the worst case, I am going to request for unconditional fulfilment of the contract.
>
> Shin : Well, I understand your position.
>
> Shin : From my standpoint, I feel that directly entering into a contract with Link Oil would reduce the loss of alternative sales.

[98] DWS at para 131; Shin's AEIC at paras 126 to 127.

[99] AB at pp 24 to 25.

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> Park : With regards to that part, I think it is the matter that my boss has to decide now.
>
> …
>
> Shin : But, it is also critical to minimize the loss. As such, I am telling you, "How about dealing with LINK?" Although I understand that it is not the right sequence from the other party's position. But if this option is dragged on for too long, it would disappear.

81 Shin's admission that pursuing the LinkOil deal opportunity would not be "the right sequence" from Apex's position, in my view, referred to the fact that it would not have been right for Apex to pursue a deal with LinkOil which dealt with the *precise* subject-matter of an *existing* contract between Apex and Wanxiang. In any case, Apex did not pursue the LinkOil opportunity, and at 4.21pm, Shin informed Park that LinkOil was no longer willing to go ahead with the deal.[100]

82 I note that at the time of the exchange above, Wanxiang had not yet communicated its refusal to acknowledge the existence of the Apex-Wanxiang Contract to Apex (which was only done on 29 November 2017). There was no renunciation of the contract by Wanxiang yet. Accordingly, there was no loss occasioned by any breach of contract which Apex was under a duty to mitigate. In fact, both Shin and Park continued attempting to salvage the situation after the potential deal with LinkOil had collapsed. This is evident from Shin's text message to Park at 4.34pm on 28 November 2017 that he would confirm the Deal Recap if Park had included his "condition".[101] Thus, had Apex pursued and accepted LinkOil's purported offer (even if I accept that it was as Shin described

[100] AB at p 25.

[101] AB at p 26.

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it), it would have committed an unlawful repudiation of the Apex-Wanxiang Contract.

83 For the above reasons, I do not think that Apex had acted unreasonably in mitigating its loss by the Alternative Sale to Youngor. Accordingly, the Alternative Sale was a valid basis for assessing Apex's loss.

Whether the Hedging Arrangement was unreasonable

84 Having entered into the Alternative Sale, in my view, the Hedging Arrangement was *prima facie* a reasonable step in mitigation because it limited the total loss that could result from any fall in the MOPS GO 500p index to US$0.40 per barrel.

85 Wanxiang levied a number of allegations in respect of the Hedging Arrangements. These are stated briefly as follows:

(a) First, that the Hedging Arrangement was not a matter within its contemplation or knowledge at the point where the Apex-Wanxiang Contract was discussed between Park and Shin;[102]

(b) Second, that following on from Wanxiang's contention that the Alternative Sale should have been based on the Dec 2017 Indexed Price and not the Jan 2018 Indexed Price (see [75] above), the Hedging Arrangement was Apex's attempt to speculate on the gasoil market upon arranging for the Alternative Sale, so that they would "keep all gains that they would have earned from the ICE trades, if January gasoil prices

[102] DWS at para 139.

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fell, while at the same time pursue Wanxiang for losses arising from the physical sale under the [Alternative Sale]".[103]

(c) Third, that there was no reason for Apex to take a position against the rise in gasoil prices (by way of the Hedging Arrangement) and "deliberately create a loss" when the market prices were experiencing a "continuous upswing for 6 continuous months from June 2017"[104] and would possibly rise further;[105] and

(d) Fourth, that Apex did not even have to enter into the Hedging Arrangement to mitigate any potential loss from any potential adverse movement in the MOPS GO 500p index because they could recover that loss from Wanxiang if they were successful in their claim in the present proceedings.[106]

86 Dealing with each of these points in turn, I do not find Wanxiang's first contention relevant to the issue of mitigation. The reasonableness of mitigation does not depend on whether the defaulting party was aware, at or after the time of contract formation, that such steps would be taken. Taking Wanxiang's arguments to their natural conclusion would lead to an untenable result. The mere fact that the parties did not contemplate any form of mitigation at all could not oust the common law duty to mitigate loss owed by the innocent party.

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[103] DWS at paras 155 to 157.

[104] DWS at para 140.

[105] DWS at para 144.

[106] DWS at para 151.

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87 As for Wanxiang's second contention, it is in my view wholly misconceived for Wanxiang to argue that Apex had sought to speculate in the market. The *only* benefit under the Hedging Arrangement that Apex could have derived was the *guaranteeing of a fixed loss* of US$0.40 per barrel of gasoil hedged in exchange for avoiding the possibility of sustaining an even larger loss. There was no element of profit in Apex's side of the Hedging Arrangement. This being the case, there is no conceivable way in which Apex's actions can be characterised as "speculation" on the gasoil market. If anything, under the Hedging Arrangement, it was ICE, and not Apex, which took on the risk and reward of fluctuations in gasoil prices, and who, consequently, could have been said to be "speculating". Apex did nothing more than to act out of an abundance of caution – the very opposite of speculating.

88 Wanxiang's third contention is, in my view, flawed. There is no doubt that the Hedging Arrangement would have operated to limit the potential loss from adverse movements in the MOPS GO 500p index. In my judgment, it would have been reasonable for Apex to limit the possibility of such adverse movements. Historical data showing a rising trend in the MOPS GO 500p index did not automatically lead to the conclusion that the index would have inexorably risen from December 2017 to January 2018, such as to make Apex's actions unreasonable.

89 Lastly, Wanxiang's fourth contention was untenable. The entire point of mitigation is so that the party in breach need not be made liable for the full extent of the loss occasioned by its breach of contract if that loss may be reasonably reduced by the innocent party. The mere fact that Wanxiang was able and willing to pay the full loss suffered by Apex did *not* in any way render Apex's attempts at mitigation unreasonable.

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90 For all of the above reasons, I am of the opinion that Wanxiang has failed to show that Apex's efforts at mitigation, *viz* the Alternative Sale and the Hedging Arrangement, were unreasonable. I turn now to consider the quantum of damages claimed.

Damages to be awarded

91 Having found that the Alternative Sale and the Hedging Arrangement were reasonable mitigating steps taken by Apex, I return to the damages claimed. As enumerated at [56] above, Apex's claim for US$1,211,778.60 comprises the following:

(a) The sum of US$783,245.05. This is the difference in the price premium between the Apex-Wanxiang Contract and that under the Alternative Sale. This represents Apex's expectation loss. Wanxiang did not challenge the computation, and I find that the amount is claimable in damages.

(b) The sum of US$297,500. This is the freight cost incurred by Apex in performing the Alternative Sale. This is an expense incurred in Apex's efforts to mitigate its loss which is recoverable in damages.

(c) The sum of US$102,586.35, which represents the costs incurred by Apex of procuring extensions of the credit period in respect of the Letter of Credit which it had obtained to finance the S-Oil purchase. Such extensions would not have been necessary under the Apex-Wanxiang Contract. In my opinion, these costs were reasonably incurred by Apex in entering into the Alternative Sale, and are therefore claimable.

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(d) The sum of US$21,330. As set out at [63]—[64] above, this sum was incurred by Apex as the *net* cost of entering into the Hedging Arrangement to remove Apex's exposure to the volatility in the MOPS GO 500p index. It was an expense incurred by Apex in its reasonable efforts to mitigate its loss and is recoverable.

(e) The commissions paid in respect of the Hedging Arrangement, comprising US$5,092.20 paid to BNP Paribas Commodity Futures Ltd and US$2,025 paid to Ginga Global Markets Pte Ltd. In my view, these were expenses incurred in respect of Apex's mitigation of its loss by way of the Hedging Arrangement, and are therefore claimable.

Conclusion

92 For the above reasons, I grant judgment for Apex and order Wanxiang to pay damages in the sum of US$1,211,778.60 with interest at the rate of 5.33% per annum from the date of writ. Parties are to provide costs submissions within two weeks of the judgment.

Hoo Sheau Peng
Judge

Sarbjit Singh Chopra, Lee Wen Rong Gabriel and Luis Inaki Duhart Gonzalez (Selvam LLC) for the plaintiff;
Eng Zixuan Edmund, Brinden Anandakumar, James Tan and Danica Gan (Fullerton Law Chambers LLC) for the defendant.

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