The “STX Mumbai” and another matter
[2015] SGCA 35

Case Number	: Civil Appeal No 80 of 2014 and Summons No 4235 of 2014
Decision Date	: 24 July 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA; Judith Prakash J; Quentin Loh J
Counsel Name(s)	: Leong Kah Wah, Vellayappan Bala, Koh See Bin (Rajah & Tann Singapore LLP) and Navinder Singh (Navin & Co LLP) for the applicant/appellant; Gerald Yee, Prakash Nair, Moses Lin and Nazirah K Din (Clasis LLC) for the respondent.
Parties	: The "STX Mumbai"

Civil Procedure – Striking Out

Contract – Discharge – Anticipatory Breach

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2014] 3 SLR 1116.]

24 July 2015

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The Appellant supplied bunkers to the Respondent’s vessel, *STX Mumbai* (“the Vessel”), on terms which required payment to be made within 30 days. Three days *before* the payment date arrived, the Appellant issued a letter of demand to the Respondent’s agent, STX Corporation, demanding *immediate* payment of the contract price by the close of the same business day. This demand for accelerated payment was founded on a set of circumstances which, in the Appellant’s view, demonstrated that payment would not be forthcoming when it fell due under the contract. In essence, these circumstances had to do with the poor financial health of the group of companies that the Respondent appeared to be a part of and this was evidenced, in particular, by the insolvency of another company, STX Pan Ocean Pte Ltd (“STX Pan Ocean”), which was also named as the “group owner” of the Vessel. No payment was received pursuant to the letter of demand and so the Appellant proceeded to commence *in rem* proceedings and arrested the Vessel the next day. The Appellant did so on the basis that the bunker supply contract had been repudiated by reason of the Respondent’s *anticipatory* breach, claiming that the Respondent had evinced a clear intention to renounce the contract by refusing to comply with the letter of demand or, alternatively, that the circumstances were such that it was impossible in any event for the Respondent to have made payment when the time arrived under the contract.

2 The Respondent applied to strike out the *in rem* action. It succeeded before the Assistant Registrar whose decision was upheld on appeal to the High Court (see *The “STX Mumbai”* [2014] 3 SLR 1116 (“the GD”)). In the Judge’s view, the Appellant’s action was legally unsustainable. She noted that certain facts were disputed by the parties – for example, whether the Respondent was even the party liable *in personam* for the bunkers (see below at [7]) – but found that even if these facts were assumed in favour of the Appellant, the Respondent was not in anticipatory breach of the

contract. In gist, the Judge held that insolvency *per se* did not automatically amount to a repudiatory breach in law and, further, that this principle applied *a fortiori* in the present case because what the Appellant had sought to rely on when it issued the letter of demand was not the insolvency of the party liable *in personam* for the bunkers (*viz*, the Respondent) but that of a separate corporate entity altogether (*viz*, STX Pan Ocean). In the absence of any attempt to lift the corporate veil, the insolvency of the latter could not be imputed onto the former. Hence, the Appellant had no legal basis for issuing the letter of demand. Accordingly, the Respondent's failure to comply with the demand could not be construed as a *renunciation* of its contractual obligations. Not surprisingly, the Judge also rejected the Appellant's alternative argument to the effect that the Respondent had (owing again to STX Pan Ocean's insolvency) placed itself in a situation which would render it *impossible* for it to meet its obligation to pay on the date fixed for payment.

3 This was sufficient for the Judge to strike out the *in rem* action but she went on to consider, by way of *obiter dicta*, a novel legal point which touched on the scope of the doctrine of anticipatory breach. Simply put, the question was this – does the doctrine of anticipatory breach apply only to *executory* contracts or does its application extend further to *executed* contracts? In offering her tentative views on this issue, the Judge stated that she was inclined to prefer the former, more circumscribed, position with the result that, if applied to the present facts, the Appellant's claim would have no legal foundation to rest on. There was, after all, no dispute that this case concerned an *executed* contract since the Appellant had fully performed its obligation to supply the bunkers and the only obligation which remained was on the part of the Respondent to make payment at a future date. However, as this particular argument was not canvassed by the parties, the Judge noted that she could not base her decision on it (see the GD at [54] and [55]). Fortunately, we were not faced with a similar constraint as this issue was in full legal play before this court. We will therefore consider it first as a matter of logic as well as commonsense. Put simply, if the exception applied (*ie*, the doctrine of anticipatory breach did *not* apply to *executed* contracts), then that would be the end of the matter and the present appeal would have to be dismissed on this point alone as it was clear – at least on the facts of this particular case – that the contract concerned was an *executed* one. *However*, as we note later on in this judgment, we are of the view that the exception is *not* good law in the Singapore context.

4 We allowed the Appellant's appeal. In our view, the *in rem* action here was not so plainly and obviously unsustainable as to warrant being struck out. To begin with, there was the issue as to whether the doctrine of anticipatory breach applied not only to *executory* contracts but also to *executed* contracts – an issue which (as mentioned in the preceding paragraph) we deal with later on in this judgment. Assuming that the doctrine of anticipatory breach applied to executed contracts (an assumption which, for the reasons we set out below, is entirely correct), it would be open to the Appellant to invoke the doctrine of anticipatory breach but whether its claim was a sustainable one on the facts required us to focus on STX Pan Ocean's insolvency and consider whether that formed a proper basis for the Appellant to conclude that payment could not have been made when the time arrived under the contract. On this score, we were pointed to sufficient material which satisfied us that there was an arguable connection between the Respondent and STX Pan Ocean such that one could not discount entirely the bearing which the latter's insolvency had on the ultimate question of whether the bunkers supplied to the Vessel would eventually be paid for. In addition to this, the Appellant raised a *new* argument *and* fresh evidence on appeal to buttress its submission on the impossibility of performance. Its new argument and fresh evidence revolved around its standard terms and conditions. The Appellant submitted that, on a true interpretation of the relevant clause, it was in fact entitled to receive payment on the date of the arrest itself and so, in the absence of any evidence to suggest that the Respondent had arranged to make payment by that time, it was virtually impossible for timely payment to have been made. In our view, this was not so plainly unmeritorious an argument that the Appellant should be precluded from amending its pleadings to raise

it subject to the usual costs consequences.

5 In the result, we decided to set aside the Judge's decision to strike out the Appellant's claim. For completeness, we should also mention that the Judge had set aside the arrest of the Vessel and found the Appellant liable for wrongful arrest and continuance of the same, ordering, in this last-mentioned connection, an inquiry as to the sum of damages payable. However, in light of our decision not to strike out the action, we allowed the Appellant's appeal against the setting aside of the arrest and reserved the question of wrongful arrest to the trial judge to be considered after the relevant findings have been made. These are the detailed grounds of our decision.

Background facts

The parties

6 The Appellant, Transocean Oil Pte Ltd, is a locally incorporated company in the business of supplying bunkers. The Respondent, POS Maritime VX SA, is a Panamanian incorporated company and the registered owner of the Vessel.

The Appellant supplies bunkers to the Vessel

7 On 15 May 2013, the Appellant received an order from a company known as STX Corporation (see above at [1]) for the supply of bunkers to the Vessel. The buyer named in the purchase order was stated thus – "M.V. STX MUMBAI AND/OR MASTER AND/OR OWNERS, MESSERS. STX Corporation". We should highlight that this – the identity of the buyer – was the source of a fundamental disagreement between the parties. The arguments ran as follows:

(a) The Appellant understood the above description in the purchase order to mean that it had contracted with *the Respondent* as owner of the Vessel. Although it had dealt with STX Corporation, STX Corporation had simply placed the order for the bunkers as the Respondent's agent.

(b) On the other hand, the Respondent claimed that the Appellant's contract was concluded directly with *STX Corporation*. In support of this contention, the Respondent relied on an affidavit filed by its representative, Mr Lee Sun Haing ("Mr Lee"), wherein the Vessel was stated as being on bareboat charter to STX Pan Ocean at the material time and, further, that STX Pan Ocean had independently arranged with STX Corporation for the latter to procure the supply of bunkers to the Vessel. In other words, the Respondent's case, effectively, was that there was a chain of contracts for the supply of the bunkers with the Appellant as the ultimate seller who had contracted only with STX Corporation. On this view, the Respondent could not be said to be the "relevant person" liable *in personam* for the bunkers and, accordingly, the Appellant had improperly invoked the court's *in rem* jurisdiction under s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) when it arrested the Vessel.

8 We were not required to resolve this difference in views. In the proceedings below, the Respondent was content to take the Appellant's case at its highest for the purposes of the striking out application and, as a consequence, the parties proceeded on a set of facts which were assumed in favour of the Appellant. This included the fact that STX Corporation had acted as agent for the Respondent in relation to the bunkers stemmed by the Vessel and that the Respondent was also the person liable *in personam* for these bunkers (see the GD at [20]). In light of the common ground between the parties in so far as these proceedings are concerned, we will say no more about this aspect of the case.

9 Returning to the factual matrix at hand, STX Corporation received a reply from the Appellant the next day, 16 May 2013, which concluded the contract between the parties. The Appellant indicated its agreement to supply bunkers according to the specifications in the purchase order and, importantly, made explicit provision for the payment term to be 30 days. It should further be mentioned that the Appellant had also sought, in its reply, to incorporate its latest standard terms and conditions into the contract. As alluded to earlier at [4], the Appellant's standard terms were not adduced in the proceedings below but as it was of particular relevance to that strand of the Appellant's argument regarding the date on which it was entitled to receive payment under the contract, the Appellant filed Summons No 4235 of 2014 primarily to seek leave to adduce these standard terms as fresh evidence on appeal. At the hearing, counsel for the Respondent, Mr Gerald Yee, stated that he was not objecting to the application. We allowed the Appellant's standard terms to be introduced into the record.

10 The bunkers were duly supplied by the Appellant to the Vessel two days later on 18 May 2013. This was evidenced by a bunker delivery note signed off by the master of the Vessel and also a tax invoice issued by the Appellant. This invoice stated that the total contract price for the bunkers was US$571,451.68 and that payment was to be made by way of telegraphic transfer. Notably, it also provided that the due date for payment was on 16 June 2013, which was a Sunday.

The circumstances leading up to the arrest of the Vessel

11 A flurry of events took place in the week prior to 16 June 2013 which, the Appellant claimed, led it to believe that payment would not be made when the due date did arrive. The Appellant therefore argued that it was justified in arresting the Vessel two days earlier (14 June 2013).

12 We pause here to mention that besides the Vessel, the Appellant had also dealt with STX Corporation for the supply of bunkers to four other vessels, *viz*, *STX Alpha*, *STX Delicata*, *Asita Sun*, and *Cape Race*. The point which is relevant to note about these other vessels is their ownership structure. Of the four vessels just mentioned, only *STX Delicata* was similar to the Vessel inasmuch as both were owned by the Respondent and named STX Pan Ocean as "group owner". The three remaining vessels, on the other hand, were not owned by the Respondent. Nor was STX Pan Ocean named as "group owner" of any of them. Notwithstanding this last-mentioned distinction, however, the Appellant's stated understanding was that all these vessels were "part of a conglomerate of related companies" such that defaults in payment by any of them would cause the Appellant to fear that the Respondent would default in its obligation to pay in respect of the Vessel.

13 This brings us to the first of the events which the Appellant submitted put it on alert regarding the likelihood of it receiving timely payment. This occurred on 10 June 2013 and related to *STX Alpha*. On this date, the sum of US$250,353.58 fell due under the contract for the supply of bunkers to *STX Alpha* but no payment was received by the Appellant. Thereafter, the representatives of the Appellant and STX Corporation had a telephone conversation which was followed up by an email from the former dated 11 June 2013. In this email, the Appellant informed STX Corporation that payment was outstanding under the contract, that its management was taking an extremely harsh view of the matter, and that it was prepared to exercise its full legal rights to enforce its claim, including arresting *STX Alpha*, if the contract sum was not paid by 14 June 2013.

14 The next day, 12 June 2013, the Appellant learnt from a news report that one of STX Pan Ocean's charter vessels, *New Ambition*, had been arrested in Seattle for unpaid bunkers in excess of US$1m. Importantly, the same source also reported that STX Pan Ocean (a Korean incorporated company) had filed for bankruptcy in South Korea. We pause to note that although the Judge had gathered from the news report that STX Pan Ocean had taken this step on or about 10 June 2013

(see the GD at [9]), the evidence before us shows that STX Pan Ocean had in fact obtained a bankruptcy order from the Seoul Central District Court some days earlier on 7 June 2013.

15 The foregoing events led the Appellant to send an email to STX Corporation on 13 June 2013, demanding *immediate* payment of a global sum of US$2,845,987.78 by the close of the same business day. The said sum was an aggregation of the contract prices for *all* the five vessels in respect of which STX Corporation had placed orders for bunkers. This was notwithstanding the fact that, by the time of the Appellant's email, the contract price had actually fallen due only for *STX Alpha*. For ease of reference, the various vessels and the fixed payment dates under their respective contracts are set out as follows:

(a) *STX Alpha* – 10 June 2013

(b) The Vessel (*ie*, *STX Mumbai*) – 16 June 2013

(c) *STX Delicata* – 23 June 2013

(d) *Asita Sun* – 23 June 2013

(e) *Cape Race* – 23 June 2013

16 The Appellant's email was sent only to STX Corporation and time-stamped at 5.36pm local time (which corresponded to 6.36pm in Seoul, South Korea). The email enclosed separate letters of demand addressed to STX Corporation and the respective registered owners of the vessels above. In each of these letters, the Appellant essentially alluded to the events outlined earlier at [13]–[14] – *viz*, that payment had not been forthcoming in respect of *STX Alpha* and STX Pan Ocean's insolvency – as the basis for its demand for accelerated payment. The Appellant then concluded by stating that if payment was not received by the close of business on 13 June 2013, it would accept the various bunker supply contracts as having been repudiated on the ground of the respective owners' "anticipatory breaches" and that it would commence legal proceedings to recover the outstanding sum.

17 As it turned out, no payment was received by the Appellant on 13 June 2013 pursuant to the aforementioned letters of demand.

The arrest of the Vessel and subsequent events

18 The next day, 14 June 2013, the Appellant obtained a warrant of arrest for the Vessel in the morning (around 10.36am) and served it on her in the afternoon (around 3.50pm). The Appellant's *in rem* action was premised on the Respondent's alleged anticipatory breach which, the Appellant claimed, could be established on two alternative grounds – (a) first, that the Respondent had *renounced* the contract by refusing to comply with the 13 June 2013 letter of demand; and (b) second, that it would in any event have been *impossible* for the Respondent to make payment on the due date given the financial difficulties that afflicted the STX group of companies which it was a part of.

19 On 26 June 2013, the Respondent's solicitors wrote to the Appellant's solicitors requesting the security breakdown in respect of the Vessel and this was duly furnished on the same day. The Respondent eventually put up the security some four weeks later on 22 July 2013 and the Vessel was released.

The procedural history

20 Prior to the Vessel's release, on 16 July 2013, the Respondent made an application in Summons No 3613 of 2013 ("SUM 3613/2013") to, *inter alia*, (a) strike out the Appellant's *in rem* action; (b) set aside the warrant of arrest; and (c) claim for damages on grounds of the wrongful arrest and/or wrongful continuance of arrest of the Vessel.

21 SUM 3613/2013 came up for hearing before the Assistant Registrar on 14 August 2013. It was allowed in so far as an order was made for the *in rem* action to be struck out on the basis that it was legally unsustainable. However, no further orders were made in respect of the Respondent's other prayers.

22 The Appellant subsequently filed Registrar's Appeal No 297 of 2013 ("RA 297/2013") to appeal against the Assistant Registrar's striking out order while the Respondent cross-appealed in Registrar's Appeal No 298 of 2013 ("RA 298/2013") to set aside the arrest and claim damages for wrongful arrest. Both RA 297/2013 and RA 298/2013 were heard by the Judge on 8 November 2013, 21 February and 19 May 2014.

The decision below

23 The Judge dismissed the Appellant's appeal in RA 297/2013. Like the Assistant Registrar, she was of the view that the Appellant's action was legally unsustainable because even if the factual substratum was assumed in the Appellant's favour, there was nevertheless no valid basis for holding the Respondent in anticipatory breach of the contract (when the Vessel was arrested on 14 June 2013) on the ground either of its renunciation or impossibility of performance.

24 The Appellant's *renunciation* argument failed because, in the Judge's view, there was no basis for it to issue the 13 June 2013 letter of demand in the first place; hence, the Respondent's non-compliance with the same could not be interpreted as evincing a clear refusal to perform its payment obligation when the time came (see the GD at [43]). In this regard, the Judge noted that the "set of circumstances" alluded to by the Appellant in the said letter (see above at [16]) was not capable of supporting a claim for anticipatory breach *by the Respondent*. To begin with, the Appellant's reliance on the non-payment of bunkers in respect of the *STX Alpha* was flawed because that vessel was not owned by the Respondent nor was STX Pan Ocean its "group owner" (see the GD at [34]). We pause to mention that the Judge's reasoning on this point should be understood against the fact that, in the proceedings below, the parties were only on common ground in so far as STX Pan Ocean, STX Corporation, and the Respondent were part of the same group of companies (see the GD at [20]). The Appellant was therefore left essentially to rely on *STX Pan Ocean's insolvency* as the basis of its demand for immediate payment but that too was ultimately found by the Judge to be "misguided" because: (a) the Appellant had not sought to lift the corporate veil and so could not impute STX Pan Ocean's insolvency onto the Respondent (see the GD at [35]); and (b) in any event, it was clear as a matter of common law that insolvency *per se* did not automatically amount to a repudiatory breach in the absence of an early termination or acceleration of payment clause in the contract or some other clear words or conduct by the promisor manifesting an intention not to adopt the contract (see the GD at [36]–[37]).

25 The Appellant's alternative argument from *impossibility* rested essentially on STX Pan Ocean's insolvency and, unsurprisingly, the Judge was similarly unpersuaded by it given that it was afflicted by the same underlying problem: there being no attempt to lift the corporate veil in respect of STX Pan Ocean, its insolvency could not have any relevant connection to the Respondent's ability to make payment under the contract. Further, the Judge noted that insolvency *per se* did not imply that a party was necessarily incapacitated in respect of its obligations under the contract since it was still

possible for the liquidator to elect to adopt the contract (see the GD at [47]).

26 In light of the above, the Judge held that the Appellant's claim against the Respondent was legally unsustainable. She therefore upheld the Assistant Registrar's decision to strike out the Appellant's *in rem* action. However, she proceeded to further consider, by way of *obiter dicta*, the novel (and logically anterior) legal issue that was mentioned at [3] earlier, *viz*, whether the doctrine of anticipatory breach distinguished between executory and executed contracts in a way which excepted the latter from its application. After surveying a range of Commonwealth authorities as well as a host of academic commentary on this issue, the Judge finally arrived at the "entirely provisional" (see the GD at [55]) view that there was, on balance, "a strong case for the exception to fully apply in the present case based on the facts assumed" (see the GD at [74]). If that were so, then the Appellant's claim would effectively be defeated on a preliminary legal point, *viz*, that it was not even open to the Appellant to avail itself of the doctrine of anticipatory breach given the wholly executed nature of the contract in the present case. The Judge, however, did not rule conclusively on this issue (see also above at [3]).

27 Turning to the Respondent's cross-appeal in RA 298/2013, the Judge held that it followed automatically from her decision to strike out the *in rem* action that the legal basis for the arrest had been removed; hence, the warrant of arrest was set aside (see the GD at [2] and [23]). The Judge also held the Appellant liable for the wrongful arrest of the Vessel and ordered an inquiry as to the damages payable. In support of this finding, the Judge took a particularly dim view of the 13 June 2013 letter of demand which she noted was sent after office hours in South Korea yet demanded immediate payment on the very same day. According to the Judge, this tight deadline was "designed to achieve and create a semblance of refusal to pay" that was clearly artificial (see the GD at [79]).

The parties' arguments on appeal

The Appellant's case

28 The Appellant appealed against the whole of the Judge's decision. The crux of its case remained premised on the doctrine of anticipatory breach but the focus was now placed primarily on the ground of *impossibility of performance* by the Respondent. The Appellant had two strings to this particular bow.

29 First, the Appellant maintained that it could properly rely on STX Pan Ocean's insolvency to determine that the Respondent would not be able to pay for the bunkers supplied to the Vessel when the time arrived under the contract. The Appellant submitted that it was not fatal that no attempt had been made to lift the corporate veil because the proceedings were still at a very early stage and so, as more evidence came forward in the course of discovery, the Appellant could yet amend its pleadings to lift the corporate veil. The Appellant also submitted that in so far as the Judge had held that insolvency can *never* amount to an anticipatory breach, that reasoning was flawed because it failed to account for the facts of each case. The Appellant pointed out that, in this case, the facts were such that the financial state of STX Pan Ocean was highly germane to the question of whether timely payment was possible under the contract – as things stood, there was already a sufficient body of evidence to suggest that STX Pan Ocean could well be the *alter ego* of the Respondent. This evidence comprised the following:

(a) STX Pan Ocean was listed as the "group owner", operator, and manager of the Vessel which suggested that the Respondent – who had not furnished evidence of any independent bank account or funds – was essentially a one-ship company.

(b) STX Pan Ocean and the Respondent shared the same office address in South Korea as reflected in the bareboat charter (the authenticity of which, it should be mentioned, the Appellant disputed).

(c) The person who had been affirming the affidavits in these proceedings on the Respondent's behalf, *viz*, Mr Lee (see above at [7(b)]), was the same person who had signed the alleged bareboat charter on behalf of STX Pan Ocean.

(d) In an affidavit filed in support of STX Pan Ocean's application to be placed under a scheme of arrangement sometime in July 2013, STX Pan Ocean's representative had described the Vessel as its vessel and identified the Appellant as "a creditor of [STX Pan Ocean]".

30 Secondly, the Appellant sought to raise a new argument which turned on the proper interpretation of cl 9 of its standard terms and conditions. The relevant part of this clause reads as follows:

> Payment shall be deemed to have been made on the date of the payment credited to the counter of the bank designated by the [Appellant]. If payment falls on a non-business day, then payment shall be made on or before the business day nearest to the due date. If the preceding and succeeding business days are equally near to the due date, then payment shall be made on or before the preceding business day.

31 There was no dispute that the due date for payment on 16 June 2013, falling as it did on a Sunday, was a "non-business day". This therefore raised the question as to what was the nearest business day to 16 June 2013 on which payment ought to have been made. In the Appellant's submission, this was the preceding day (*ie*, 15 June 2013) since Saturday was considered a business day in Singapore. However, the Appellant went further to submit that, even though Saturday was a business day, no clearing of funds paid by telegraphic transfers took place on Saturdays; hence the contract sum should have been received into the Appellant's designated account by *14 June 2013* (a Friday) at the latest. It was significant in this respect, though, that there was no evidence of arrangements having been made to make payment before the *in rem* writ was issued on 14 June 2013 itself; hence, as the Appellant submitted, it was "virtually impossible" for the Respondent to have made payment on that date. The Appellant had an alternative submission on this point. It argued that even if it were wrong in identifying 14 June 2013 as the proper date for payment to be made, the evidence suggested that outward telegraphic remittances from the biggest local banks could take up to four days such that the contract sum could only have been received into the Appellant's designated account sometime in the *middle* of the week commencing 17 June 2013. If this alternative submission were correct, then, regardless of how cl 9 was interpreted, the impossibility of performance on the part of the Respondent would be placed beyond all doubt.

32 On the novel issue regarding the scope of the doctrine of anticipatory breach, the Appellant submitted that the majority of the Commonwealth jurisdictions surveyed by the Judge were not settled on this issue. Further, there were strong reasons to reject the exception favoured by the Judge as had been canvassed in numerous academic writings. For example, the exception could (if recognised) lead to unjust outcomes since a party which had yet to perform its obligations under an executory contract would be entitled to seek immediate recourse but a party who had wholly performed its part of an executed contract would have to wait until the other party's obligations fell due under the contract.

33 Finally, the Appellant submitted that if the *in rem* action was not struck out, then it should follow as a matter of course that its arrest of the Vessel was not wrongful. Accordingly, the order for

an inquiry into the damages payable should be set aside.

The Respondent's case

34 The Respondent submitted that, first and foremost, the Judge's tentative observations in respect of the exception to the doctrine of anticipatory breach should be endorsed by this court. This exception was supported by a principled rationale which was that a party who had no obligation left to perform ought not to be able to hasten the other party's obligation to make payment by a fixed date by invoking the doctrine of anticipatory breach. If this exception were accepted as forming part of Singapore law, then the rest of the Appellant's arguments would be rendered moot.

35 However, assuming that the Respondent was wrong on the above point, it went on to submit that there was, in any event, no basis for holding that the contract was anticipatorily repudiated on 14 June 2013 by reason of the alleged impossibility of performing it.

36 In so far as the Appellant's reliance on STX Pan Ocean's insolvency was concerned, the Respondent echoed the Judge's observations that this was not only misguided, given that the Appellant had not pleaded that the corporate veil should be pierced, but that it was also a *non sequitur* because it was premised on the imperfect assumption that the mere fact of insolvency meant that the contract was rendered incapable of being performed (see, in this regard, above at [25]).

37 In so far as the Appellant's new argument in respect of its standard terms and conditions was concerned, the Respondent submitted that the Appellant's interpretation of cl 9 was flawed. In the Respondent's view, Saturday (*ie*, 15 June 2013) was not a business day and so the nearest business day to 16 June 2013 was in fact the following day, which was a Monday. Accordingly, on the Respondent's construction of cl 9, payment under the contract was due only on *17 June 2013*. In any event, the Respondent submitted that since cl 9 contemplated payment being "credited to the counter of the bank designated by the [Appellant]" (see above at [30]), telegraphic transfer was not the only possible mode of payment; it was open to the Respondent to make payment by cheque or cash over-the-counter and this could still be done by the contractual due date of 16 June 2013.

38 The Respondent also submitted that the Judge was correct, in so far as RA 298/2013 was concerned, to set aside the warrant of arrest and to order that damages be paid for wrongful arrest. Pertinently, the Respondent highlighted in this appeal that the Appellant had failed to disclose material information in its *ex parte* application for the warrant of arrest. In particular, it was a material fact that the other vessels such as *STX Alpha* were clearly not owned by the Respondent, yet the Appellant did not disclose this and sought to rely, instead, on their indebtedness to claim that the Respondent would not be able to make payment for the bunkers supplied to the Vessel. According to the Respondent, this material non-disclosure was both a ground for setting aside the warrant of arrest and a clear demonstration that the arrest was the result of either bad faith or gross negligence such as to justify an order of damages.

The issues before this court

39 Based on the parties' respective submissions, we distilled four issues:

(a) First, in respect of the Appellant's appeal against the Judge's decision to strike out its *in rem* claim:

(i) Can the Appellant rely on the doctrine of anticipatory breach notwithstanding that

the contract in this case is an *executed* contract? ("Issue 1")

(ii) If so, is the Appellant's claim nevertheless *still* legally unsustainable because, in so far as it continues to be premised on the insolvency of STX Pan Ocean, insolvency can *never* amount to an anticipatory breach? ("Issue 2")

(b) In the event that the Appellant's *in rem* claim is *not* struck out:

(i) Should the warrant of arrest nevertheless be set aside on the independent ground raised by the Respondent in this appeal, *viz*, the Appellant's non-disclosure of material facts? ("Issue 3")

(ii) Does it follow as a matter of course that the Judge's finding of wrongful arrest should be overturned and the order for assessment of damages set aside as argued by the Appellant? ("Issue 4")

Our decision

Issue 1: Can the Appellant rely on the doctrine of anticipatory breach even though this case involves an executed contract?

The theoretical difficulties with the doctrine

40 The doctrine of anticipatory breach has had a chequered history (see generally Sir Michael Mustill, "Anticipatory Breach of Contract: The Common Law at Work" in *Butterworth Lectures 1989-90* (Butterworths, 1990)). As we shall see, this is due, in the main, to the fact that its very basis is none too clear to begin with. Now, even after a brilliant doctoral thesis exploring its multifarious aspects as well as difficulties (see the published version by Qiao Liu, (simply and aptly) entitled *Anticipatory Breach* (Hart Publishing, 2011) ("*Liu*")), its problems nevertheless continue to trouble the courts in various jurisdictions. One particular problem has reached our legal shores in the present case. It can be simply stated but is not easily resolved: does the doctrine of anticipatory breach apply to a contract that has already been executed by the innocent party? Put simply, if the innocent party has already performed all its obligations pursuant to the contract concerned, is it then disentitled from invoking the doctrine of anticipatory breach? Must the innocent party wait until the time for performance has arrived before it can sue the other party for (actual) breach of contract? If so, then it would follow that the doctrine of anticipatory breach would *only* apply in the context of *(bilateral) executory* contracts. It would also follow that the doctrine is *not* applicable in the context of *unilateral* contracts. We digress briefly to clarify that our use of the term "unilateral contract" here (and in the rest of this judgment) is intended to refer only to situations in which the innocent party has performed all its obligations under the contract, which is, in substance, the *same* situation that we are presented with here. In short, what we mean by the term "unilateral contract" in the present context is no more than what is in effect an executed bilateral contract. Indeed, Prof Carter has, in a similar vein, interestingly referred to a *bilateral* contract which was *executed* as "a *second type* of unilateral contract" [emphasis added] (see J W Carter, "The Breach of Unilateral Contracts" (1982) 11 Anglo-American Law Rev 169 at 169). The complexities arising from the particular issue just stated are, as we shall see, inextricably bound up with the difficulties surrounding the very nature of anticipatory breach in the first place. So it is to this last-mentioned (and foundational) point that our attention must first turn. However, before proceeding to do so, we note that there is no *direct* authority as such in the *Singapore* context on this particular issue (though *cf* the very recent commentary on a decision of this court in *Tan Hock Keng v L & M Group Investments Ltd* [2002] 1 SLR(R) 672 in Goh Yihan, Lee Pey Woan & Tham Chee Ho, "Contract Law" (2014) 15 SAL Ann Rev

217 at paras 12.119–12.131).

41 At first blush, the doctrine of anticipatory breach appears to embody a logical contradiction: how can the innocent party (let us now and hereafter call it "the plaintiff" for the convenience of exposition) be permitted to sue the other party (let us now and hereafter call it "the defendant", again for the convenience of exposition) for breach of contract when the time for performance has yet to arrive? If the time for performance has arrived and the defendant has breached one or more of the terms of the contract, then that would of course be a situation of an *actual* breach. It is far less intuitive to state in the same breath, however, that the defendant is equally in breach of contract even though the date of actual performance has yet to arrive. In fairness to the defendant, ought it not to be penalised only when the time to perform has arrived and it either refuses to perform its contractual obligations or performs one or more of these obligations in an unsatisfactory fashion? Does it not seem unduly harsh to penalise the defendant in *advance* of the time when it is *expected* to perform? However, we would interject here to point out that, in so far as these arguments appear to be centred on notions of general unfairness to the defendant, they are, to an extent, balanced out by the fact that an integral part of the doctrine of anticipatory breach lies in the fact that *the plaintiff* must *also* demonstrate that *it was able and willing to perform its part of the contract* – in particular, as a learned author aptly put it, the plaintiff would ordinarily be required "to show (1) that non-completion of the contract was not [its] fault and (2) that [it] was disposed and able to complete it, and would have done so, had the [party in breach] not renounced it" (see Francis Dawson, "Metaphors and Anticipatory Breach of Contract" [1981] CLJ 83 ("*Dawson*") at 90 and 99). Nevertheless, this still leaves unanswered the question as to why the plaintiff ought to be able to sue in *advance* of the time of performance by the defendant, *notwithstanding* the fact that the defendant has clearly evinced an intention *not* to perform its obligations under the contract.

Rationalising the doctrine – the traditional view centred on an implied promise

42 The explanation as well as justification for permitting the plaintiff to sue for anticipatory breach is *not* premised on an *actual* breach by the defendant since, *ex hypothesi*, the time for performance has *not arrived yet*; this is notwithstanding the fact that the defendant has *signalled clearly* that it will *not be performing* (*ie*, would *breach*) the contract when the time for performance *in fact arrives*. What many writers have done is to proffer an *alternative* explanation as well as justification instead. In particular, they have premised the plaintiff's right to sue for *anticipatory* breach of contract on the *actual breach* by the defendant of *a separate (albeit implied) promise that* the defendant *would not prevent the plaintiff from performing its contractual obligations which simultaneously constitute the conditions precedent to the plaintiff's entitlement to the performance of the defendant's obligations pursuant to the same contract* (see generally, *eg*, *Dawson* at 99 and 100–101). Looked at in this light, what the court is effectively seeking to ensure is that the contract is ***not*** *rendered* ***an exercise in futility*** . This last-mentioned (and more general) point is an extremely important one in the context of the present case – a point to which we shall return below (at [45] and [47]).

43 It is precisely at this juncture that the difficulties bedevilling the specific legal issue that is the focus of the present case appear. Put simply, if the plaintiff (the Appellant in this case) has performed all its obligations under the contract, then there is *nothing* that the defendant (the Respondent in this case) in fact *prevents* by its repudiation or renunciation of its obligations (albeit *in advance*) under the contract. If so, then the very *basis* upon which the plaintiff is permitted to sue the defendant for an *anticipatory* breach of contract has *disappeared*. In essence, there has been ***no breach*** of the ***separate (and implied) promise*** *to the effect that the defendant would not prevent the plaintiff from performing its obligations under the contract in order to obtain the benefit of the defendant's performance of its obligations under the same contract.* As Prof Dawson puts it (see *Dawson* at 102):

These decisions seem in accord with principle, because it would enlarge the parties' obligations if the doctrine of anticipatory breach were to extend to executed contracts and were not confined to cases involving some dependency of performance. If a repudiation is a breach of an implied promise not to hinder or prevent the innocent party from complying with the condition precedent to his right to claim the counter-performance, what breach of that promise can there be if the innocent party has already been permitted to perform? Since all that remains is for the other party to render the promised counter-performance on the agreed date, what reasons are there for bringing that date forward and for enlarging the defendant's contractual obligations? As Baxter J. said in *Melanson* v. *Dominion of Canada General Insurance Co.* [in [1934] 2 DLR 459 at 463] "in the case of an executed contract where the defendant simply says that he will not, under any circumstances, pay a sum of money when it falls due there is no possible reason for accelerating the payment and no hardship upon the plaintiff in not doing so." Precisely the same reasoning applies in the case of an independent promise: what reason is there to enlarge the parties' obligations by permitting an action to be brought prior to the date for its performance?

44 Indeed, the court below in the present case noted – for broadly similar reasons (albeit by way of *obiter dicta*) – that the doctrine of anticipatory breach did *not* apply to *executed* contracts (such as that which existed on the facts of the present case). If, in fact, the logic of the analysis set out in the preceding paragraph is accepted, this would appear to be the correct answer to the legal issue that is the focus in the present appeal. However, we would respectfully differ and hold, instead, that the doctrine of anticipatory breach *does* apply not only to executory contracts *but also* to *executed* contracts. Let us elaborate.

45 To begin with, it is true that if the plaintiff has already performed all its obligations under the contract, then there is nothing which the defendant can prevent the plaintiff from performing. There is therefore no (actual) breach as such of the implied promise on the part of the defendant that it would not prevent the plaintiff from performing its (the plaintiff's) obligations under the contract. *However*, we are of the view that, *even in* a situation where the plaintiff has *already performed* all its obligations under the contract, the defendant would nevertheless be in anticipatory breach *if* it states, in advance, that it will *not perform its obligations under the contract when the time for the actual performance of these obligations arrives*. This is because *there would, in our view, be* ***an actual breach*** *of* ***another*** ***separate (as well as implied) promise by the defendant to the effect that it (the defendant) would not act in such a manner so as to render the plaintiff's performance of its obligations towards completion of the contract*** ***an exercise in futility*** . It cannot be gainsaid that by announcing (albeit in *advance*) that it would *not* be performing its obligations under the contract when the time for the actual performance of these obligations arrives, *the defendant is*, ***necessarily*** *, rendering the plaintiff's performance of its obligations under the contract* ***an exercise in futility*** . It is obvious, at this juncture, that this is ***precisely the same general*** purpose and rationale which underlies the application of the doctrine of anticipatory breach to ***executory*** contracts (see above at [42]).

46 The analysis proffered in the preceding paragraph is also surely one that is *just and fair*. More importantly, it is also logical as well as coherent. Put simply, *how could the plaintiff in the situation of an* ***executed*** *contract (in which it had* ***in fact performed all of its obligations under the contract*** *) be* ***in a worse position*** ***compared to*** *a situation in which it (the plaintiff) had* ***yet (although it was able and willing) to perform*** *all of its obligations under the same contract*? However, that would be *precisely* the legal result (in both form *as well as* substance) if we were to hold that the doctrine of anticipatory breach did *not* apply to *executed* (as opposed to executory) contracts. Indeed, in our view, such a result would not only be contrary to logic but would also militate against commonsense as well as a just and fair result. Indeed, on a related note, if the plaintiff chooses not to exercise its option to terminate the contract concerned in a situation of anticipatory breach, it might not be able

to exercise its legal rights against the defendant for breach of contract later if, owing to a subsequent event amounting to frustration, the contract is discharged by operation of law (see, *eg*, the oft-cited English decision of *Avery v Bowden* (1855) 5 E & B 714 (which was also referred to by, *inter alia*, Viscount Simon LC in the leading House of Lords decision of *Heyman and another v Darwins, Limited* [1942] AC 356 at 361)). Further, the damages which the plaintiff will obtain as a result of the defendant's breach of contract will be subject to the established rules and principles with regard to proof, causation, quantification as well as mitigation (although we should point out that there remain issues that require to be dealt with in this connection as evidenced by the very recent decision handed down by the UK Supreme Court in *Bunge SA v Nidera BV (formerly known as Nidera Handelscompagnie BV)* [2015] UKSC 43 ("*Bunge*") at [13] which had, in turn, considered the previous House of Lords decision of *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha* [2007] 2 AC 353 (more commonly referred to as "*The Golden Victory*")).

47 Returning to the current issue (*viz*, that it is just and fair for the doctrine of anticipatory breach to apply not only to executory contracts but also to executed contracts), it is important to reiterate the point that permitting the doctrine of anticipatory breach to apply to executed contracts as well does *not* entail any compromise *in principle* as it can (as explained above at [45]) be justified on the basis of a separate implied promise (albeit of a somewhat different character from that used to rationalise an anticipatory breach of an *executory* contract). However, the purpose and principle underlying ***both*** types of implied promises remain *the same*: *they serve to ensure not only that there is* ***a just and fair result*** *but* ***also*** *that the contract concerned is* ***not rendered an exercise in futility*** . Indeed, what is a key consideration, in our view, relates to *the conduct of the defendant*. If the defendant has evinced a clear intention that it will *not* perform its obligations under the contract, then it is only *just and fair* that the plaintiff be permitted, in law, to rescind the contract (if it so chooses) and/or claim damages on the basis of an *anticipatory breach* of contract – ***regardless*** of whether the contract is *executed* ***or*** *executory*. Although the factual scenarios in both these last-mentioned situations are ***literally*** different, there is, in ***substance*** , ***no difference whatsoever*** when each situation is examined at a ***deeper*** level and *compared with each other*.

An alternative rationale – the modern view centred on the defendant's conduct

48 It should be noted, at this juncture, that the analysis with regard to the issue as to whether or not the doctrine of anticipatory breach applies to both executory and executed contracts has hitherto been confined to the sphere of ***implied promises*** . This is perhaps not surprising, given the (perceived) need to accommodate two propositions that were in seeming tension with each other – that, on the one hand, there could be *no actual* breach of the defendant's contractual obligations at a time when those obligations had yet to fall due and that, on the other hand, it was nevertheless just and fair (having regard to its conduct) to hold the defendant liable for *an actual breach* of contract. The implied promise was therefore a conceptual as well as practical device that served to bridge the gap and appeared to resolve the aforementioned tension. However, the use of implied promises is – even at the best of times – somewhat ***strained and artificial*** . Yet, by analogy with the way in which the use of an implied term initially dominated the way the doctrine of unjust enrichment was perceived as well as explained, this is perhaps not surprising – especially when the doctrine of anticipatory breach is viewed in the context of its *formative years*. Indeed, the leading (English) decisions (*viz*, *Hochster v De la Tour* (1853) 2 E & B 678 and *Frost v Knight* (1872) LR 7 Exch 111 ("*Frost*")) reflect this early vintage of the doctrine itself and so the question arises as to whether (again, by analogy with the development of the law of unjust enrichment) ***an alternative and more modern (yet no less principled)*** way of explaining the basis of the doctrine of anticipatory breach is available. We would suggest that there is. But before proceeding to elaborate upon it, we should note that the use of the *implied promise* has ***not found favour*** *in recent times* – ***thus buttressing the case for the alternative and more modern approach just alluded to (and which we would now***

endorse) . The implied promise approach has, for example, been clearly rejected by both Prof Liu (see *Liu* at pp 32–33 and 37–39 (although he does observe (at p 33) that "it has not been subject to any formal denunciation"); see also the view of the Hon Justice William Gummow in the *Foreword* to *Liu* at pp viii–ix) and Prof Carter in his seminal treatise on breach of contract (which is also the leading work on this important area of the law of contract in the Commonwealth) (see J W Carter, *Carter's Breach of Contract* (LexisNexis Butterworths Australia, 3rd Ed, 2011) ("*Carter*") at para 7-20). The following observations by a learned author over four decades ago might also be usefully noted (see E Tabachnik, "Anticipatory Breach of Contract" [1972] Current Legal Problems 149 ("*Tabachnik*") at 151):

> … But the implied term theory is unsatisfactory for two reasons: first, it may in a given case be no more than a fiction; secondly, the breach of an implied term would be an actual, not an anticipatory, breach of contract. It seems more satisfactory to rest the doctrine on a duty not to do anything inconsistent with the maintenance of contractual relations. …

49 Let us therefore now turn to consider ***the alternative approach*** .

50 In our view, whilst the focus of the case law has been on ascertaining an implied promise upon which an *actual breach* can be based, it ought to be borne in mind that even *that* particular analysis is premised (in turn) on *a very important (indeed, crucial) fact* (which we have already referred to earlier at [47]) – *that* ***the defendant*** *has* ***evinced a clear intention that it will not perform its obligations under the contract*** . As Prof Stoljar aptly observed (see Samuel Stoljar, "Some Problems of Anticipatory Breach" (1974) 9 Melbourne Univ L Rev 355 at 361, citing *Frost* at 115):

> … The repudiation, in other words, does not break a performance, it only breaks a duty or *promise* to perform. Nor does this promise merely represent an 'inchoate' duty or right; on the contrary, it represents a 'present' or 'continuing' one, if only because once an offeror's promise to perform is accepted by the offeree, that promise can no longer be repudiated or revoked. For once a contract is made, there is this consequence for each side: 'Each becomes bound to the other; neither can, consistently with such a relation, enter a similar [and inconsistent] engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished.' [emphasis in original]

And (albeit in a more general vein with respect to the merits of the doctrine of anticipatory breach), the following observations by Prof Ballantine are also apposite (see Henry Winthrop Ballantine, "Anticipatory Breach and the Enforcement of Contractual Duties" (1924) 22 Michigan L Rev 329 ("*Ballantine*") at 352):

> To say that the law cannot logically give any remedy to enforce the contract against the repudiator until he actually carries out his injurious threat seems as pacifistic as to say that a country cannot take any measures to defend itself upon a mere declaration of war, but must wait until it is actually invaded and occupied by the enemy. There is no logical necessity that the law should indulge the repudiator in the power or privilege of breaking his contract or let him threaten with impunity. It is not a question of constructing a self-evident syllogism based upon some self-imposed premise. It turns rather upon a consideration of the duties that should result from the making of a contract, and what remedies the law should provide for their protection, and enforcement. It is submitted that the doctrine of anticipatory breach is not only supported by its practical convenience, but by strong considerations of justice to the plaintiff; that it does not enlarge the duties of the defendant or hold him liable on a promise he never made. It simply authorizes the commencement of proceedings to enforce those duties when the situation or misconduct of the defendant demands it. While there may be little prospect of the courts feeling

free to extend the doctrine to debts and unilateral obligations, such extension may at least be worthy of consideration in connection with a legislative restatement of the law upon this subject. If a party's rights are questioned or denied by another with whom he has contracted, should he not be able to commence proceedings to obtain at least a declaratory judgment and incidentally an award of relief in event of non-performance?

51 Our views are very much aligned with those of Prof Stoljar and Prof Ballantine. If it is the case that ***the defendant*** *has* ***evinced a clear intention that it will not perform its obligations under the contract*** , then we see little reason why ***this very fact*** might not ***itself*** form ***the basis for holding that, in principle and logic, an actual breach has, in substance , occurred – notwithstanding the fact that the time for the defendant's performance has yet to arrive under the contract*** . The *defendant* is *not prejudiced* simply because its conduct clearly signals that it would *not* be performing its obligations under the contract. Indeed, if the contrary is sought to be argued (*ie*, that the defendant ***is*** indeed prejudiced), *then that argument would apply* ***equally*** *to the analysis that centres on* ***an implied promise*** . If, on the other hand, there is – as we have already noted – *no prejudice* involved, then there is (as we have just stated) nothing preventing the court (in both principle and logic) from utilising ***the defendant's conduct*** as itself evincing ***a present (ie , actual) breach of its obligations under the contract – albeit notified in advance to the plaintiff*** . This seems to us to be a ***much less convoluted way*** of understanding the basis underlying the doctrine of anticipatory breach, whilst simultaneously avoiding the artificiality surrounding the use of the device of the implied promise. Indeed, if this *alternative* approach towards the doctrine of anticipatory breach is adopted, it follows, ***a fortiori*** , that it would ***not matter*** whether the contract was executed ***or*** executory. If there is a breach justifying the plaintiff in electing to treat the contract as discharged (which we elaborate upon below at [64]–[78]), the doctrine of anticipatory breach could be applied, ***regardless of*** whether the contract is executed *or* executory.

52 At this juncture, we should pause (by way of what would appear to be a slight digression) to consider an issue of *terminology*. It will be noticed that in the alternative and more modern approach which we have set out and endorsed in the preceding paragraph, we have referred to the defendant's clear refusal to perform its obligations under the contract (albeit notified in advance) as involving an *actual* breach (*cf Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 *per* Lord Denning MR at 196). However, Prof Liu has argued against the use of the term "*actual* breach" in light of the fact that, the time for performance not having yet arrived in the situation of an *anticipatory breach*, no "actual" breach as such could therefore occur. In the circumstances, the learned author prefers the use of the terms "*present* breach" and "*inferential* breach" instead (see *Liu* at pp 35–37; *cf* also *Carter* at para 7-21). With respect, this appears to be more a matter of terminology (and even semantics). We do not differ, in *substance*, from Prof Liu and it might well be the case that the use of the term "*present* breach" (as well as "*inferential* breach") – as opposed to "actual breach" – might avoid any confusion to the extent that an *anticipatory breach* is *not* to be equated with the breach of an actual contractual obligation since, *ex hypothesi*, the time for performance has yet to arrive.

53 Returning to the substantive issue at hand, and in *addition to* the ***general points of principle*** referred to above which underpin ***the alternative and more modern approach which we endorse*** , there is in fact ***case law as well as weighty academic authority*** which ***further support*** this particular approach.

(1) The case law

54 Turning first to the relevant ***case law*** , the leading ***English*** decision is *Moschi v Lep Air Services Ltd and others* [1973] AC 331 ("*Moschi*"), which permitted the operation of the doctrine of

anticipatory breach in the situation where the contract was executed (this decision was in fact also cited by the Judge in the GD at [60]). This was also the case in the earlier English Court of Appeal decision of *Synge v Synge* [1894] QB 466.

55 However, as Prof Carter notes, the position in ***Australia*** (which is summarised admirably in *Carter* at para 7-82) "remains uncertain" (see *ibid*) – although Prof Liu endorses and cites extensively from one particular decision of the High Court of Australia (*viz*, *The Progressive Mailing House Proprietary Limited v Tabali Proprietary Limited* (1985) 157 CLR 17 ("*Progressive Mailing House*")) in arriving at the conclusion that the doctrine of anticipatory breach *does* apply to executed as well as unilateral contracts (see below at [61]). The case of *Progressive Mailing House*, though, should be contrasted with another decision of the High Court of Australia, *viz*, *Mackenzie v Rees and another* (1941) 65 CLR 1 where Dixon J had (at 15–16) cited with approval the American position of excepting executed contracts from the doctrine of anticipatory breach. Both these contrasting cases, it should be mentioned, were also cited by the Judge at [64] and [63] of the GD, respectively.

56 It should also be noted that there are two specific jurisdictions which appear to suggest that the doctrine of anticipatory breach does *not* apply to executed (as well as unilateral) contracts. The first is, of course, that from which this proposition first originated – ***the USA*** (see generally, for example, E Allan Farnsworth, *Farnsworth on Contracts* vol II (Aspen Publishers, 3rd Ed, 2004) at para 8.20). Even then, there are still some state jurisdictions in the USA (such as Texas, New Hampshire and Florida) which do *not* endorse this proposition and whose views are therefore consistent with that which has been adopted in the present judgment (see generally, *eg*, Donald A Wiesner & Janisse Klotchman, "Anticipatory Breach and the Unilateral Contract: A Decade of the Status Quo?" (1982) 8 U Dayton L Rev 61, especially at 75–80).

57 The second jurisdiction is ***Canada*** , where there is also a decision (also referred to by the Judge in the GD at [68]) which holds that the doctrine of anticipatory breach is not applicable in the context of executed contracts. This is the decision of the New Brunswick Supreme Court (Appellate Division) in *Melanson v Dominion of Canada General Insurance Co* [1934] 2 DLR 459 ("*Melanson*"). The crux of the decision (delivered on behalf of the court by Baxter J) is encapsulated within the following observations (at [9]):

> … The distinction [between executory and executed contracts] is a reasonable one. In all the cases of executory contract cited the plaintiff might be put to great hardship if he had to wait until the day of performance should arrive or if he had to do the things which, on his part, the contract bound him to do in the face of an imperative declaration on the part of the defendant that under no circumstances would he perform his portion of the contract. But in the case of an executed contract where the defendant simply says he will not, under any circumstances pay a sum of money when it falls due there is no possible reason for accelerating the payment and no hardship upon the plaintiff in not doing so …

58 With respect, the reasoning by Baxter J in *Melanson* quoted in the preceding paragraph is not, in the final analysis, persuasive for the reasons which we have already set out above (at [45]–[46]) and (perhaps even more importantly) does not take into account *the alternative and more modern approach* presently considered.

(2) The academic authority

59 Turning now to the relevant ***academic authority*** , Prof Carter echoes the view we have expressed above (at [46]), observing as follows (see *Carter* at para 7-80 (significantly, the sub-heading to this particular paragraph is entitled " ***The argument from principle*** ")):

> In principle, it is difficult to justify the exclusion of partially executed contracts from the doctrines of repudiation and anticipatory breach. A bilateral contract is partially executed once the promisee has performed. Whether the issue is approached from the perspective of the entitlement of the promisee to terminate the contract, or from the perspective of the right to sue immediately for loss of bargain damages, to deny the benefit of the doctrines to such a promisee would seem ***illogical*** . ***A promisee's concern about any conduct which materially increases the risk of non-receipt of the agreed return for its performance is, if anything, more acute where the promisee has already provided that performance.*** [emphasis added in bold italics]

60 It should also be noted that Prof Carter, in discussing *Moschi*, observed thus (see *Carter* at para 7-81; see also *Liu* at p 162):

> … If the time of performance had not arrived prior to judgment ***some discount of the damages awarded*** would have been necessary to take account of premature recovery by Lep [the plaintiff/respondent]. *Such a discount meets any criticism that termination for repudiation in respect of a partially executed contract changes the contract by increasing the promisor's obligations*. [emphasis added in italics and bold italics]

61 Prof Liu *also rejects* the proposition that the doctrine of anticipatory breach is not applicable in relation to executed as well as unilateral contracts. As already noted (above at [40]), his work is the only one which focuses specifically on the doctrine of anticipatory breach and his views in this particular regard merit extensive quotation as follows (see *Liu* at pp 164–167):

> … The exception, hardly visible in English law but widely recognised in the USA, holds that where the contract is unilateral or executed on one party's side when the other party commits an anticipatory breach, namely, where the victim of an anticipatory breach is under no outstanding obligation at the time of the breach, no action in damages lies before the contract-breaker's performance falls due. …
>
> The possible justification for the exception can be examined in three steps. First, it is obvious that the exception does not claim that no anticipatory breach can be constituted under a unilateral or one-sidedly executed contract. It would be ludicrous to suggest that the contract-breaker's conduct should be treated differently according simply to whether the victim has any outstanding obligations under the contract. If the conduct constitutes an anticipatory breach under a bilateral executory contract, it must equally constitute an anticipatory breach under a contract which is unilateral or executed on the victim's side. Secondly, the exception can be said to rest upon the fact that under a unilateral or one-sidedly executed contract, it is not open for the victim of an anticipatory breach to terminate the contract and thus, according to the conditional damages rule, the breach gives rise to no right of action in damages. This is perhaps the principal justification thus far advanced for the exception. Nevertheless, it is distinctly dubious that the argument can be sustained. If the reasoning is that it is not open for the victim to terminate the contract as there is no outstanding obligation from which it may extricate itself, the argument is clearly misconceived. The termination of a contract does not depend upon the existence of some future obligations on the terminating party. It can be invoked solely for the purpose of putting an end to the other party's future primary obligations and substituting them with a secondary obligation to pay damages for the total loss of bargain. The victim may, therefore, terminate the contract even though it has no future obligations to perform. It might be further argued that the doctrine of anticipatory breach should have no application and an immediate right of termination (and hence an immediate right of action in damages) should not be granted where the main policy factor underlying that doctrine, namely, the need to prevent future wasteful performance, is not present in a case involving a unilateral or one-sidedly

executed contract. Yet the fact that the victim is under no future obligation does not mean that it is not susceptible to future wasteful performance. Under a unilateral contract, for example, the victim's future performance of a non-promissory condition may equally be wasteful in view of the anticipatory breach. … More importantly, the argument assumes that the doctrine of anticipatory breach is concerned only with future waste, not with past waste. There is no foundation for such an assumption. The need to alleviate or eliminate past waste, just as the need to avoid future waste, equally justifies immediate remedies. Besides, is it not true that where the victim has already executed its part of the contract, it is in greater need for swift protection than where it has yet to perform some or all of its obligations? The victim would be put 'at the mercy of the reneging party who may toy with [it] as he will' if its only option is to wait for the contract to run its course and then claim damages when an actual breach arises. Further, the exception 'almost always operates in favour of the rich and powerful, and tramples on the poor and helpless', for those who are due to perform at a later time than the counter parties are likely to have stronger bargaining power. For these reasons the conditional damages rule ought not to be considered to warrant the exception. Indeed, the fact that the operation of the doctrine of anticipatory breach requires 'some dependence of performances' must not be taken to require the contract to be wholly or partially executory on the victim's side. Thirdly, it might be said that unless the victim has immediate remedies incorporated into the contract, such as in the form of an acceleration clause in loan contracts, the contract-breaker would be unduly penalised by an immediate action by the victim. This 'acceleration of obligation' argument has previously been dismissed as an objection to the immediacy rule in the context of a bilateral executory contract. It fares no better in the context of a unilateral or one-sidedly executed contract. As noted by Corbin, an immediate action in damages does not involve bringing forward the 'date of maturity' for the contract-breaker's performance; a judgment for damages must be distinguished from an order of specific performance, even where the performance specifically enforced is the payment of money. When assessing damages the courts normally deduct interest that reflects the victim's earlier use of money. In this way an acceleration of the contract-breaker's obligations is avoided. To summarise this critique of the exception, it is fitting to quote in full the following remarks of Brennan J in the High Court of Australia [in *Progressive Mailing House* at 44–45]:

> The principles relating to anticipatory breach put both a shield and a sword in the hands of an innocent party who accepts the other party's repudiation. His shield is the ending of his executory obligations; his sword is an immediate right to damages. ... [A victim whose side of the contract is executed] has no need of a shield. But he may wish to brandish a sword. Although the paradigm case in which the principles are applied involves interdependent executor obligations, anomalies would occur if there were an unqualified rule that damages for repudiation by anticipatory breach should be refused where the innocent party has fully performed his obligations, but granted where he has not. Whether the contract be executed or executory, it can be said that repudiation causes the innocent party loss of the benefit of the contract. Indeed, where the innocent party has fully performed his obligations, a repudiation by the other party deprives him not only of the profit to which his bargain entitled him but also of compensation for the cost incurred in performing his obligations.

62 It is also significant, in our view, that the Judge acknowledged (in the GD at [69]–[72]) that the academic commentary was *critical* of the proposition that the doctrine of anticipatory breach did not apply in the context of executed contracts (citing, *inter alia*, *Carter*). We have focused on *Carter* and *Liu* as they are, respectively, the leading works in the Commonwealth on the law relating to discharge by breach in general and the law relating to anticipatory breach in particular. It is highly significant that both works endorse the proposition that the doctrine of anticipatory breach *does* indeed apply to *executed* contracts (and not merely to executory contracts).

A brief summary of our views thus far

63 For the reasons set out above (at [45]–[62]), we would respectfully differ from the views expressed by the Judge and hold that the doctrine of anticipatory breach ***applies*** to ***both executed and executory contracts*** . For the avoidance of doubt, we also hold that the doctrine ***applies*** to ***unilateral*** contracts (which, as has been clarified above at [40], concern a similar situation as that which obtains in respect of bilateral executed contracts). We would add that we would prefer the alternative and more modern approach that justifies this holding – an approach that is not only grounded in sound general principle but also has the support of both modern case law as well as academic authority (see generally above at [54]–[62]).

Anticipatory breach and the application of the principles in RDC Concrete

64 But what, then, would justify the plaintiff in electing to treat the contract concerned as discharged in the context of the doctrine of *anticipatory breach*? We pause to observe (parenthetically) that this is an important issue in the context of the present case because, as we point out below (at [75]), the specific ground of impossibility of performance which was relied on by the Appellant in the court below, and which is the focus of the present appeal, necessarily invites clarification of this particular issue. In this regard, the Judge, understandably, did not need to consider this issue as she had held that insolvency could not, in this case, constitute an anticipatory breach to begin with (much less an anticipatory *repudiatory* breach). However, as our analysis below demonstrates (see especially at [85]–[89]), this is a point on which we respectfully differ from the Judge; hence, it becomes necessary for us to consider the circumstances in which a plaintiff may be justified in electing to treat the contract as discharged in the context of an anticipatory breach and, in particular, whether the defendant's impossibility of performance constitutes one such circumstance. This would, in our view, depend on whether or not the legal principles first set out by this court in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") apply – a point which was in fact canvassed during oral submissions before this court in the present appeal. In *RDC Concrete*, this court set out the various situations which would justify the plaintiff's election to treat the contract concerned as discharged as a result of the defendant's breach of contract. It is important to emphasise that *not every* breach of contract by the defendant will enable the plaintiff to elect to treat the contract as discharged. As this court observed (by way of a summary of the applicable legal principles) in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 (at [153]–[158]):

> 153 As stated in *RDC Concrete*, there are four situations which entitle the innocent party (here, the appellant) to elect to treat the contract as discharged as a result of the other party's (here, the respondent's) breach.
>
> 154 The *first* ("Situation 1") is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract (see *RDC Concrete* at [91]).
>
> 155 The *second* ("Situation 2") is where the party in breach of contract ("the guilty party"), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (see *RDC Concrete* at [93]).
>
> 156 The *third* ("Situation 3(a)") is where the term breached (here, Clause C.1) is a *condition* of

the contract. Under what has been termed the "condition-warranty approach", the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty): see *RDC Concrete* at [97]. The focus here, unlike that in the next situation discussed below, is not so much on the (actual) consequences of the breach, but, rather, on the *nature of the term* breached.

157 The *fourth* ("Situation 3(b)") is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (see *RDC Concrete* at [99]). (This approach is also commonly termed the "*Hongkong Fir* approach" after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; see especially *id* at 70.) The focus here, unlike that in Situation 3(a), is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach*.

158 Because of the different perspectives adopted in Situation 3(a) and Situation 3(b), respectively (as briefly noted above), which differences might, depending on the precise factual matrix, yield different results when applied to the fact situation, this court in *RDC Concrete* concluded that, as between both the aforementioned situations, the approach in Situation 3(a) should be *applied first*, as follows (*id* at [112]):

> If the term is a *condition*, then the innocent party would be entitled to terminate the contract. *However*, if the term is a *warranty* (instead of a condition), then the court should nevertheless proceed to apply the approach in Situation 3(b) (*viz*, the *Hongkong Fir* approach). [emphasis in original]

[emphasis in original]

65 An anticipatory breach would typically fall under *Situation 2* above (see, for a similar observation, *Bunge* at [12]) and we pause here to mention that ***an argument based on Situation 2 was canvassed in the court below although, as we have alluded to above at [28], this was not (correctly in our view) emphasised by the Appellant before this court*** . An anticipatory breach would *not*, however, fall under *Situation 1* above (absent the existence in the contract of an actual term which falls within the ambit of Situation 1). It might be apposite at this juncture to note that a *renunciation* within the meaning of *Situation 2* would, *ex hypothesi*, entail the plaintiff being deprived of substantially, or even all (depending on when the renunciation is rendered) of, the benefit it was intended that it (the plaintiff) should obtain under the contract. Indeed, cases of renunciation of a contract within the ambit of Situation 2 would – by their very nature – be *anticipatory* in nature. What, then, about *Situation 3(a)* and *Situation 3(b)*?

66 First, if a defendant is in *anticipatory* breach of a *condition* of the contract within the ambit of *Situation 3(a)*, we would think that that would be sufficient to entitle the plaintiff to elect to treat the contract as discharged. Indeed, even in a situation of *actual* breach of a *condition*, the focus is not on the actual nature and consequences of the defendant's breach of the condition as such but, rather, on the *nature of the term(s)* concerned. However, as Prof Carter has observed, "[a] promisee may treat the *prospective* breach of a *condition* as an *anticipatory* breach *provided it is clear that the breach will occur*" [emphasis added] (see *Carter* at para 7-38). In this regard, Prof Carter refers – correctly, in our view – to the key requirement of ***a (serious) absence of readiness or willingness to perform*** *on the part of the defendant* (see *Carter* at para 7-15). The following observations by Popplewell J in the recent English High Court decision of *Geden Operations Ltd v Dry Bulk Handy Holdings Inc, The Bulk Uruguay* [2014] 2 All ER (Comm) 196 ("*The Bulk Uruguay*") (at [18]) may also be usefully noted:

> … Save for possibilities which are so remote that in practice they can be ignored, what is required is inevitability. It is not sufficient if something is done which makes future performance unlikely, even very unlikely, still less that it renders performance uncertain. That is why renunciation is often a more favoured basis for invoking the doctrine of anticipatory breach.

67 Secondly, if there is an anticipatory breach which falls within the ambit of *Situation 3(b)*, it would appear, in our view, that such a breach would also entitle the plaintiff to elect to treat the contract concerned as discharged. *However*, could it be argued that Situation 3(b) is one in which the court concerned must know what the *actual* nature and consequences of the breach are before ascertaining whether the plaintiff is deprived of substantially the whole benefit which it was intended to obtain from the contract and, to the extent that the situation of an *anticipatory* breach necessarily excludes the possibility of such knowledge (since, *ex hypothesi*, the time for *actual performance* would have yet to materialise), it might be inadvisable for the court to treat an anticipatory breach as falling within the ambit of this particular situation (*ie*, *Situation 3(b)*)? Such an argument does appear attractive at first blush. *However*, there are difficulties with it. Let us elaborate.

68 The first difficulty is that, *even in* a situation of an *actual* breach of contract, the court would – in many cases at least – be required to *extrapolate or project* to some extent (albeit not speculate), particularly if no concrete evidence is forthcoming, as to what the *actual* nature and consequences of the (here, *actual*) breach might be. Nevertheless, the parties could adduce, for example, expert evidence (for the court's consideration) as to what the nature and consequences of the defendant's breach are *likely* to be. And, to take another example, in the House of Lords decision of *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc and others* [1979] AC 757, the court took into account *the umpire's findings*. But if this is the case, then the distinction or line between the situation of an *actual breach* of contract on the one hand and an *anticipatory breach* of contract on the other would be *a very fine (or even non-existent) one – depending, of course, on the particular facts of the case concerned.*

69 The second – and very closely related – difficulty is that, on a practical level, even in the situation of an anticipatory breach, by the time the court hears the case, the ***actual*** nature and consequences of that breach might, in any event, be ***known, given the passage of time between the date of the breach and the date(s) of the trial itself*** (*cf* also *Tabachnik*, especially at 153 as well as *Ballantine* at 340). And, as was made clear by a majority of the House of Lords in *The Golden Victory* (whose opinions were recently affirmed by the UK Supreme Court in *Bunge* at [23]), there is no principled reason why the court should be precluded from taking into account such events which occur subsequent to a breach of contract in assessing the actual nature and consequences of the breach (although, it should be mentioned, that these observations were made in the specific context of the quantification of damages). Once again, therefore, the distinction or line between an actual breach of contract on the one hand and an anticipatory breach of contract on the other would be a very fine (or even non-existent) one – depending, of course (and once again), on the particular facts of the case concerned. This is not surprising, given the complexity of life and the myriad permutations of facts that are possible.

70 There is yet a third difficulty which is – for reasons that will be apparent in a moment – also very closely related to the first two difficulties and might, on one view at least, be perceived as being *buttressed by* them. Put simply, there is both case law and weighty academic authority *supporting* the view that an *anticipatory breach may also* fall *within* the ambit of *Situation 3(b)*.

71 There is, first, the House of Lords decision of *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan (trading as R Pagnan & F.lli)* [1983] 1 WLR 195 ("*The Afovos*"), in which Lord Diplock

was clearly of the view that there could indeed be an *anticipatory* breach which might entitle the plaintiff concerned to elect to treat the contract as discharged pursuant to what has been termed *Situation 3(b)* in *RDC Concrete*. More recently, the English Court of Appeal in *Valilas v Januzaj* [2015] 1 All ER (Comm) 1047 also expressed no difficulty in performing a "multi-factorial" (see at [53], *per* Floyd LJ; see also at [31], *per* Underhill LJ) or "fact-sensitive" (see at [60], *per* Arden LJ) assessment in line with the *Hongkong Fir* approach to determine whether certain *anticipatory* breaches concerning timeous payment under an oral agreement threatened by the claimant would have the effect of depriving the defendant of substantially the whole benefit which the parties had intended for him to receive under the agreement (reference may also be made to the decision of this court in *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 at [61]–[64] (which was not, however, a situation of anticipatory breach)). We note, however, that, in so far as the first of these two aforementioned decisions (*viz*, *The Afovos*) is concerned, Prof Carter has expressed some reservations (see *Carter* at para 7-37). However, his reservations ***extend only*** to the fact that Lord Diplock did *not* appear to have recognised the possibility of the doctrine of *anticipatory breach applying to an anticipatory breach of a* ***condition*** (which is *Situation 3(a)* in *RDC Concrete*). We agree with Prof Carter in this particular regard as we have already expressed the view (above at [66]) that, if a defendant is in *anticipatory* breach of a *condition* of the contract within the ambit of *Situation 3(a)* in *RDC Concrete*, we would think that that would be sufficient to entitle the plaintiff to elect to treat the contract as discharged (reference may also be made to John E Stannard & David Capper, *Termination for Breach of Contract* (Oxford University Press, 2014), especially at para 7-07). The following observations by Popplewell J in *The Bulk Uruguay* (at [15]) are also apposite:

> … Anticipatory breach is the name given to conduct of one party to a contract before the time for performance of his obligations has arrived which is sufficient to entitle the other contracting party to treat himself as discharged from further performance. It may consist of one or both of two kinds of conduct. The first, renunciation, comprises words or conduct which evince an intention by the contracting party no longer to be bound by his contractual obligations. The second, self induced impossibility, comprises conduct by the contracting party which puts it out of his power to perform his contractual obligations. In each case the anticipatory breach must be repudiatory in character. *That is to say that the breach of contractual obligations, which the party's conduct anticipates that he can not or will not perform, must be of the same character as would entitle the other party to treat himself as discharged from future performance if it occurred after the time for performance had arisen.* ***So the anticipated breach must be breach of a condition, or breach of an innominate term which goes to the root of the contract or deprives the innocent party of substantially the whole benefit of the contract*** . [emphasis added in italics and bold italics]

72 There is also the view of Prof Carter, who is the foremost expert on the law of breach of contract in the Commonwealth and whose work we have already referred to above (see, in this particular regard, [71] above; and see *ibid* at paras 7-37 and 7-39). And, consistently with the view we have just expressed with regard to the analysis the court might have to engage in as well as the evidence to which the court might need to have regard, Prof Carter observes as follows (*Carter* at para 7-39):

> Of course, if (as must be assumed) the promisee purported to terminate the performance of the contract prior to the breach, ***the serious consequences required by*** the *Hongkong Fir* doctrine ***will not have occurred*** . The court must therefore engage in a process of ***<u>extrapolation</u>*** . … [emphasis added in bold italics and underlined bold italics]

73 However, as already noted above (at [68] and [69]), the need for the "extrapolation" referred to by Prof Carter in the preceding paragraph in the context of an *anticipatory breach* of contract

might not entail much – if any – speculative elements and, indeed, might not even entail a situation that is (in practical terms at least) different from a situation of *actual breach* of contract.

74 There is yet another legal scholar, to whose work we have also already referred, who adopts a similar approach, but appears to go even further. Put simply, he not only endorses the "*Hongkong Fir* approach" in the context of *anticipatory breach* (which he terms "the principle of inferred fundamental breach" (see generally *Liu* at Ch 4)) but also in fact relies upon it as the sole "unifying test". Prof Liu's thesis therefore does not appear to take into account *all* of the situations in *RDC Concrete* (other than the (equivalent) situation which he presumably endorses (*viz*, *Situation 3(b)*)) that constitute the complete legal matrix in the *Singapore* context for determining whether or not the plaintiff can elect to treat the contract as discharged. For the avoidance of doubt, whilst we note Prof Liu's support in so far as endorsing the test in Situation 3(b) of *RDC Concrete* in the context of *anticipatory breach* is concerned, we do *not* agree that the *only* test (as Prof Liu has suggested) is that embodied within Situation 3(b) of *RDC Concrete* (*viz*, the "*Hongkong Fir* approach"). The law for Singapore in this particular area remains as was stated in *RDC Concrete* (and as elaborated upon in subsequent decisions of this court) for *both* actual *as well as* anticipatory breach (with the reasons for the latter approach being set out earlier in this judgment).

75 There is one remaining issue that was not in fact dealt with in detail in *RDC Concrete*. This relates to situations where there is an *inability to perform* on the part of the defendant (the oft-cited (and leading) decision in this regard being that of Devlin J (as he then was) in the English High Court decision of *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401). ***Indeed, we pause to note (parenthetically) that this was the other ground which was before the Judge in the court below and which is the focus of the present appeal.***

76 We should add that these situations (where there is an *inability to perform* on the part of the defendant) *exclude* situations where the inability to perform is due to some *external, catastrophic* event *beyond the control* of *both* parties as such situations would be governed by the doctrine of *frustration* instead (which, in contradistinction to the doctrine of discharge by breach, discharges the contract concerned by *operation of law*). It will suffice for the purposes of the present judgment to simply note that situations which involve an inability to perform on the part of the defendant can – depending on the precise facts of the case – fall within one (or more) of the situations set out in *RDC Concrete* (with the exception of Situation 1, unless a relevant term exists which brings such a situation into existence (see, in this regard, below at [84])) (*cf* Tham Chee Ho, "Discharge by Breach" in ch 17 of *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 17-057–17-058, where the learned author treats a repudiatory breach due to impossibility arising from disablement as a *separate* category). Further (and consistently with the analysis set out above), *both* situations of actual *and* anticipatory breach would be covered. Indeed, all this is clear from the following passage in Prof Carter's treatise (see *Carter* at para 9-02; see also generally *ibid* at Ch 9):

> **[9-02] Basic propositions.** Consideration of inability can raise very difficult issues. There are, however, some basic (uncontroversial) propositions. ***First*** , a declaration of an inability to perform is ***a refusal*** to perform.
>
> ***Second*** , an act on the part of the promisor which disables the promisor from performing is, similarly, ***a refusal*** to perform.
>
> ***Third*** , ***prospective breach*** may be proved by reference to an inability to perform.
>
> ***Fourth*** , if, ***prior to the time for performance*** , a promisor is in fact unable to perform, that is, wholly and finally disabled from performing the contract, the inability may be treated as an

anticipatory breach .

[emphasis in bold in original; emphasis added in bold italics]

Reference may also be made to the observations of Popplewell J in *The Bulk Uruguay* at [15] (quoted above at [71]).

77 In summary, it would appear that – assuming there is no express provision involving Situation 1 in *RDC Concrete* – an anticipatory breach could (potentially, at least) fall within the ambit of the remaining situations (*viz*, Situation 2, Situation 3(a) and Situation 3(b)). Much would of course depend on the precise facts of the case concerned. And, as already mentioned, this summary would be subject to further refinement (or even change) when the issue next arises directly for decision by the court. What *is* clear, however, is that the fact that the present case related to an *executed* contract does *not* preclude the application of the doctrine of anticipatory breach.

78 What is equally clear is that a fact situation that falls within *Situation 2* of *RDC Concrete* (*ie*, renunciation) would constitute an anticipatory breach. What is also clear is that an *inability to perform* on the part of the defendant might *also* constitute an anticipatory breach if (with the exception of Situation 1, unless a relevant term exists which brings such a situation into existence) it falls within one (or more) of the other situations set out in *RDC Concrete* (see above at [76]). Indeed, the Appellant relied, in the court below, on both these aforementioned instances (*viz*, renunciation and inability to perform) in order to argue that the Respondent was in anticipatory breach of contract. As already mentioned, the focus appears now to be solely on the latter. However, in both instances, the key issue that arises is whether *insolvency* can amount to an anticipatory breach – an issue to which our attention now turns.

Issue 2: Can insolvency ever amount to an anticipatory breach?

79 In our view, the simple answer to the question just posed is as follows: ***insolvency cannot , in and of itself , amount to an anticipatory breach. That being said, however, everything will still ultimately fall to be determined on the precise facts of each case and so, when the defendant's insolvency is viewed in its proper context , it may well be found – pursuant to the tests in (especially)* RDC Concrete *– to constitute an (anticipatory) breach which justifies the plaintiff in electing to treat itself as discharged from the contract concerned.***

80 The analysis proffered in the preceding paragraph is in fact *consistent with* the general analysis of the Judge in the court below – *save in one significant (and practical) respect, which relates to the* ***consequences*** *of such an analysis*. However, before elaborating on what this is, we find it useful to first reproduce the relevant extracts from the Judge's decision which demonstrates that she, too, was of the view that insolvency cannot – in and of itself – amount to an anticipatory breach. For example, she observed thus (see the GD at [36]):

> STX Pan Ocean's insolvency is without more irrelevant for the simple reason that insolvency *per se* is not automatically considered a breach of contract at common law.

81 The Judge also observed as follows (see the GD at [44]):

> The plaintiff's case on impossibility of performance rested on STX Pan Ocean's insolvency – the latter's insolvency would render it impossible for the defendant to meet its obligation to pay on the fixed payment date. *I repeat here* that *it is trite law that insolvency of a company* ***by itself*** *is* ***not*** *a breach of contract* ***nor*** *does it* ***automatically*** *terminate the contract. The question is*

whether ***the set of circumstances*** *relied on by the plaintiff was sufficient to support is claim of impossibility of performance.* [emphasis added in italics and bold italics]

82 Finally, the Judge stated thus (see the GD at [53]):

As stated, the general rule is that *insolvency* does *not* ***by itself*** *amount to a breach*. ***The exception*** is where the parties had included ***an express clause providing for an event of default like insolvency*** which was *not the case here*. [emphasis added in italics and bold italics]

83 On a related note, the Judge also expressed the opinion – in connection with her rejection of the Appellant's original argument based on the Respondent's alleged *renunciation* – that "[i]t is one thing to say that a party is insolvent, but it is quite another to say the insolvent party does not intend to be bound by the contract" (see the GD at [38]). She added in this vein that "[t]he former goes to the ability of the party to complete its performance due, while the latter goes towards its willingness to carry out its obligations" and that "[t]hey are two separate concepts and should not be conflated" (see *ibid*). In our view, there is no doubt as to the soundness of these observations which, we note, are also amply supported by the old English authority of *Morgan and another v Bain and another* (1874–75) LR 10 CP 15 that the Judge had considered at [39]–[42] of the GD.

84 Of significance, too, is the Judge's view that "[i]n well thought-out commercial contracts, one would usually find ***provisions for early termination or immediate payment in the event of the promisor's insolvency*** " [emphasis added in bold italics] (see the GD at [37]; this view is also expressed in the GD at [53]); in her view, such "[a]n ***acceleration payment clause*** serves to alter the existing obligations under the contract" [emphasis added in bold italics] (the GD at [37]). Indeed, in the Judge's view, such an express provision was " ***[t]he*** exception" [emphasis added in bold italics] where insolvency could, ***in and of itself*** , amount to ***a breach of contract*** (see the GD at [53]; also quoted above at [82]). It should be noted that such an express provision in the contract concerned would fall under *Situation 1* in *RDC Concrete* (which, of course, was *not* the situation in the present case).

85 Whilst we agree with the Judge's analysis of this issue, in particular that insolvency does ***not*** , ***in and of itself*** , amount to *a breach of contract*, we hasten to add that ***implicit*** in this very proposition lies the ***possibility*** that, ***depending on the precise facts at hand*** , an insolvency ***which occurs in a particular factual matrix might in fact amount to a breach of contract*** . In other words, we agree with the Judge *to the extent* that we see no *necessary* equation between the mere change in a company's legal status in terms of its solvency and the legal result that it is in repudiatory breach of a contract justifying termination – as a pure matter of law, the one does not lead inexorably to the other. But because the law does not operate in a vacuum but against a backdrop of relevant facts, where we would supplement the Judge's analysis is to make clear that there may well be situations where the insolvency of a company, ***taken together with the surrounding circumstances*** , would indeed disclose that the contract has been rendered impossible to perform. ***Put simply, we consider that the precise facts and context are of the first importance and relate to the practical sphere of application .***

86 The point just made is a ***crucial*** one in the context of the present appeal because, based on the Appellant's pre-existing as well as new arguments, it could *not*, in our view, be said that the Appellant's claim was legally unsustainable. Much would depend on the *precise facts* which could only be adduced if the action went to trial. In the first place, we are satisfied by the evidence which the Appellant had pointed us to that there was some plausible connection between STX Pan Ocean and the Respondent such that it was not completely unarguable that the former's insolvency could well have made it impossible for the latter to make timely payment under the bunker supply contract in

respect of the Vessel (see above at [29]). We do not, of course, venture to say more because this is ultimately a finding of fact to be made by the trial judge. We would also make similar observations about the Appellant's new argument raised on appeal in respect of cl 9 of its standard terms and conditions (see above at [30]–[31]), in that the Appellant's proposed construction of this clause is likewise not plainly unsustainable but how it is finally to be interpreted should be left to the trial judge after receiving evidence of, for instance, what constituted a "business day" within the banking industry. In other words, the point which we are essentially making is that *if* the Appellant manages to succeed in proving its assertions at trial, then that helps to establish a substratum of facts against which STX Pan Ocean's insolvency *should* be considered and which *may well* lead to the outcome that such insolvency *did* in fact render performance of the contract impossible. The important point, simply, is that such a conclusion cannot be reached upon a consideration of STX Pan Ocean's insolvency *alone* – but when the relevant facts which were raised in argument are taken into account (which facts can only be established at trial), then this becomes a possibility that cannot be dismissed out of hand.

87 There is a further reason for our emphasis on the need to pay close attention to the facts of each case. We note that, in her decision, the Judge had cited several authorities for the proposition that insolvency *per se* did not amount to an anticipatory breach and, on that basis, held that the Appellant's claim (based as it was on STX Pan Ocean's insolvency) was legally unsustainable. However, a careful reading of those cases will reveal that they involved facts which were eminently distinguishable from those in the present case and so are not entirely applicable. In this regard, the important distinguishing factor concerns the fact that the contracts in those cases were *executory* in nature and thus *potentially beneficial* to the insolvent's estate – the courts were therefore cognisant of the distinct *possibility* that the contracts in question might well still be adopted by the insolvent's representative such that any argument advanced on the basis of impossibility was necessarily premature and speculative. For example, in the central case of *Jennings' Trustee v King* [1952] 1 Ch 899 ("*Jennings*") which the Judge had relied on (see the GD at [46]–[47]), Harman J (sitting in the Chancery Division of the English High Court) held that a vendor of certain property could not simply assume from the fact of the purchaser's bankruptcy that the latter was not going to pay the remainder of the purchase price under the contract of sale because the trustee in bankruptcy might well decide to adopt the contract. It was not lost on Harman J that there was, on the facts of that case, an enhancement of the price of the property such that the creditors of the estate naturally stood to benefit from the adoption of the contract (see at 908). And in the earlier English decision of *In re Agra Bank; Ex parte Tondeur* (1867) LR 5 Eq 160 (which the Judge had also cited at [48] of the GD), Sir Page Wood VC held that a bank which had extended but later suspended payment on a letter of credit by reason of its insolvency was not in anticipatory breach of contract because "it was not at all impossible that the trustees might still choose to perform the contract; and it *might be beneficial* to the estate that they should do so" [emphasis added] (at 165).

88 The circumstances in the present case are, however, plainly different. The contract here was for the one-off supply of a stated quantity of bunkers and those bunkers had already been duly supplied by the Appellant. All that remained was for the Respondent to make payment. In other words, the contract here was an *executed* contract in which the Respondent had enjoyed the full benefit of the contract and carried the burden of all its outstanding obligations. From the Respondent's perspective, therefore, this had morphed into a wholly *detrimental* contract. Indeed, we would also go on to observe that if a liquidator is appointed to handle the Respondent's affairs, the liquidator might decide that he or she could not pay out on the debt owed to the Appellant, lest he or she be in breach of duty on at least two counts: first, he or she would not be treating the creditors even-handedly as he or she would be unduly favouring the Appellant and, secondly, he or she would be dissipating the Respondent's assets for no good reason. As mentioned earlier, the *Jennings* line of authorities which the Judge had relied on all concerned contracts which had the potential of

benefiting the insolvent's estate – in such contracts, it made sense for the trustee or liquidator to be given the opportunity of electing to carry out the contract, from which it could then be said that the insolvency *per se* was not a proper basis for inferring that the contract had become impossible of performance. The same reasoning, however, did not apply in the present case since it was unclear what (if any) benefit would inure to the insolvent's estate by adopting the contract. In our view, therefore, the *Jennings* line of authority does not lay down any blanket rule to the effect that insolvency *per se* can *never* amount to an anticipatory breach and, to the extent that the Judge's decision may be read as interpreting the cases in that way, we would respectfully disagree with it. As we have stressed in our analysis thus far, it is a proper appreciation of the *factual matrix* within which the insolvency occurs that will ultimately be determinative of whether the contract has become impossible to perform.

89 For these reasons, we hold that the Appellant's claim for anticipatory breach should not be struck out. We were satisfied that the Appellant's case as based on the insolvency of STX Pan Ocean was not legally unsustainable when considered in light of the factual assertions made.

Issue 3: Should the arrest be set aside because of material non-disclosure?

90 We turn now to Issue 3, which concerns the Appellant's appeal against the Judge's decision to set aside the warrant of arrest.

91 In the proceedings below, the Judge stated that it followed "as a consequence" of her decision to uphold the striking out of the Appellant's *in rem* claim in RA 297/2013 that the Respondent's cross-appeal to set aside the warrant of arrest in RA 298/2013 would be allowed (see the GD at [2]). In essence, the Judge's decision to set aside the arrest was *premised* entirely on her striking out of the Appellant's claim. With our finding in this appeal that the Appellant's claim should *not* be struck out, however, that premise on which the Judge relied disappears and, accordingly, the logical conclusion must be that the warrant of arrest should *also* not be set aside. This is *unless*, of course, the Respondent could persuade us with its argument that, in its *ex parte* application for the warrant of arrest, the Appellant had failed to make full and frank disclosure of all the material facts (see above at [38]). That, as the authorities make clear, may well justify the setting aside of the arrest (see the decision of this court in *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*Vasiliy Golovnin*") at [84]; see also the decision of this court in *The "Bunga Melati 5"* [2012] 4 SLR 546 at [113]). We should pause to make clear that the Respondent's argument in this connection was not a new one raised only on appeal – the Judge was cognisant of the Appellant's alleged non-disclosure of material facts but, based on her view that the striking out of the Appellant's *in rem* claim was sufficient ground for setting aside the warrant of arrest, she considered that it was "not necessary" to deal with this particular complaint (see the GD at [23]). However, given how we departed from the Judge's decision in respect of the striking out application, the Respondent's allegation of material non-disclosure did assume particular significance in this appeal as an *independent* ground for setting aside the arrest. And so it is to this complaint that we now turn.

92 The crux of the Respondent's complaint here was that, in applying to arrest *the Vessel* on the basis of anticipatory breach of contract, the Appellant had relied on the unpaid bunkers supplied in respect of four ships *other* than the Vessel (*viz*, *STX Alpha*, *STX Delicata*, *Asita Sun* and *Cape Race*) and, importantly, omitted to disclose the fact that three of those ships (with the exclusion of *STX Delicata*) were *not* owned by the Respondent (see above at [12]). With respect, however, we did not find much merit in this particular complaint. A perusal of the affidavit leading the arrest deposed by the Appellant's trading manager, Mr Yeo Wei Liang Sherman ("Mr Yeo"), makes clear that the Appellant's application for the warrant of arrest was based on the following assertions:

(a) First, that STX Corporation had placed orders with the Appellant on behalf of four other vessels;

(b) Second, that the STX group of companies had been facing financial difficulties for the past two months; and

(c) Third, that given the dire financial situation of the STX group of companies, there was no prospect of the owner or charterer of the Vessel making payment for the bunkers supplied to the Vessel.

The Appellant's reliance on this set of facts demonstrates to us that the line which it pursued at the time of the arrest proceedings has essentially remained unchanged right up to the present appeal – that is, the Appellant believed that all the vessels to which it had supplied bunkers through STX Corporation were part of the STX group of companies and, given the said group's evident financial difficulties at the time, the Appellant had a legitimate basis for concluding that payment of the bunkers supplied specifically to the Vessel would not be forthcoming by the contractual due date. In our view, this makes clear that the Appellant's case at the time of the arrest was (and continues to be) based on the financial difficulties of *the STX group of companies* as a collective and, therefore, whether or not the Respondent was ultimately registered as the owner of each of the other vessels was not, on its case, entirely to the point.

93 In any event, what we consider to be more important is that Mr Yeo appears to have sufficiently disclosed that the Respondent was indeed not the registered owner of the three other vessels which had been supplied bunkers by the Appellant. In this regard, we note that Mr Yeo had stated in the main body of his affidavit that the Appellant's letters of demand of 13 June 2013 (see above at [15]–[16]) had been sent not only to STX Corporation but also to the "registered owners of the respective vessels" and, in the letters which were so exhibited, the addressees in respect of the various vessels were clearly named as follows:

Addressee	**Vessel(s)**
STX Corporation	*STX Alpha*, *STX Mumbai* (*ie*, the Vessel), *STX Delicata*, *Cape Race*, and *Asita Sun*
KDB Capital Corp	*Cape Race*
POS Maritime FA SA	*STX Delicata*
POS Maritime VX SA (*ie*, the Respondent)	*STX Mumbai* (*ie*, the Vessel)
Bacorino Marine Co Ltd	*Asita Sun*
Rotes Kliff GMBH & Co KG	*STX Alpha*

94 As can be seen, the Appellant *did* in fact make due disclosure of all relevant information about the ownership of the various vessels in respect of which it believed that payment of the bunkers supplied was not forthcoming given the financial difficulties of the STX group of companies. Accordingly, we found that there is no basis for the Respondent's complaint and allowed the Appellant's appeal against the Judge's decision to set aside the warrant of arrest.

Issue 4: Should damages be awarded for wrongful arrest?

95 During the course of oral arguments, counsel for the Appellant, Mr Leong Kah Wah, submitted that if the *in rem* claim was not struck out, then it followed as a matter of course that the arrest was not wrongful and that no damages should be payable by the Appellant in that respect. However, we did not agree with this submission. In our view, the fact that the Appellant has succeeded in reversing the Judge's decision to strike out its claim merely goes towards the fact that we were satisfied that the claim is not a plainly and obviously unsustainable one that should be struck out at this preliminary stage. This finding should not, in and of itself, be taken as foreclosing the possibility that as more evidence emerges during the course of the underlying proceedings, it may well point towards a finding that the Appellant's arrest of the Vessel was indeed "so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply malice or gross negligence" on its part (see *Vasiliy Golovnin* at [137]). Put simply, we could not, at this early stage of the proceedings, hold with any certainty that the arrest was the result of either bad faith or gross negligence on the part of the Appellant. That is a matter to be determined only when all the evidence is in and, accordingly, we find that the correct approach would be to reserve the question of damages for wrongful arrest to the trial judge to be considered after the relevant findings have been made.

Conclusion

96 For the reasons set out above, we allowed the appeal against the Judge's decision to strike out the Appellant's claim and to set aside the warrant of arrest. In the circumstances, we also reserved the question of damages for wrongful arrest to the trial judge after the relevant findings have been made.

97 We also ordered the costs of this appeal to be in the cause. The usual consequential orders were to apply.