IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 04

Suit No 1170 of 2017

Between

Ramo Industries Pte Ltd

… *Plaintiff*

And

DLE Solutions Pte Ltd

… *Defendant*

JUDGMENT

[Building And Construction Law] — [Contractors' duties] — [Duty as to materials and workmanship]
[Building And Construction Law] — [Building and construction contracts] — [formation and interpretation]
[Contract] — [Contractual terms]

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Ramo Industries Pte Ltd
v
DLE Solutions Pte Ltd

[2020] SGHC 04

High Court — Suit No 1170 of 2017
16–19, 23–24 July 2019; 9 October 2019

7 January 2020 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This suit arises out of a dispute on a contract for the supply, fabrication, painting and delivery of structural steel (the "Contract") between the plaintiff (*ie*, the buyer) and the defendant (*ie*, the seller), for the construction of an accommodation camp in the Petronas Refinery and Petrochemical Integrated Development Project (the "Petronas Rapid Project") in Pengerang, Johor Bahru District, Malaysia.

Background Facts

2 The plaintiff is Ramo Industries Pte Ltd ("Ramo"), a Singapore incorporated company in the business of building construction. The following representatives are the plaintiff's witnesses at trial:

(a) Mr Veerabadran Gunaseharan ("Guna"), a Director of Ramo;

(b) Mr Chidambaram Sribathi ("Sri"), the Senior Contracts Engineer of Ramo;

(c) Ms Parthasarathi Maheswari ("Mahe"), the Senior Sales & Marketing Manager of the plaintiff's sister company, Ramo Engineering Services Pte Ltd; and

(d) Mr Raji Francis ("Francis"), the Construction Site Engineer of Ramo.

3 The defendant is DLE Solutions Pte Ltd ("DLE"), a company incorporated in Singapore whose principal business activity is "other specialised construction and related activities". The following representatives are the defendant's witnesses at trial:

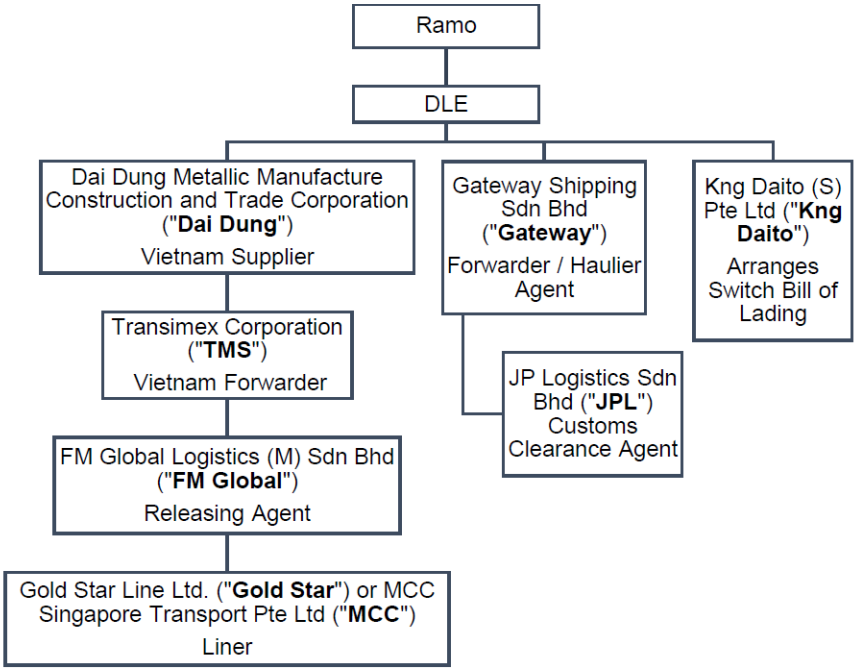
(a) Mr Dennis Leu Yew Onn ("Dennis"), the Managing Director of DLE; and

(b) Ms Elaine Leu Kwai Hing ("Elaine"), the Contracts Manager of DLE and the wife of Mr Dennis Leu.

4 The owner of the Petronas Rapid Project is PRPC Refinery and Cracker Sdn Bhd ("PRPC") and its main contractor is Punj Lloyd Limited ("Punj Lloyd"). Ramo is a sub-contractor of Punj Lloyd for the Petronas Rapid Project engaged to construct the pre-engineered structure and prefabricated building for an accommodation camp in the Petronas Rapid Project (the "Accommodation Camp").

5 In turn, Ramo awarded DLE the Contract for the supply, fabrication, painting and delivery of structural steel to the site in Pengerang, Johor ("the

Site"). The following diagram sets out the relevant parties involved in the shipment process of the structural steel:[1]



6 DLE engaged the services of Dai Dung to supply and prefabricate the structural steel in Vietnam. It appointed Gateway as the forwarder to collect the prefabricated structural steel from the port upon arrival at Pasir Gudang port, Johor and in turn deliver it to the Accommodation Camp.[2] Upon arrival at Pasir Gudang port, the prefabricated structural steel shipments had to undergo clearance at the Malaysian customs. According to the plaintiff, Gateway

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1 Plaintiff's Closing Submissions ("PCS") at para 5.

2 Guna's AEIC at paras 10 and 12.

introduced JPL to assist DLE with the customs clearance.[3] A key issue that parties are in dispute over is their respective responsibility for customs clearance, which will be further discussed below.

Summary of Issues

7 I will first set out briefly the two main issues that this judgment will deal with, namely the Contract Issue and the Liability Issue.

The Contract Issue

8 The first issue is whether the Contract is contained in or evidenced by the following documents ("the Contract Issue"):

(a) the Letter of Award dated 20 January 2016 ("20 January LOA");

(b) the Purchase Order No. RI/PO/152754 dated 1 March 2016 ("PO"); and

(c) the Letter of Credit No. 1CMLC592121 on 29 March 2016, including Amendment Nos. 1 to 9 ("Letters of Credit").

Essentially, the parties are in contention over the applicability and binding nature of the 20 January LOA signed by Dennis and hence, their respective obligations flowing from the Contract. My holding on the binding nature of the 20 January LOA for the Contract Issue would essentially impact three aspects of the Liability Issue:

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[3] Guna's AEIC at para 13.

(a) whether Ramo is contractually entitled to claim for liquidated damages;

(b) whether DLE is entitled to the retention monies currently held by Ramo; and

(c) whether DLE's scope of works includes the customs clearance at Pasir Gudang port.

Parties' cases

9 Ramo submits that the 20 January LOA, the PO and the Letters of Credit form the Contract between parties. On the other hand, DLE submits that the 20 January LOA was *not* a part of the Contract between the parties.

10 DLE initially took the position that the PO *alone* constituted the Contract in its pleadings[4] and opening statement,[5] but subsequently changed its position at trial: it now says that *both* the PO and the Letters of Credit constitute the Contract.[6] DLE does not dispute that Dennis had signed the 20 January LOA, but contends that it was not intended to be part of the Contract between the parties.[7] It is DLE's position that at the stage of signing the 20 January LOA, parties were still in the process of negotiations as the price had not even been agreed upon. DLE's case is that it was orally agreed between Guna and Dennis that the document to be signed was "only *temporary* pending finalisation of the

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4 Defence and Counterclaim (Amendment No. 2) ("D&CC") at para 3(b).

5 Defendant's Opening Statement at para 8.

6 Transcript 19 July 2019 at p 176.

7 Defendant's Closing Submissions ("DCS") at para 30.

actual written agreement between the parties".[8] DLE submits that the sole purpose of the signed 20 January LOA was to convince PRPC/Punj Lloyd that Ramo had formally engaged a steel supplier (*ie*, DLE) for the project (the "Punj Lloyd Purpose") and the said letter of award was not intended to be binding on the parties.[9] As such, the Letter of Award was not a part of the Contract.

11 In short, the parties are essentially disputing over whether the 20 January LOA, specifically, forms a part of the concluded Contract and hence, whether the terms contained within it are binding on the parties.

The Liability Issue

12 After deciding the Contract Issue, I will deal with (a) the question whether DLE is in breach of its obligations under the Contract; and (b) the respective parties' liabilities under the claim by Ramo and the counterclaim by DLE (jointly referred to as "the Liability Issue").

Parties' cases

13 Ramo's case is that DLE had failed to meet its obligations under the Contract, which includes the fabrication and delivery of 1,328mt of structural steel to the Site, and the responsibility for customs clearance processes.[10] The parties agreed that a total of 14 shipments of structural steel were to be delivered from Vietnam to Pasir Gudang port in Malaysia.[11] DLE failed to comply with its contractual obligations by:[12]

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8 Dennis' AEIC at para 41.

9 D&CC at para 3A.

10 Statement of Claim (Amendment No. 2) ("SOC") at para 7.

11 SOC at para 14.

(a) causing a shortfall in the requisite quantities of structural steel delivered under the Contract ("the Shortfall Issue");

(b) delivering unpainted structural steel ("the Unpainted Steel Issue"); and

(c) failing to fabricate the structural steel supplied in accordance with the specifications provided by Ramo ("the Improper Fabrication Issue").

As a result, Ramo had to incur costs in rectifying the above issues.

14 In addition, demurrage charges arose from the delay caused by DLE in the customs clearance processes, and DLE's failure to deliver painted structural steel. First, DLE's failure to obtain promptly the switch bill of lading, the Certificate of Approval ("COA") and an import licence from the Construction Industry Development Board in Malaysia ("CIDB"), which were the documents required before the prefabricated structural steel shipments could be released, resulted in the delay of the release of the shipments from Pasir Gudang port.[13] Second, DLE's failure to deliver painted structural steel (for the first to third and seventh to tenth shipments) resulted in the containers carrying the shipments to be transported first to a yard for painting works to be carried out, before they were delivered to a work site.[14] The shipping liner refused to release the 11th to 13th shipments from the port until the containers for the ninth and tenth

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12 PCS at para 10.

13 SOC at para 24.

14 SOC at para 65.

shipments were returned to the port.[15] Ramo could not return the containers for the ninth and tenth shipments to the port as the painting works had to be carried out on the unpainted structural steel.[16] As a result, the 28-day laytime under the bills of lading was exceeded and demurrage charges were incurred. Ramo paid the demurrage charges on DLE's behalf first to ensure the release of the structural steel from the port and now seeks reimbursement of the demurrage payments from DLE ("the Demurrage Issue").[17]

15 Finally, Ramo seeks liquidated damages from DLE based on the rate stated in cl 14 of the 20 January LOA, due to the delay to the construction of the Accommodation Camp resulting from the above issues with the structural steel and DLE's failure to coordinate the customs clearance processes ("the Delay Issue").[18]

16 In summary, Ramo submits that DLE's actions resulted in loss and damage in the following amounts:[19]

(a) US$33,139.20 for DLE's over-claiming an amount of 34.52mt of structural steel on the Letters of Credit (*ie*, DLE's liability arising out of the Shortfall Issue);

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15 SOC at para 66.

16 SOC at para 67.

17 PCS at para 10.

18 PCS at para 10.

19 PCS at para 171.

(b) S$147,237.25 for DLE's liability for supplying 439.17mt of unpainted structural steel and the third-party painting costs incurred by Ramo (*ie*, DLE's liability arising out of the Unpainted Steel Issue);

(c) S$100,66.17 (*ie*, comprising S$99,491.78 for the modification works and S$10,574.39 for the materials purchased) for DLE's liability for fabrication errors listed in Ramo's Invoice No. 2289/16 and for failing to supply the sag rods and turnbuckles listed in Ramo's Invoice No. 2291/16 and the costs incurred by Ramo in relation thereto (*ie* DLE's liability arising out of the Improper Fabrication Issue);

(d) RM624,420.43, for demurrage charges incurred by Ramo as a result of DLE's failure to coordinate the customs clearance process (*ie* DLE's liability arising out of the Demurrage Issue); and

(e) RM2,889,000, for DLE's liability to Ramo for liquidated damages for the delay DLE had caused in failing to deliver the structural steel in a timely manner (*ie* DLE's liability arising out of the Delay Issue).

17 On the other hand, DLE counterclaims against Ramo for the sum of US$35,936.16, being the retention monies of 5% that the parties agreed in June 2016 to be withheld by Ramo following the dispute over the shortfall and the unpainted steel delivered ("the Retention Monies Issue").[20] DLE also counterclaims against Ramo for the sum of US$5,040.42 being the value of

[20] DCS at para 146.

bolts supplied by DLE to Ramo for the Petronas Rapid Project ("the Bolts Issue").[21]

The Contract Issue

18 I first deal with the Contract Issue: which documents constitute the governing contract between the parties and hence the nature and scope of the resulting obligations of both parties that follow. The central question that needs to be answered is whether the contract between Ramo and DLE is contained in or evidenced by one or more of the following documents:

(a) the 20 January LOA;

(b) the PO; and

(c) the Letters of Credit.

Facts

Events prior to the signing of 20 January LOA

19 Prior to the Petronas Rapid Project, Ramo and DLE had previously worked on other projects pertaining to the supply of structural steel, such as the project for structural steel works at the Keppel Benoi Yard in Singapore in September 2015 ("Keppel Project").[22] In the Keppel Project, the material for the steel structure supplied is identical to the one in the Petronas Rapid Project.[23] However, the steel structures for both projects are "almost the same", "not

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21 DCS at para 148.

22 Transcript 18 July 2019 at pp 41–42; 19 July 2019 at p 138; Plaintiff's Bundle of Documents ("PBOD") at pp 30–39.

23 Transcript 18 July 2019 at p 42.

identical" and with slightly different drawings.[24] DLE also undertook the supply, fabrication, installation and design work for the Keppel Project. This is in contrast to the Petronas Rapid Project, which only required DLE to supply, fabricate and deliver steel structural material to the site, and did not involve installation works.[25]

20 According to Dennis, there were preliminary discussions between Guna and Dennis in January 2016 before signing the 20 January LOA regarding the following: the construction of the Accommodation Camp, the general size of the project and magnitude of the contract (*ie*, between 800 to 1,000 tonnes of steel), the technical requirements for the Petronas Rapid Project which were discussed with reference to drawings, Ramo's budget of slightly over US$1,000/mt,[26] the material specifications for the structural steel, the urgency of the project and the schedule that Ramo had to meet for the Petronas Rapid Project for Punj Lloyd.[27] This is corroborated by Guna, who also testified that the scope of work, technical terms and specifications of the steel structure requirements were discussed between the parties prior to signing the 20 January LOA.[28]

20 January LOA

21 I now reproduce the material clauses in the 20 January LOA. The 20 January LOA is titled "Letter of Award – Supply, Fabricate, Painting and

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24 Transcript 18 July 2019 at pp 42–43.

25 Transcript 18 July 2019 at p 44.

26 Transcript 23 July 2019 at p 22.

27 Transcript 23 July 2019 at pp 20–22, 26–29.

28 Transcript 18 July 2019 at pp 40–41.

Delivery of Structural Steel for the Construction of EPCC Camp for Rapid Project … at Pengereng. For the [Sub-Contract] Works". The preamble states:[29]

> We refer to DLE's quotation and are pleased to award DLE the sub-contract for ***Supply, Fabricate, Painting and Delivery of Structural steel material*** under the main contract scope to the whole project for the construction of epcc camp for rapid project … for the sub contract works for the Lump Sum amount of Singapore Dollars _____ ***(Price to be negotiated).*** The appointment of your sub contract is subject to the [following]:
>
> i. Re-measurement and Final Value of the Contract will reflect the exact net Quantity of Works Executed
>
> ii. Approval of your appointment by our Client and Consultants
>
> ***This letter shall constitute a binding agreement*** between [Ramo] & [DLE] based on the following terms and conditions: -
>
> [emphasis in original omitted; emphasis added in bold italics]

22 At cl 1 of the 20 January LOA, the scope of works and responsibilities of DLE is enumerated: "Supply, Fabricate, Painting and Delivery of Structural Steel Material For The Construction, Testing and Commissioning (If Necessary) of following". Clause 1 then lists the number and types of buildings that the supply, fabrication, painting of "mild steel structures" would be for.[30] Clause 1 further states that the scope of work includes:

> a) Supply, fabrication, Painting of mild steel structures for the above buildings.
>
> b) Place of Fabrication – Vietnam in accordance with the ITP Submitted
>
> c) To provide Shopdrawings and Fabrication Drawings within 6 weeks from the date of acceptance of this LOA.

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29 Agreed Bundle of Documents ("ABD") Vol 1 at p 14.

30 ABD Vol 1 at p 15.

> d) To provide all test reports as specified in the contract specification by the Consultants.
>
> ***e) To deliver material to site – Duty to be reimbursed by Ramo.***
>
> f) Provision of all necessary supervisory staff, workers, safety personnel, etc., in Fabrication Yard
>
> g) Submission of Method of statement, Risk assessment, Safe work procedure, and QA / QC procedure for Fabrication works in accordance to the specifications.
>
> ***h) To ensure to abide with main contractors programme schedule***
>
> i) All works are to be done in accordance with our Architectural Drawings, Structural Drawings, Detail drawings and Contract Specifications.
>
> j) To provide all necessary equipments, materials, labour and supervision for the proper execution of works.
>
> k) To co-ordinate and co-operate with other sub-contractors when necessary.
>
> [emphasis added in bold italics]

Clause 1(e) specifies that DLE is "[t]o *deliver material to site* – Duty to be reimbursed by Ramo" [emphasis added].

23 Clause 14 on liquidated damages in the signed copy of the 20 January LOA states:[31]

> ***The Liquidated Damages shall be RM 10,750.00*** (RINGGIT MALAYSIA TEN THOUSAND SEVEN HUNDRED FIFTY ONLY) per day for each day the works remain incomplete including Sundays and Public Holidays. DLE will be subjected to these damages for any delay in completion of the project caused by you. Notwithstanding the foregoing, in event of any delays due to [DLE's] default, DLE [is] required to reimburse [Ramo's] losses, damages and expenses incurred by [Ramo] as a result of the delay. ***Sub-contractor shall follow the work schedule allotted for said works strictly*** and there shall not be any [extension of time] approved.

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[31] ABD Vol 1 at p 20.

[emphasis in bold italics]

24 Clause 16 of the 20 January LOA on Retention Monies states:[32]

> **16. <u>Retention money:</u>**
>
> - 10% of the Gross Value (excl GST) of each Invoice
> - The percentage retention shall be 10% of which 5% will be released upon practical completion and acceptance of the sub-contract works by Ramo.
> - Balance 5% will be released upon expiry of the Maintenance Period and final completion certificate by Ramo.

25 Finally, the Schedule of Works attached to the 20 January LOA states the description of work as: "For Supply, Fabricate, Painting and Delivery of Structural steel material under the main contract …" for the quantity of 1295 mt.[33] The rate charged was "to be [n]egotiated" and the price was also left blank.[34]

Signing of the 20 January LOA

26 On 20 January 2016, a representative from Ramo's office informed Dennis that he could come down to the office. Guna testified that Dennis arrived at the office and they had some final discussions on "some items related to the scope of work".[35] Parties also agreed upon the main contract completion date before Dennis signed the 20 January LOA.[36] Sri made the necessary amendments to the terms and conditions of Ramo's standard contract.

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32 ABD Vol 1 at p 20.

33 ABD Vol 1 at p 25.

34 ABD Vol 1 at p 25.

35 Transcript 18 July 2019 at p 48.

36 Transcript 18 July 2019 at p 69.

Thereafter, Sri printed a copy of the 20 January LOA.[37] Guna testified that after he reviewed the amendments, he passed it to Dennis to review. Thereafter, Dennis proceeded to sign two copies of the 20 January LOA without any objections to the terms.[38] Sri testified that Dennis had brought along his company stamp to the meeting and stamped the company stamp on every page beside his signature.[39] It is Guna's testimony that *after* Dennis had signed the 20 January LOA, Guna then informed Dennis that Guna needed the copy of the signed LOA to show PRPC/Punj Lloyd that Ramo had secured a steel supplier for the project.[40]

27 On the other hand, Dennis testified that on 20 January 2016, he received a call from Sri informing Dennis that Ramo had a document that they needed Dennis' signature in order to show PRPC/Punj Lloyd that Ramo had engaged DLE as a subcontractor for the fabrication work.[41] DLE requested Dennis to come down to Ramo's office with his company stamp.[42] Dennis did not understand that the document he was going to sign was a form of a contract and informed Ramo that he wanted to look at the documents before he appended his signature.[43]

28 Dennis said that Guna assured him that the 20 January LOA was "only *temporary* pending finalisation of the actual written agreement between the

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37 Transcript 18 July 2019 at p 48.

38 Transcript 18 July 2019 at p 48; 19 July 2019 at p 116.

39 Transcript 19 July 2019 at p 116.

40 Transcript 18 July 2019 at pp 47, 49.

41 Transcript 23 July 2019 at p 31; Dennis' AEIC at para 41.

42 Transcript 23 July 2019 at p 31; Dennis' AEIC at para 41.

43 Transcript 23 July 2019 at p 32.

parties" [emphasis added] and "its sole objective was to convince [PRPC/Punj Lloyd] that [Ramo] had engaged a supplier for the structural steel".[44] Dennis also testified that Guna informed him that "[l]ook, if you're not comfortable, let's leave it blank on the items that [mean] something to you", which was the reason why the price and the quantum for the liquidated damages clause (cl 14) in the 20 January LOA had been left blank.[45]

29 After reviewing the document, Dennis said he had raised objections to various clauses, including cl 1(e) of the 20 January LOA. According to Dennis, he could not agree to "deliver material to site" in cl 1(e) and informed Guna that DLE did not want to be involved in the delivery of the materials to site since that would include clearing customs.[46] Further, Dennis testified that DLE did not agree to paying the customs duty first and then seeking reimbursement from Ramo in cl 1(e) because DLE, as the shipper and not the importer of the steel, could not pay the duty. Only the importer of the goods could pay the customs duty.[47] Further, Dennis had an issue with cll 1(h) and 9, which specified that DLE had "to ensure to abide with [Ramo's] programme schedule" as Dennis did not see any programme schedule in the documentation.[48] Dennis was allegedly informed that all the details would be discussed later, and that he just needed to sign the document so that it could be submitted to PRPC/Punj Lloyd to evidence that Ramo had awarded the contract to DLE.[49]

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44 Dennis' AEIC at para 41.

45 Transcript 23 July 2019 at p 32.

46 Transcript 23 July 2019 at pp 35–36, 39.

47 Transcript 23 July 2019 at p 40.

48 Transcript 23 July 2019 at pp 41, 45.

49 Transcript 23 July 2019 at p 32.

30 Dennis also allegedly objected to cl 14 on liquidated damages, noting that he was in principle not agreeable to the entire liquidated damages clause being imposed on DLE, despite his testimony that the quantum of the liquidated damages in cl 14 was left blank when he signed it.[50] Dennis also allegedly raised objections regarding various clauses, including cl 4 on Price and Rates, cl 6 on Sub-Contract Work, cl 11 on indemnifying Ramo, cl 12 on the certificate of warranty, and cl 13 on the defects liability period.[51] Dennis did not raise any concerns as regards the price (which was left blank) and the scope of work under cl 1(b).[52]

31 Dennis further testified that he did not make any handwritten comments for any of the issues that he did not agree with in the 20 January LOA as he was told not to make any comments.[53] Instead, Dennis was told to leave the disputed areas "blank" and "[Ramo and DLE would] come back and sign another agreement with both sides agreeing on the terms and conditions".[54] According to Dennis, the 20 January LOA contains no reference to the price quantum or the chargeable amount of liquidated damages.[55]

32 After assurances from Ramo that the 20 January LOA was "just formality documents for them to show [their client]" and having considered that a document "without the value, without dates, without the [liquidated damages] amount" would not be a binding document based on his experience, Dennis

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50 Transcript 23 July 2019 at pp 48–49.

51 Transcript 23 July 2019 at pp 42–46.

52 Transcript 23 July 2019 at pp 37–39.

53 Transcript 23 July 2019 at p 32.

54 Transcript 23 July 2019 at p 32.

55 Transcript 23 July 2019 at p 33.

accepted and signed the 20 January LOA without making any handwritten amendments to the document.[56] As such, DLE argues that the 20 January LOA was not intended to be a binding agreement due to the circumstances in which Dennis had signed the 20 January LOA.

33 A fax dated 22 January 2016 was sent from Ramo to Punj Lloyd in which Sri forwarded a copy of the 20 January LOA, titled "Submission of Unpriced LOA – Structural Steel Works – [DLE]".[57] Sri also agreed that he needed to "submit an unpriced contract document to [his] client" as a confirmation that he had finalised the contract with his subcontractor for the scope of work.[58]

Correspondence before the Oral Price Agreement by 14 February 2016

34 As at 20 January 2016, the price for the structural steel had not been agreed upon.[59] The parties could not agree on the unit price of the structural steel as Dennis had to check with Dai Dung, its supplier in Vietnam, on the price and material specifications of steel that Dai Dung could supply to DLE, which DLE charged a small mark-up on.[60] After the signing of the 20 January LOA, which dealt principally with the scope of the works, parties continued negotiating on the unit price of the structural steel.

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56 Transcript 23 July 2019 at p 32.

57 ABD Vol 11 at p 2.

58 Transcript 19 July 2019 at p 150.

59 Guna's AEIC at para 20.

60 Transcript 23 July 2019 at p 22.

35 On 2 February 2016, Dennis sent Guna a Whatsapp message: "Sorry Guna Dennis here. I'm still studying the costing with Production side as your budget given to us is very very low. …"[61]

36 On 4 February 2016 at 10.57am, Dennis sent an email ("4 February Email") to Rohit, a staff of Ramo, inquiring about the following:[62]

> I would like to check with you the following:
>
> 1. Using SS400 grade 235MPA steel with blast and paint (ex factory) - *USD920/MT*
>
> *2. CIF to Malaysia $90/MT*
>
> *Delivery period to be 6-8weeks for 1200MT. First delivery can be 4-5weeks.*
>
> Please advise if SS400 can be used ?
>
> Dennis Leu
>
> [emphasis added]

On 4 February 2016 at 12.05pm, Dennis sent Guna three Whatsapp messages ("4 February Messages"):[63]

> [12:05 PM, 2/4/2016] PEB-Dennis Leu: Hi Guna, I've sent our coatings to rohit
>
> [12:05 PM, 2/4/2016] PEB-Dennis Leu: Coatings
>
> [12:06 PM, 2/4/2016] PEB-Dennis Leu: *EXWORKS $920/MT*
>
> *CIF $90MT Pasir gudang*
>
> [emphasis added]

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61 ABD Vol 1 at p 115.

62 ABD Vol 1 at p 113.

63 ABD Vol 1 at p 115.

37 Dennis' initial offer was to supply the steel at the price of US$1,100/mt, comprising US$920/mt for the cost of the structural steel and US$90/mt for delivery to Pasir Gudang port.[64] Dennis made the offer in the 4 February Email and 4 February Messages after he had checked with Dai Dung on the schedule.[65] Ramo submits that the 4 February Email and 4 February Messages evidenced Dennis' intention to be bound by the 20 January LOA, in order to close off the outstanding issue of the unit price of the structural steel.[66]

38 I note that Dennis' initial offer for "CIF to Malaysia $90/MT" in the 4 February Email and "CIF $90MT Pasir gudang" in the 4 February Messages suggests that DLE's obligation was only limited to delivery of the steel to Pasir Gudang port, and not to the Site in Pengerang. This is confirmed by Guna, who testified that this was DLE's *initial* offer to deliver the steel to Pasir Gudang port, and not the Site in Pengerang.[67] Eventually, the parties agreed upon DLE's obligation to "deliver to site" for US$960/mt, which comprised US$900/mt for the steel works and another US$60 for delivery to the Site in Pengerang.[68] This was recorded in the PO (see below at [59]) which describes DLE's obligations as "Supply and fabrication … delivery of pre engineering steel structural material *to site* … under the main contract scope … for the construction of epcc camp for Rapid project package #22 *at pengereng*" [emphasis added].[69] This is also consistent with cl 1(e) of the 20 January LOA.

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64 Guna's AEIC at para 24.

65 Transcript 19 July 2019 at p 146.

66 PCS at para 62.

67 Guna's AEIC at para 24

68 Guna's AEIC at paras 24–25

69 ABD Vol 1 at pp 110, 238.

39 On 12 February 2016, Dennis sent Sri an email to request for the following information for DLE's planning and execution purposes ("12 February Email"):[70]

> … please kindly provide me with the following information for my planning & execution purposes:
>
> 1. I need information about the project – e.g. Total number of buildings, show drawings, MTO list etc.
>
> 2. I need the delivery sequence – which blocks to be fabricated and delivered first.
>
> 3. I need the *site delivery address for me to coordinate and fix up the inland transportation.*
>
> 4. I need the passport address of the said visitor to arrange for visa on arrival.
>
> 5. I need the PO for my processing and arrangement with Vietnam side.
>
> Contractual Matters:
>
> 1. As agreed based on our meeting, please kindly provide the said items for 1 & 2, as I need them to do members conversion, ensure all raw materials needed are available, production planning.
>
> 2. Please note that *as our agreement, we will fabricate, pack, ship the cargo CIF to Malaysia & handle the inland transportation to the site (need site address).* ***Customs clearance & duties are by [Ramo] (as you will be the consignee & importer).***
>
> 3. Material Used will be by SS400/A36 Grade with Mill Test Certificate. Material testing and all QAQC requirements shall be compliant to Dai Dung / DLE in house ITP test program. (No ITA is included in our option).
>
> 4. *Production schedule will be establish based on receiving shop drawings, production sequence and LC.* We are trying our best to follow the schedule but next week I will be in Vietnam to establish this.

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70 ABD Vol 1 at p 249.

> 5. If client / [Ramo] need any special inspection, please note that associated cost will not be included in our offer. But it can be arranged.
>
> Shipment Matters:
>
> 1. We will establish this issue later if you need CO Form D or not, this is pertaining to duties.
>
> 2. *Site location is important for us to establish the final shipping cost,* please provide.
>
> 3. *Unloading on site including container clearance and cleaning up to be handled by [Ramo].*
>
> 4. For site erection works, I will need drawings to pass over to my installers there for assessing the site and costings. We will discuss this separately.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

Oral Price Agreement before 14 February Email

40 It is undisputed that the price of the Contract was orally agreed between Sri and Dennis ("Oral Price Agreement") before 10.34pm on 14 February 2016.[71] For the oral negotiations, Guna had given Sri authority to agree to a price within the range of US$940–960/mt.[72] The unit price was finally agreed upon at US$960/mt (comprising US$900/mt for the steel works and US$60/mt for delivery to site), which Ramo had negotiated down from DLE's initial offer of US$1,100/mt. According to Guna, the US$60/mt component included the costs for shipment from Vietnam to the Pasir Gudang port, marine insurance, *clearing the shipment through customs* (excluding the payment of any duties or taxes to be borne by Ramo), and local transport to site.[73]

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71 Transcript 19 July 2019 at pp 22, 42, 158.

72 Transcript 19 July 2019 at p 23.

73 Guna's AEIC at para 25.

41 Dennis could not remember the exact date on which the oral agreement on price was made.[74] At the very least, both Ramo and DLE are in consensus that the unit price of US$960/mt was *agreed* upon *before* Sri sent an email to Dennis dated 14 February 2016 at 10.34pm ("14 February Email").[75] This agreed fact is crucial as the oral agreement on price is the point in time at which the Contract was crystallised, as elaborated below at [69]. This was before Ramo issued the PO to DLE, which was signed by parties on or around 28 to 29 March 2016.[76]

Parties' Correspondence from 14 February 2016 onwards

42 Since the Contract was crystallised the moment the Oral Price Agreement was made before 10.34pm on 14 February 2016, all subsequent actions by the parties after the Oral Price Agreement are efforts to amend the Contract. In determining whether the parties subsequently succeeded in amending the terms of the 20 January LOA and the Oral Price Agreement, I will assess if their subsequent correspondence had evidenced *both* a request of change of terms by one party *and* a clear acceptance by the other party, without either of which there would be no amendment to the Contract already formed. With that in mind, I now proceed to detail the parties' correspondence from 14 February 2016 onwards.

43 On 14 February 2016 at 10.34pm, Sri sent Dennis a draft of the Letter of Award dated 14 February 2016 ("14 February Draft") by way of an email to DLE, stating "[p]lease find herewith enclosed Contract document for your kind

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74 Transcript 19 July 2019 at p 34.

75 Transcript 19 July 2019 at pp 29, 42; 24 July 2019 at pp 58–59.

76 Guna's AEIC at para 20.

perusal".[77] The 14 February Draft was not signed by DLE. Sri testifies that the major differences between the 20 January LOA and the 14 February Draft are (a) the price which was inserted in the Schedule of Works at US$960,000 (based on US$960/mt for 1000 mt);[78] (b) the schedule for delivery at cl 9;[79] and (c) the address of the site for delivery.[80] Ramo submits that the 14 February Draft evidenced an oral agreement between parties on the following terms: the unit price of US$960/mt, the delivery schedule with the final shipment date of 10 April 2016 and the grade material of the structural steel being SS400.[81]

44 On 15 February 2016 at 8.05pm, Elaine replied to Sri, with an email attaching an unsigned draft with handwritten mark-ups on the 14 February Draft ("15 February Draft").[82] These handwritten mark-ups represent DLE's comments on the 14 February Draft and the amendments were made by Elaine with the knowledge of Dennis.[83] In the email, Elaine also informed Sri that "there [were] some clauses not applicable to [their] supply contract and would be better omitted from the contract scope to avoid confusion".[84] In the 15 February Draft, under cl 1(h) which states "Upon completion of fabrication, to deliver material to RAPID Site- Accommodation Camp…" (in the 14 February Draft), Elaine made the following handwritten comments beside cl

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77 ABD Vol 1 at p 202.

78 ABD Vol 1 at p 13.

79 ABD Vol 1 at p 7.

80 Transcript 19 July 2019 at p 157.

81 PCS at para 77.

82 ABD Vol 1 at p 201.

83 Transcript 24 July 2019 at p 45.

84 ABD Vol 1 at p 201.

1(h): "custom[s] clearance at [port] and duty shall be paid by Ramo upon material arrival".[85]

45 In an email dated 16 February 2016 to Ramo, Dennis also confirmed receiving "all the structural drawings".[86]

46 On 26 February 2016, Elaine sent an email to Sri, stating:[87]

> I refer to my email of 15 Feb 2016 sent to you with our comments on the contract draft … Should there be no further comments, please send [DLE] the revised contract …

47 On 2 March 2016, DLE sent Ramo an email enquiring about seven issues for Ramo to clarify (including item (5) where DLE sought contact details of Ramo's Malaysian agent from whom DLE could obtain a quotation for performing customs clearance services in Malaysia, presumably on DLE's behalf). Ramo replied on 3 March 2016 at 9.41am on the seven issues, with the email reproduced as follows (with Ramo's replies in italics):[88]

> Please find below the details for your reference and further action.
>
> 1) Understand you need to check with your boss for the LC term "LC-sight", please revert to us- *LC at Pengarang sight*
>
> 2) Certificate Of Origin (COO) required for this project ? – *we need the certificate of ORIGIN*
>
> 3) If yes, consignee to put Ramo or Petronas Malaysia? – *Ramo Industries Sdn Bhd*

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85 ABD Vol 1 at p 4.

86 ABD Vol 1 at p 189.

87 ABD Vol 1 at p 233.

88 Guna's AEIC at p 171.

> 4) Notify party on the BL, to arrange 1st Notify : RAMO INDUSTRIED PTE LTD, 2nd Notify : PETRONAS MALAYSIA ? – *Ramo Industries Pte Ltd only*
>
> 5) Please advise your Malaysia agent contact no, person-in-charge and the quotation from them for customs clearance in Malaysia ? – *I will forward u the details asap*
>
> 6) Please confirm the cargo description we can arrange "PRE-ENGINEERING STEEL BUILDING" on the BL and COO? – *you have to confirm with your forwarder*
>
> 7) And, what is the HS code for Malaysia Customs Clearance? - *you have to confirm with your forwarder*
>
> [emphasis added]

48 On 3 March 2016 at 11.58am, Elaine replied to Ramo with an email seeking to negotiate on the payment terms by Letter of Credit:[89]

> I refer to your email of 3 March 2016 below.
>
> > 1) Understand you need to check with your boss for the LC term "LC-sight", please revert to us- *LC at Pengarang sight*
>
> I would like to clarify that "LC-sight" means money will be released by the bank to the beneficiary once all the required documents are in order. Our VN supplier requires this LC-sight upon shipment and they would not accept to wait for another 60 days (i.e. LC-60 days term) before release of the money to them.
>
> Hence, *please check with your boss on the LC-sight instead of LC-60days term.*
>
> Appreciate Ramo understanding to this payment issue and the LC can be released to us within this week.
>
> [emphasis in original omitted; emphasis added in italics]

49 On 3 March 2016 at 1.35pm, Elaine sent an email to Sri stating:[90]

> Dear Sri

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89 Guna's AEIC at pp 171–172.

90 ABD Vol 1 at p 233.

> I refer to my email of 26 Feb 2016 (see below).
>
> Please forward us the revised contract for us to proceed with the job.

This was with reference to the 15 February Draft of the Letter of Award.

50 On 3 March 2016 at 5.00pm, Ramo clarified the issue of payment terms by letter of credit by sending an email to Elaine which states, "… please try to get 60 days Credit term from the supplier, which was already confirmed with Mr. Dennis".[91]

51 On 4 March 2016 at 6.26pm, Elaine sent Ramo an email as follows:[92]

> We refer to your email of 3 Mar 2016. After Dennis talking to the supplier, this is what they can accept for the Phase 01 payment (i.e. USD$300K) :
>
> Option 1: 30% down-payment (i.e. USD$90K) to be paid and remaining (i.e. USD$210K) to be issued with LC 30- day term; or
>
> Option 2: No down-payment. USD$300K to be issued with LC 15-day term.
>
> This is what our supplier can accept, LC 60-day term is not accepted by them. Please let us know which option Ramo will go for, Option 1 or 2.
>
> In addition, please re-consider the following:
>
> a) *Delivery Order Countersigned By Applicant – please omit this as part of the requirement.* It is *not workable for us as the site is in Malaysia.* Furthermore, Ramo will be inspecting the material before shipment.
>
> b) Please omit the Tolerance Credit Amount of +/- 10%. We won't over-claim the LC amount, at the same time, we do not expect to under-claim the LC amount too.
>
> c) LC term: pending Ramo decision on Option 1 or 2.

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91 Guna's AEIC at p 170.

92 Guna's AEIC at pp 169–170.

> d) We have updated our USD bank account number (under Special Instruction), for your info please.
>
> e) Description of goods: pending your forwarder to confirm an "ok" to go.
>
> We would like to highlight that Ramo has put in the additional terms in the LC requirement (i.e. Item a & b). Please re-consider to omit them. With these additional requirement, it's very difficult for us to continue with this job. Furthermore, if our supplier does not agree with the LC terms, this job is not able to be undertaken as well.
>
> [emphasis added]

52 During the period of 7 March 2016 to 9 March 2016, the relevant Whatsapp correspondence between Dennis and Guna was as follows:[93]

> [10:08 PM, 3/7/2016] Guna-BB Guna-BB: … I discussed with Mahi about your LC. … Btw,how far is the fabrication going on?
>
> …
>
> [9:17 PM, 3/8/2016] PEB-Dennis Leu: Hi Guna, I have spoken to mahe today and also setup some things at the factory already. We will start production by tomorrow or Thursday based on the schedule given by Sri for the first building. However, for shipment we still have issues not resolve: *1. HS code of product 2. Ramo import license 3. Duties that will be induced in Malaysia.* Due to these issues not resolved, ***I'm afraid I can't undertake the delivery to site scope of works under my scope.*** *I will however do my best to support your side to work closely on getting above items resolve before the shipment.* But if you put the conditions related to the customs on my side which will ultimately affect Vietnam side then they will refuse to start the work. Please understand our strength in this sense is to support on engineering and fabrication *so I hope you can help us* ***by getting the first LC out as CIF scope.*** The cost reduction is as per discussed last time if the scope of inland is not by myside. But I will support in coordination. Is that okay for you Guna ?
>
> …
>
> [5:45 AM, 3/9/2016] Guna-BB Guna-BB: Good morning Dennis…

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93 ABD Vol 1 at pp 115–116

> I will try to call you in the late afternoon. Or you can do so...
>
> [emphasis added in italics and bold italics]

At this juncture, it is apparent that Dennis was attempting to implore Ramo to alter DLE's obligation for "delivery to site" and to issue the first letter of credit under CIF terms.

53 On 9 March 2016 at 4.00pm, Elaine sent Mahe (from Ramo) an email, referencing the email on 4 March 2016 and a conversation between Dennis and Mahe, stating:[94]

> I refer to our email of 4 Mar 2016 and the conversation between Dennis and you yesterday.
>
> As mentioned to you, *we propose to supply the material as CIF term* and ***will support Ramo 100% with the Malaysia clearance process***. As this project is on tight schedule, we should not spend any more time on negotiating on the terms of the LC. Let's close this LC issue and *let us supply the material as CIF*. Please issue the LC based on this (see revised LC draft attached) so that the fabrication will not be hindered further.
>
> In the attached LC draft, please input the Malaysia local company full name and address (under "Documents Required") and the description of goods (under "Brief Description of Goods"). Should there be any query on the LC draft which may impact on the shipment clearance, please don't hesitate to contact us for clarification.
>
> [emphasis in original in underline; emphasis added in italics and bold italics]

54 On 11 March 2016, Dennis sent the following Whatsapp message to Guna:[95]

> [12:22 PM, 3/11/2016] PEB-Dennis Leu: Mr Guna. Dennis here. Sorry for the whole held up but this LC issue we can't follow your requirements. I spoke to my bankers yesterday

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94 Sri's AEIC at para 13 and Guna's AEIC at p 169.

95 ABD Vol 1 at p 116.

> afternoon and today morning. *They told me not to accept DDP term because* 1. I do not have a company in Malaysia. If I incur to pay GST I can't claim back from government. 2. I have no import license so I can import the cargo under my company name. 3. If the importation have hiccups cargo get stuck at port and bank cannot clear the LC due to DO not received and cargo not sent to site so bank will get problem also [w]ith supplier. Under these situation *I can't have the LC as DDP. However as my commitment to you**, I'll support to coordinate and clear the customs to site***. Also to hi-light that if I engage the logistic company in Malaysia I have to pay them GST and I can't claim GST from Malaysia government so this is also an issue for me. As you know I put in whatever effort possible to support this job but these restrictions are beyond me. *Pls help to confirm the LC to issue out as CFR, we will settle the insurance to your side.* And coordinate the inland delivery.
>
> …
>
> [emphasis added in italics and bold italics]

55 At this stage of the negotiations, the parties' correspondence indicates that Ramo's intention was for the shipment to be on Delivered Duty Paid ("DDP") terms, while DLE was imploring Ramo to issue the Letters of Credit under Cost and Freight ("CFR") terms, on the condition that DLE would settle the insurance for Ramo (hence rendering it CIF terms in substance) as well as supporting Ramo to "*coordinate and clear the customs to site*". Shipping under DDP terms would mean that DLE assumed all the responsibility, risks and costs associated with transporting the steel until the destination of unloading at the named place of delivery, which would necessarily include the customs clearance obligation. On the other hand, shipping under CFR terms would mean that DLE paid for the carriage of the steel up to the named port of destination. It is apposite to note that on 11 March 2016, there was a distinct shift in DLE's position regarding its willingness to accept customs clearance obligations, contrasted with its earlier refusal to undertake such obligations in the 12 February Email (see above at [39]). DLE's negotiating position appears weak bearing in mind the pre-existing oral agreement made sometime before 14 February 2016,

presumably premised on the scope of works set out in the 20 January LOA, that places the obligation on DLE to deliver to site. It seems that there was limited room for DLE to manoeuvre in its negotiation to have Ramo undertake the customs clearance if Ramo did not agree.

56 On 21 March 2016, Sri made further amendments to the 15 February Draft and sent Elaine an email seeking DLE's approval, enclosing a revised draft Letter of Award dated 21 March 2016. The email states:[96]

> Please find herewith enclosed revised contract for your kind perusal.
>
> Please sign, chop and email us a copy of the same for our retention.

Parties however did not ultimately sign or execute the draft Letter of Award dated 21 March 2016.[97]

57 At this stage, I am inclined to take the view that the parties' correspondence above from 14 February 2016 onwards were mere requests to alter the terms but do not evidence a clear acceptance by the other party. Hence, I find no amendments to the Contract constituted by the 20 January LOA and the Oral Price Agreement as the parties failed to vary the terms of the Contract.

Issuance of the PO by Ramo and acceptance by DLE

58 On 28 March 2016 at 8:24pm, Sri sent an email to DLE enclosing a copy of the PO signed by Ramo, stating:[98]

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96 ABD Vol 1 at p 232.

97 Sri's AEIC at para 17.

98 Guna's AEIC at p 168.

> Please find enclosed PO for processing the LC.
>
> Please sign, chop and email us the same for our retention and onward submission.
>
> …

59 Under the PO, the description of DLE's obligations are as follows:[99]

> Supply and fabrication including sand blasting and painting, *delivery of pre engineering steel structural material to site* excluding unloading at site under the main contract scope to the whole project for the construction of epcc camp for Rapid project package #22 at pengereng. [emphasis added]

This substantively mirrored the scope of works and responsibilities in cll 1 and 1(e) of the 20 January LOA, except that the obligation of "sand blasting" was included in the PO. Sri testified that DLE's obligation for sandblasting was merely not spelt out in the 20 January LOA but spelt out in the PO.[100] Sri explained that the obligation of sandblasting was not a new item since both parties understood that sandblasting had to be done before the painting of the steel could be done.[101] I accept Sri's explanation because sandblasting creates a clean surface so that the paint can adhere well to the steel to be painted. In any case, the issue of sandblasting was not disputed between parties.

60 The unit price of US$960/mt in the Oral Price Agreement is stated clearly in the PO, which sets out briefly DLE's basic scope of work. Under the PO, the contracted quantity is only for 312.50mt of steel structural material at the total amount of US$300,000.00 (based on the same unit price of US$960/mt). Most notably, DLE's scope of work is described as "delivery of

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99 ABD Vol 1 at p 110.

100 Transcript 19 July 2019 at p 162.

101 Transcript 19 July 2019 at p 162.

[pre-engineering] steel structural material to site" with no exclusion of "customs clearance". This remains consistent with cl 1(e) of the 20 January LOA. The terms and conditions of the PO state:

> 1. Ramo Industries Pte Ltd Reserves the right to revoke this Purchase Order to alter, amend and supplement due to the contingencies that may arise then and there.
>
> 2. Chop and send back the purchase order upon accepting the same.
>
> 3. Our PO reference number should be mentioned in your Invoice for processing of Payment.
>
> 4. Payment shall be made upon submission of all Relevant Original Documents/Delivery Order Work completion Report Duly signed by Authorised Ramo personel [*sic*] along with Invoice

61 On 28 March 2016 at 8.24pm, Dennis replied in an email to Sri, stating "Sri you put in the first term on the PO doesn't make it easier for me to sign off quickly".[102] Nevertheless, DLE decided to accept the PO on 29 March 2016 at 5.13pm through an email to Ramo enclosing the PO signed and stamped by both parties. The email states, "Attached signed PO no. RI_PO_15_2754 for you to submit to bank for LC processing. Kindly send us the LC by tomorrow, thank you."[103] DLE signed and stamped the PO with its company stamp in accordance with cl 2 of the PO, signifying DLE's acceptance of the terms of the PO on 29 March 2016. The consistency of the essential terms of the PO and the 20 January LOA further reinforces the binding nature of the 20 January LOA and confirms that the parties' negotiations from 14 February 2016 onwards failed to alter the Contract especially in relation to DLE's obligation to deliver

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102 Guna's AEIC at p 167.

103 ABD Vol 1 at pp 110; Guna's AEIC at p 167.

the fabricated steel structural material *to site*. I do however accept that where the express terms of the PO are *different* from that in the Contract, they are only to that extent varied by subsequent agreement of the parties when Ramo issued the PO and DLE accepted it on 29 March 2016.

Letters of Credit

62 The parties agreed that the payments were to be effected by letters of credit issued by United Overseas Bank, Singapore ("UOB") on a rolling basis.[104]

63 On or around 29 March 2016, UOB issued the first letter of credit for the amount of US$300,000.00 in DLE's favour.[105]

64 On 1 April 2016, Elaine sent an email to Sri, stating:[106]

> As spoken, we note that some of our comments on the contract are not being considered for we can't close it citing the discrepancies. It would be better if we can meet up to iron out the discrepancies …

65 On 20 April 2016, the shipment process was summarised in an email by Guna seeking Dennis' confirmation on the procedure, with Dennis' replies to the said email italicised as follows:[107]

> Can I summarise this shipping, by this following step by step procedure:
>
> Step 1: Vietnam Shipper Dai Dung appoints a local forwarder "AAA" to handle this shipment. *Correct*

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104 SOC at para 11.

105 SOC at para 12; ABD Vol 10 at p 176; Guna's AEIC at para 20.

106 ABD Vol 1 at p 232; Dennis' AEIC at para 55.

107 ABD Vol 2 at p 176.

Step 2: The Vietnam forwarder "AAA" fix up with the liner TMS. *Correct*

Step 3: TMS do the shipment, by the named vessel, and their appointed releasing agent in Pasir Gudang is 'BBB'. *Correct.*

Step 4: Dai Dung collects the ~~Master~~ HOUSE BL from the liner in Vietnam and submitting to BANK for discounting the LC. Since, it is a LC based shipment, the consignee shall be the LC issuing bank in Singapore – In this case it is UOB. *Correct*

Step 5: Upon receiving of LC discount documents from Vietnam, UOB clears the payment formalities and releasing the shipping documents to RAMO in Singapore. *Correct*

Step 5 [*sic*]: Since ***this contract to DLE is on delivery to site basis***; RAMO shall hand over the original shipping documents to DLE in Singapore. *Correct*

Step 6: DLE shall approach the Liner's Singapore office to switch the BL with consignee name as PRPC. *Correct, this process we have checked with Shipping Line and they told us, they can't produce a Switched BL without the Original. They can do the draft for us now but only upon collection of the ORIGINAL BL they can issue us the SWITCHED one on the SAME DAY @ S$250.*

Step 7: Upon receiving the switch BL, DLE shall pass on the same to Gateway shipping (their local Forwarder), for further proceedings. *Correct*

Step 8: Gateway shipping shall handover the Switch BL to JPL for customs clearance and releasing the containers. *Correct*

Step 9: JPL shall be liaising with the Pasir Gudang customs and get it cleared. *Correct*

Step 10: Upon clearing the customs, JPL shall approach the liner's local releasing agent 'BBB' for releasing of the containers. *Correct*

Step 11: Upon release, Gateway shipping shall forward the containers by road to the site. *Correct*

Step 12: Upon emptying the containers RAMO shall inform DLE/Gateway for taking out. *Correct*

Step 13: Gateway shipping shall arrange to collect and transport and return the containers to the liners, to complete the whole shipment procedure. *Correct*

Please correct me if any of this procedure is wrong.

> [emphasis in original omitted; emphasis added in italics and bold italics]

Step 5 of this email confirms that parties were *ad idem* that DLE is responsible for "delivery to site", which would encompass customs clearance obligations.

66 On or around 20 June 2016, UOB issued Letter of Credit Amendment No. 4 for the revised amount of US$1,211,136.00 for 1,328 mt of structural steel material at the unit price of US$912.00/mt (see below at [115]).[108].

67 On 1 August 2016, Sri sent DLE an email stating:[109]

> We still haven't received the signed contract.
>
> We need the same today evening otherwise all further payments will be [frozen] by our bank.

On 5 August 2016, Elaine replied to Sri with an email noting that DLE had already signed the PO since 29 March 2016, and that the PO would be "sufficient as [it was] related to DLE's scope of work".[110] Elaine's view that the PO itself would be sufficient as a contract suggests that by August 2016, it was way past the contract formation stage.

My decision

Crystallisation of Contract

68 The following excerpt from Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell, 5th Ed, 2018) ("*Law and Practice*

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108 SOC at para 13; ABD Vol 10 at p 186.

109 ABD Vol 1 at p 231.

110 ABD Vol 1 at p 229.

of Construction Contracts") at paras 1.051, 1.052 and 1.059 provides guidance on the formation of construction contracts in relation to the parties, price and scope of works, as well as the role of a letter of award:

> Parties in negotiations will be expected to discuss a range of issues. As negotiations develop, parties may seek to accommodate each other's concerns and new terms may be agreed. At some stage the parties may consider that agreement has been reached on the essential terms and, having reached such agreement, parties may be satisfied that the works can begin. *It is quite clear that an agreement may be enforceable notwithstanding that the details of the obligations had not been fully set out.* The question in these situations, however, is whether the terms which have been agreed include all the essential terms which, even though the parties did not realise it, were in fact essential. "If some particulars essential to the agreement still remain to be settled afterwards there is no contract", *per* Lord Blackburn in *Rossiter v Miller* (1878).
>
> …
>
> *… agreement as to parties, price, time and description of works (or scope of works) is normally the minimum necessary to make the contract commercially workable.* If parties have reached a definite position on these terms, it points irresistibly to the existence of a contract. The reverse is not necessarily true. *The absence of any of these terms – essential as they are – does not mean that no agreement has been concluded.* In some instance this lacuna [can] be cured, provided that it is clear that the parties intended to contract. Nevertheless, the court will not consider that a contract has come into existence if by their words and conduct the parties make clear that they do not intend to be bound until certain terms are agreed notwithstanding that the terms may be relatively minor. Ultimately, it is for parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. Obviously, "the more important the term is the less likely it is that the parties will have left it for future decision".
>
> …
>
> … This [letter of award] is generally intended to operate as a legally binding acceptance of the tender on its terms, thereby bringing the contract into operation. The letter itself is usually expressly incorporated as part of the eventual contract documents. *Frequently the letter of award may be issued even though not all the terms have been agreed between the parties.* … but the *terms of the letter may therefore suggest that the*

> *parties fully envisage this state of affairs and expressly allow for the modification of amendment of the terms governing these matters.*
>
> [emphasis added]

In the ordinary course of business, it is often the case that the scope of works/services are first discussed, such as the specifications and quality of the steel structural materials in the present case, before the unit price can be agreed upon because the price depends substantially on (a) how extensive the scope of works/services is; (b) how stringent the specifications are; and (c) how onerous the contractual obligations are. As Mr Chow Kok Fong rightly notes in *Law and Practice of Construction Contracts* at para 1.057: "the description of the works, or what is normally referred to as the scope of works, is critically important. … The terms relating to price and time can only be understood in relation to the scope of works." Logic dictates that parties would usually negotiate over the price only *after* they have agreed upon the scope of works/services.

69 It is clear in the present instance that the Contract could not have crystallised at the time when the parties signed the 20 January LOA since the parties had not yet reached agreement on the price, which is clearly an essential term. However when the parties made the Oral Price Agreement for the agreed scope of works as set out in the 20 January LOA, this is sufficient for the formation of the Contract. Taking into account the factual chronology of events, I find that the Contract crystallised when the parties reached an Oral Price Agreement on a certain price per metric tonne for the prefabricated structural steel, and this was *before* Sri sent the 14 February Draft at 10.34pm on 14 February 2016. While the parties were unable to adduce evidence at trial to determine the exact point in time when the Oral Price Agreement was made, what is crucial is that the price was already agreed upon *before* the 14 February Draft was sent.

70 In determining the agreed terms of the Contract, the court looks at the signed documentation and the correspondence showing the parties' negotiations (*ie*, the 20 January LOA, 2 February Message, 4 February Email, 4 February Messages and 12 February Email) that occurred up till the point when the Oral Price Agreement was made.

71 A variation of contract is "an agreed alteration or modification by the parties of the terms of a pre-existing contract between them" and in construction contracts, may be used by the draftsman for an agreed alteration or for extension of the contract completion date, compensatory provisions, or even the initial quoted contract price: Nicholas Dennys and Robert Clay, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 13th Ed, 2015) at para 5-017. As such, any subsequent agreement to amend the terms in the 20 January LOA after the Oral Price Agreement would be a variation of contract. Any subsequent unsigned drafts, such as the 14 February Draft and 15 February Draft, are mere evidence of the parties' negotiations to amend terms established in the 20 January LOA and the Oral Price Agreement. With this methodology in mind, I now turn to deal with the core issue of whether the 20 January LOA is binding.

Whether the 20 January LOA is binding

72 I deal first with the issue of whether the 20 January LOA is part of the Contract and binding.

73 While the Contract was not concluded on 20 January 2016 itself, I find that the terms of the 20 January LOA constitute the agreed scope of works binding on the parties once the price based on that agreed scope of works was agreed. In other words, the terms of the 20 January LOA would form a part of the concluded Contract. I also reject DLE's case that Dennis had signed the

20 January LOA for the sole reason of the Punj Lloyd Purpose (*ie*, merely to show PRPC/Punj Lloyd that Ramo had awarded the contract to DLE) and therefore the 20 January LOA was not intended by parties to be binding. I find the 20 January LOA to be a part of the Contract and binding for the following reasons.

Express wording in preamble

74 First, the express wording on the cover page of the 20 January LOA militates in favour of the binding nature of the 20 January LOA: "This letter *shall constitute a binding agreement* between [Ramo] & [DLE] based on the following terms and conditions …" [emphasis added].[111] Dennis must be taken to have at least read the preamble in the very first paragraph of the document. Dennis signed the last page that "confirmed and agreed on behalf of [DLE]". In fact, he signed and stamped every page of the 20 January LOA.

75 I do not believe Dennis' evidence that Guna assured him that the document was a mere formality in the sense that it would not form a part of the contract even if the parties were to agree on the price subsequently. Dennis tried to explain that the 20 January LOA was only for the Punj Lloyd Purpose and nothing else. If Dennis had genuinely believed that the 20 January LOA was never going to be binding even after the price was agreed, there would be no reason for Dennis to raise objections to 12 clauses on 20 January 2016, namely cll 1, 1(d), 1(e), 1(g), 1(h), 4, 6, 9, and 11–14.[112] Dennis' explanation of this contradiction was that in the worst-case scenario, he wanted to make sure that

111 ABD Vol 1 at p 14.

112 Transcript 23 July at pp 37, 39–42, 44–47.

there was nothing in the 20 January LOA that could "bind" him,[113] which meant that he must have understood the express wording in the preamble of the 20 January LOA. This, if anything, is an implicit admission of Dennis' awareness that the 20 January LOA would be binding in that it would form a part of the contract once the parties agreed on the price based on the scope of works set out in that LOA. The 20 January LOA is essentially an incomplete agreement: the terms on the scope of works have been agreed upon, subject to the finalisation of the price.

Circumstances prior to signing of the 20 January LOA

RAMO'S FORGERY

76 Next, I turn to deal with a preliminary issue that arose at trial of Dennis' allegation of Ramo's Forgery, which is essentially a dispute on the contents of cl 14. Clause 14 of the copy of the 20 January LOA in the Agreed Bundle of Documents states that the "Liquidated Damages shall be RM 10,750.00 (RINGGIT MALAYSIA TEN THOUSAND SEVEN HUNDRED FIFTY ONLY) per day." In contrast, cl 14 of the copy of the 20 January LOA admitted through Dennis' Affidavit of Evidence-In-Chief ("AEIC"), had the quantum of "RM 10,750.00 … ONLY" left as a blank.[114]

77 I do not believe Dennis' testimony that the quantum of the liquidated damages in cl 14 had been left blank when Dennis signed the 20 January LOA and the quantum of RM10,750.00 both written in figures and in words was only

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113 Transcript 23 July at p 52.

114 DBAEIC at p 48.

inserted *after* Dennis had signed the 20 January LOA.[115] Since it is Dennis' testimony that the quantum was not present on the *original* signed copy of the 20 January LOA[116] and every page of the 20 January LOA was signed by Dennis with his company stamp, Dennis is essentially making a serious allegation that Ramo had forged the document by inserting the quantum of RM10,750.00 both in figures and in words in cl 14 *after* Dennis had signed on the original document ("Ramo's Forgery").

78 Having examined the original signed 20 January LOA, I find it near impossible for Ramo to have inserted the quantum of liquidated damages of RM10,750.00 for cl 14 onto the original document which was signed and stamped by Dennis. The allegedly inserted quantum of liquidated damages both in figures and in words appear to be printed at the same time as with all the other words that were printed originally as a page for signature because of the near perfect alignment (based on a visual inspection) of the allegedly inserted figures and words with the rest of the other printed words. The only way Ramo could have done so to achieve such near perfect alignment would be by re-printing a new copy of that page of the 20 January LOA (with the quantum as stated in cl 14), and thereafter, forging Dennis' signature and somehow obtaining and using the company stamp of DLE to stamp on that page of the document. The objective evidence of the signature and DLE company stamp on every page of the document, including that page which has the quantum of liquidated damage both in figures and words printed therein, coupled with a lack of explanation by DLE on how Ramo could have had possession of DLE's company stamp, demonstrates the external inconsistency of Dennis' testimony. Further, Dennis'

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115 Transcript 23 July 2019 at pp 32, 57 and 60; Dennis' AEIC at para 44.

116 Transcript 23 July 2019 at pp 59–60.

bald allegation is unsupported as no expert evidence has been produced by DLE to challenge the authenticity of the original 20 January LOA, despite DLE's inspection of the original document at Ramo's solicitors' office.[117]

79 Moreover, I find Dennis' testimony to be internally inconsistent with his testimony that he had also objected to cl 14 as a liquidated damages clause being included in the January LOA in principle.[118] Dennis had been allegedly assured that he should "leave the items that meant something to him blank", which he had testified to be the price and the liquidated damages clause. He also understood that such a document "without value, without dates, without the [liquidated damages amount]" would not to be a binding document in his experience.[119] In fact, Dennis further took the position that since the dates for the programme schedule were absent, the liquidated damages clause is not important.[120] Given that the liquidated damages clause had its quantum left blank and was not important to Dennis, and the document was not binding between parties, it is illogical and inherently inconsistent for Dennis to have raised objections to cl 14 being imposed in principle in the 20 January LOA.

80 This is in contrast with Sri's testimony, which I believe. Sri testified that before Dennis signed the 20 January LOA, Sri had personally typed the words and the figures for RM10,750.00 before printing out the document for Dennis' signature.[121] Further, Sri explained how Ramo had quantified the quantum of RM10,750 for liquidated damages under cl 14. Parties had been negotiating on

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117 Transcript 23 July 2019 at p 15; Plaintiff's Reply at para 16.

118 Transcript 23 July 2019 at p 49.

119 Transcript 23 July 2019 at p 32.

120 Transcript 23 July 2019 at p 68.

121 Transcript 19 July 2019 at pp 115–116.

a price of the unit rate of US$1,000/mt.[122] The estimated quantity of structural steel supplied is set out in the Schedule of Works of the 20 January LOA at 1,295mt.[123] As such, Sri calculated the contract value to be approximately US$1.295m, which translates to approximately RM5.18m (based on the exchange rate in 2016).[124] Ramo applied the rate of 0.2075% (as testified by Sri in the approximate range of 0.2% to 0.25%)[125] of the total contract value to arrive at the quantum of liquidated damages per day for any delay (*ie*, RM10,750). The range of 0.2% to 0.25% imposed by Ramo in the Petronas Rapid Project is consistent with the liquidated damages clause imposed in the Keppel Project of S$1,000 per day for a contract value of S$435,000 (*ie,* at 0.23%).[126] In fact, Dennis had agreed that the rate imposed under cl 14 for the Petronas Rapid Project is proportionate to the rate DLE had previously agreed to in the Keppel Project.[127] Dennis also conceded that it would be reasonable for Ramo to issue a contract with DLE with a clause of liquidated damages in order to protect Ramo from any delay or loss that may arise, should DLE fail to supply the steel in a timely manner.[128]

81 For the above reasons, I find Dennis' allegation of Ramo's Forgery to be unfounded. Dennis' testimony is both internally and externally inconsistent, which demonstrates his lack of credibility: *Ng Chee Chuan v Ng Ai Tee* [2009] 2 SLR(R) 918 at [14]. Dennis blatantly lied on the stand by accusing Ramo of

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122 Transcript 19 July 2019 at p 112.

123 ABD Vol 1 at p 25.

124 Transcript 19 July 2019 at p 113.

125 Transcript 19 July 2019 at p 113.

126 PBOD at p 34.

127 Transcript 23 July 2019 at p 83.

128 Transcript 23 July 2019 at p 77.

fraudulently inserting words on a signed document in the face of objective documentation to the contrary.[129] The fact that Dennis fabricated a serious allegation of forgery by Ramo for the sheer purpose of supporting his case clearly militates against his credibility, which will be taken into account in other issues addressed in this judgment.[130] As such, I reject Dennis' testimony that the quantum of the liquidated damages was left blank when Dennis signed the 20 January LOA. I accept the version of 20 January LOA produced in the agreed bundle of documents, where cl 14 of the 20 January LOA states the quantum of liquidated damages amounting to RM10,750 a day.[131]

PUNJ LLOYD PURPOSE

82 I now turn to address DLE's main argument, which is that the *sole* purpose of the signed 20 January LOA was to convince PRPC/Punj Lloyd that Ramo had formally engaged DLE for the project (*ie*, the Punj Lloyd Purpose) and therefore the said letter of award was not intended to be binding. I reject DLE's argument and now explain my reasoning.

83 The fact that Guna had to show Punj Lloyd a document to assure Punj Lloyd that Ramo had secured a subcontractor is an undisputed fact. Most crucially, having to show Punj Lloyd an already binding document (*ie*, the signed 20 January LOA subject to finalisation of price) does not subsequently make that document non-binding between the parties signing the document. I accept that there were two concurrent reasons for the parties' signing of the 20 January LOA: (a) to have an agreed scope of works subject to the finalisation

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129 Transcript 23 July 2019 at p 57.

130 Transcript 23 July 2019 at p 57.

131 ABD Vol 1 at p 20.

of price; and (b) to show Punj Lloyd that Ramo had reached this stage of the agreement with its subcontractor. The fact that the 20 January LOA was signed for the Punj Lloyd Purpose is not mutually exclusive from the parties' intention to agree first on the scope of works as set out in the 20 January LOA before proceeding to agree on the price based on that agreed scope of works.

84 DLE's case operates on an erroneous assumption that signing a binding document, subject to the finalisation of price, to evidence a Ramo-DLE relationship to Punj Lloyd would render the document non-binding, despite the express wording of its binding nature in its preamble. DLE is also implying that the parties had agreed to jointly misrepresent to Punj Lloyd that the signed 20 January LOA, which had all the appearances of a binding document (subject to the finalisation of price), was in fact not binding because the parties had a separate secret oral agreement, unknown to Punj Lloyd, that the signed document was never meant to be binding.

85 I am unconvinced that the parties would have agreed to such a joint misrepresentation. There has to be a level of accountability to Punj Lloyd when Ramo submits a signed letter of award to evidence its contractor-subcontractor relationship. To my mind, it is implausible that Punj Lloyd would have been satisfied with being assured with a non-binding document or a document that was purely for show, as Dennis alleges. Punj Lloyd, as the main contractor, would want to be assured with a binding document that evidences certain terms the parties had agreed to, subject to the finalisation of price. After all, the objective of the Punj Lloyd Purpose is to evidence that a subcontractor had been "formally engaged" for the Petronas Rapid Project,[132] which cannot be done

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132 D&CC at para 3A(a).

simply with a non-binding document. As Sri rightly notes, Ramo could not possibly submit a document ostensibly evidencing its relationship with DLE to Punj Lloyd without Punj Lloyd asking Ramo to account for DLE's progress.[133] In fact, Punj Lloyd did send a representative with Guna to inspect and conduct a site visit of the materials in Vietnam at or about 25–28 February 2016, after the parties had agreed on the unit price.[134] I do not think that Ramo would be so bold as to mislead Punj Lloyd, its main contractor, with a signed document that in reality was completely non-binding and not worth the paper it was written on.

86 Dennis once again makes an allegation which imputes dishonesty to Guna that Ramo was knowingly sending to Punj Lloyd a document that objectively purports to be binding with express words, when in fact between the parties, it had allegedly been agreed not to be binding in any event. Dennis' lack of credibility, which has been evidenced by his allegation of Ramo's Forgery (see above at [81]), is once again exposed by his unfounded allegations of impropriety on the part of Ramo, simply to support DLE's case.

87 For the above reasons, I do not believe the parties had entered into a separate oral agreement that the signed 20 January LOA was never to constitute a part of their agreement even if they did subsequently agree on a price based on the agreed scope of works set out in the signed letter of award. The parties' intention to create legal relations was clearly present on 20 January 2016. The Punj Lloyd Purpose does not itself nullify the effect of the express wording of

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133 Transcript 19 July 2019 at p 152.

134 Transcript 19 July 2019 at p 152.

the parties' intention to be bound by the terms of the 20 January LOA, which was conditional on the finalisation of the price.

HASTE IN SIGNING

88 DLE further submits that the parties' "haste" in signing the 20 January LOA, despite the price not being agreed to and no prior draft having been sent to Dennis for his vetting, suggests that the 20 January LOA was signed *solely* for the Punj Lloyd Purpose.[135] Given that lack of advance notice of the terms, the comprehensive nature of the draft and the large value of the contract, DLE avers that such a "haste" to sign it could only be explained by the Punj Lloyd Purpose. As such, DLE avers that the 20 January LOA is not intended by parties to be binding.

89 However, the parties had prior discussions on the project before the 20 January LOA was signed. As mentioned above at [20], detailed preliminary discussions between Guna and Dennis took place prior to the 20 January LOA. Dennis admitted in his testimony that the parties had discussed: (a) the construction of the Accommodation Camp; (b) the general size of the project and the magnitude of the contract (*ie*, between 800 to 1000 tonnes of steel); (c) the technical requirements for the Petronas Rapid Project which were discussed with reference to drawings; (d) Ramo's budget of slightly over US$1,000/mt;[136] (e) the material specifications for the structural steel; (f) the urgency of the project; and (g) the schedule that Ramo had to meet for the Petronas Rapid Project for Punj Lloyd.[137] According to Guna, when the parties

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135 DCS at para 36; Defendant's Reply at para 28.

136 Transcript 23 July 2019 at p 22.

137 Transcript 23 July 2019 at pp 20–22, 26–29; Transcript 18 July 2019 at pp 40–41.

were in negotiations during the meeting on 20 January 2016, they were "almost on the final [stage of] contract negotiation on the pricing".[138] I believe Guna's evidence on this point.

90 Further, prior to the Petronas Rapid Project, Ramo and DLE had previously worked on other projects pertaining to the supply of structural steel, including the Keppel Project for similar works (see above at [19]).[139] The standard terms enclosed in the 20 January LOA were not unfamiliar to DLE, especially since there were similar terms in the Letter of Award dated 7 September 2015 for the Keppel Project.[140] I reject DLE's claims that the fact that no prior draft was sent to Dennis and the "haste" with which the 20 January LOA was signed could only mean that the 20 January LOA was signed solely for the Punj Lloyd Purpose and hence was never intended to be binding.

GUNA'S ALLEGED REASSURANCE

91 Dennis also makes the bald allegation that Guna had orally agreed with him that the document to be signed was "only temporary pending finalisation of the actual written agreement between the parties". Even if I accept this allegation to be true (in spite of Dennis' lack of credibility), this allegation does not suggest that the document was to remain temporary and non-binding even after the price had in fact been finalised based on the scope of works set out in that document. It does not go so far as to negate the existence of an incomplete agreement in the form of the 20 January LOA that was to be subject to the finalisation of price.

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138 Transcript 18 July 2019 at p 43.

139 Transcript 18 July 2019 at pp 41–42.

140 PBOD at pp 30–39.

92 In contrast, Dennis' explanation of the definition of "temporary" is unsatisfactory. To Dennis, this meant that the 20 January LOA had *no effect* whatsoever even after an agreement on the price had been reached, and not that the document was valid pending the parties' agreement on the price and followed by the issuance and acceptance of the PO.[141] I reject Dennis' interpretation for the same reasons that I had earlier rejected Dennis' claim that the parties agreed to mislead Punj Lloyd with the 20 January LOA, which only the parties themselves knew was never meant to be binding under any circumstances (see above at [84]–[85]).

93 Further, Dennis gave inconsistent accounts of Guna's alleged assurances regarding the nature of the 20 January LOA. In Dennis' AEIC, he stated that he was told the document was "*temporary* pending finalisation of the actual written agreement between the parties",[142] but later stated in cross-examination that he had been told not to worry as "this document is not binding".[143] In any case, Dennis eventually conceded that he could not recall if Guna had used any of the above exact words, showing further internal inconsistency.[144]

94 For the above reasons, even taking DLE's case at its highest, Dennis' bald assertion of Guna's representation of the 20 January LOA being "temporary" does not support but in fact weakens DLE's case.

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141 Transcript 23 July 2019 at p 67.

142 Dennis' AEIC at para 41.

143 Transcript 23 July 2019 at p 54.

144 Transcript 23 July 2019 at p 67.

Absence of Price

95 Further, DLE argues that the absence of an agreement on price in the 20 January LOA would be consistent with the notion that parties did not intend to create legal relations, since DLE "could so easily walk away ... by simply refusing … to agree on the price".[145]

96 If parties had not subsequently agreed on the price, I can accept that there is no final contract. However, given that parties had, after negotiations, come to an agreement on price before the 14 February Email, the agreed scope of works in the 20 January LOA combined with the agreement on price constitutes a final concluded contract. The absence of initial agreement on price does not necessarily imply that parties did not intend to contract on the terms of the 20 January LOA, subject to the finalisation of price. Even in the absence of terms such as price, it is possible to find that parties had intended to contract: *Law and Practice of Construction Contracts* at para 1.052.

97 The terms in the 20 January LOA represent the scope of works and specifications which the parties had negotiated and eventually agreed to, subject to the finalisation of the price. The 20 January LOA was discussed with reference to the architectural drawings in Annex 2 ("the Drawings"), which define the quantities and dimensions of the structural steel to be supplied.[146] Dennis was also aware of (a) the material specifications of the structural steel; (b) the technical requirements; (c) Ramo's budget of slightly over US$1,000/mt;[147] and (d) the rough delivery schedule before Dennis signed the

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145 DCS at para 39.

146 ABD Vol 1 at pp 26–109.

147 Transcript 23 July 2019 at p 21.

20 January LOA.[148] Further, the PO's description of DLE's obligations essentially mirrors the scope of the works stated in cll 1 and 1(e) of the 20 January LOA, and serves to confirm the finding that the 20 January LOA is binding, subject to the finalisation of price.

98 It is therefore untrue that parties had no intention to create legal relations simply because no price had yet been agreed upon. Parties clearly intended to create legal relations on the basis that a contract based on the terms and conditions agreed in the 20 January LOA would come into existence once the parties agreed on the price. The parties agreed to the terms of and signed the 20 January LOA on the understanding that the price was to be agreed subsequently based on the agreed scope of works set out in the LOA.

Brevity of the PO and Letters of Credit

99 Moreover, the brevity of the PO and the Letters of Credit lends weight to the finding that the 20 January LOA is a part of the Contract.

100 DLE's initial defence is that the PO alone constitutes the Contract. DLE subsequently changed its position during trial to argue that *both* the PO and the Letters of Credit form the Contract (see above at [10]). The PO evidences the quantity of 312.5mt of steel, for the total amount of US$300,000 at the price of US$960/mt. I note that this rate of US$960/mt is the key price matrix agreed between parties during the Oral Price Agreement before 10.34pm on 14 February 2016. According to Sri, this was the only purchase order issued to DLE, and was done at the bank's request in order to issue the Letters of Credit.[149]

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148 Transcript 18 July 2019 at p 69.

149 Transcript 19 July 2019 at p 175.

Subsequently, the bank did not ask for further purchase orders and no other purchase orders were issued.[150] The PO, by itself, could not have evidenced the *full* contract sum of US$1,274,880 for 1,328mt of fabricated structural steel to be supplied at the agreed unit price of US$960 per metric tonne: see Letter of Credit Amendment No. 4 which extends DLE credit for 95% of the total contract sum due to the 5% retention monies agreement on 16 June 2016 (see below at [108].[151] When confronted with this, DLE's counsel changed his position at trial that both the PO and the Letters of Credit form the Contract.

101 Even if I were to accept DLE's new position at trial (which is obviously an afterthought) and reading both the PO and the Letters of Credit together to evidence the Contract, I find that unlike the 20 January LOA which makes reference to the Drawings in Annex 2, neither the PO nor the Letters of Credit make any reference to any drawings for the fabrication of the steel structures. The PO and the Letters of Credit also provide no specifications on the structural steel to be supplied, such as the design and dimensions of the various structural steel pieces to be fabricated. On this issue, DLE's counsel suggested to Sri at trial that because DLE had received the Tekla model drawings from Ramo before the PO, DLE would have known exactly "the type of steels to fabricate and paint".[152] However, as Sri rightly explains, due to the confidential nature of the Tekla model drawings, they were only issued to DLE "in continuation with [the 20 January LOA]".[153] I accept Sri's explanation. The confidential Tekla model drawings must have been released to DLE following the parties'

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150 Transcript 19 July 2019 at p 175.

151 ABD Vol 1 at p 186.

152 Transcript 19 July 2019 at p 183.

153 Transcript 19 July 2019 at pp 183–184.

signatures on the 20 January LOA so that they could proceed to the next stage to finalise the price based on the scope of works set out in LOA, which has reference to architectural drawings. DLE is thus given the opportunity to study the drawings and ascertain the complexity of the fabrication of the structural steel work in order to determine for itself the appropriate price per metric tonne of the structural steel work at which it could agree with Ramo to seal the Contract.

102 Further, the quality of the steel is also not specified in the PO and the Letters of Credit. DLE's case that the Contract is constituted by only the PO and the Letters of Credit is unbelievable as the description of DLE's scope of work merely states "[supply] and fabrication … delivery of pre engineering steel structural material to site". The requirement for SS400 grade of steel is not specified anywhere. On DLE's case, this would mean that even scrap metal of low grade quality supplied at the unit price of US$960/mt could be covered within the terms of the Contract, if evidenced only by the terms of the PO and the Letters of Credit without the 20 January LOA. Clearly, the parties could not have intended this. DLE's version of what documents constitute the Contract does not make any sense commercially.

Liquidated Damages Clause (cl 14 of 20 January LOA)

103 DLE further submits that it would be unfathomable for Dennis to agree to the sum of liquidated damages stated when the delivery schedule had not been agreed upon in the 20 January LOA.[154] As such, Dennis signed the 20 January LOA knowing that the clause for the liquidated damages (cl 14) was not intended to be binding on the parties.

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154 Defendant's Reply at para 31.

104 However, this argument fails as the delivery schedule had been agreed upon as part of the scope of works in the 20 January LOA, subject to the finalisation of price. The delivery schedule is enumerated in broad terms under cll 1(h) and 9 of the 20 January LOA. Clause 1(h) states that DLE's scope of work is "[t]o ensure to abide with main contractor['s] programme schedule". Clause 9 states:[155]

> DLE [is] to note that the entire work has to be *executed in strict accordance with [Ramo] building programme* and/or such *other programme and schedule issued to DLE* to enable [Ramo] to complete the Main Contract Works for the handing over to the Employer by the [C]ontractual Completion Date. [emphasis added]

These terms, while seemingly disadvantageous to DLE, nevertheless spell out a delivery schedule which is dictated by and in favour of Ramo. This merely indicates that Ramo was in a stronger negotiating position than DLE and Ramo could dictate the terms that it wanted. Commercial freedom allows for the imposition of advantageous terms for the party with a stronger bargaining power. It is completely up to DLE to accept such onerous terms, which it did once DLE agreed on the price with Ramo. The existence of a delivery schedule dictated by Ramo, coupled with the preamble of the 20 January LOA which states that the document shall constitute a binding agreement between Ramo and DLE on the terms and conditions therein (including cl 14), puts paid to DLE's argument.

105 I reject DLE's averment that since there were no discussions of the liquidated damages clause between Guna and Dennis before the 20 January LOA was signed, it would be indicative that "no one was going to

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155 ABD Vol 1 at p 19.

enforce the liquidated clause anyway".[156] This is because DLE had accepted the quantum of RM10,750 per day in cl 14 when Dennis signed the 20 January LOA, which would form part of the Contract the moment the parties agreed on the unit price per metric tonne of prefabricated structural steel for scope of works set out in the 20 January LOA. I have found that Ramo's Forgery did not take place and that cl 14 of the original 20 January LOA already stated the quantum of RM10,750 per day for the liquidated damages clause when Dennis signed the document (see above at [81]).

106 Further, I accept Sri's explanation that the quantum was based on Ramo's standard form contract, which DLE would be familiar with due to their prior projects together.[157] The lack of discussion between the parties on the quantum of liquidated damages is therefore not probative of the parties' absence of agreement to cl 14 of the 20 January LOA. As explained above at [80], Sri had prepared the 20 January LOA on Guna's instructions and had inserted the figure of RM 10,750 per day, a calculation arrived at based on 0.2075% of the total contract value (within the range of 0.2% to 0.25%). This is consistent with the previous amount of liquidated damages clause imposed in the Keppel Project, at 0.23% of the contract price. As such, the rate imposed by Ramo for the liquidated damages clause would not have been unfamiliar to DLE.

107 Finally, Dennis even admitted that it would be reasonable to include a liquidated damages clause to protect Ramo from any delay or loss that may arise should DLE fail to supply the steel in a timely manner.[158] For the above reasons,

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156 Transcript 19 July 2019 at p 113; DCS at para 51.

157 Transcript 19 July 2019 at p 113.

158 Transcript 23 July 2019 at p 77.

I reject DLE's averment as regards the parties' lack of intention for cl 14 of the 20 January LOA to be binding when Dennis signed the document.

Retention Monies Clause (cl 16 of 20 January LOA)

108 I now turn to address DLE's submissions on cl 16 of the 20 January LOA. Clause 16 on Retention Monies of the 20 January LOA states:[159]

> **16. <u>Retention money:</u>**
>
> - 10% of the Gross Value (excl GST) of each Invoice
> - The percentage retention shall be 10% of which 5% will be released upon practical completion and acceptance of the sub-contract works by Ramo.
> - Balance of 5% will be released upon expiry of the Maintenance Period and the final completion certificate by Ramo.

It is undisputed that Ramo did not withhold any retention monies for the first six shipments. On 16 June 2016, parties agreed that the retention monies from the seventh shipment onwards would be 5% on the total value of the structural steel supplied by DLE.[160]

109 DLE submits that the failure of Ramo to withhold any retention monies for the first six shipments and exercise its right under cl 16 for the retention monies of 10% shows that the 20 January LOA was not binding. DLE argues that the agreement on 16 June 2016 for retention monies of 5% only arose because of the disputes in relation to the Shortfall Issue and the Unpainted Steel

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159 ABD Vol 1 at p 20.

160 SOC at para 13.

Issue from the first six shipments.[161] DLE relies on this to argue that the parties never intended for cl 16 to be binding. As Sri had testified, this 5% was "security for any failings on the part of DLE in terms of shortfall and unpainted steel".[162] DLE argues that Sri's testimony supports the proposition that the 5% retention sum had a different basis (*ie*, the Shortfall Issue and the Unpainted Steel Issue) from the 10% retention sum agreed under cl 16.

110 DLE also relies on a Whatsapp message from Guna to Dennis dated 14 May 2016, which states, "How come your girl is asking for 550k LC. I told you on Monday I shall release on 250k LC as final. The balance (10%) as agreed earlier to be claimed by invoice, *since, there is no retention for this contract* …", to show that in Guna's mind, there were no retention sums in the Contract.[163] Guna's rebuttal to this point at trial was that he had "typed wrongly" and meant that *"*there is no retention sums clause in the PO" and that the word "contract" in his Whatsapp message refers to the "PO".[164]

111 On the other hand, Ramo submits that the absence of retention monies for the first six shipments did not mean that the 20 January LOA was not binding on the parties.[165] Ramo's version of events was that there was an administrative error on Ramo's part in omitting to "spell out" the 10% retention sum in the PO and in the subsequent Letters of Credit, which were issued based on the PO.[166] Essentially, it was Ramo's mistake in failing to exercise its right to 10%

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161 D&CC at para 3A(j).

162 Sri's AEIC at para 19.

163 ABD Vol 1 at p 118.

164 Transcript 18 July 2019 at p 111.

165 PCS at para 85.

166 PCS at para 86; Transcript 18 July 2019 at p 90.

retention sums in its first six shipments. According to Guna, DLE was only entitled to claim for an invoice amounting to only 90% of the contract sum as per cl 16 of the 20 January LOA. The bank would not reject DLE's claim if it had claimed 100% of the contract sum, which DLE did for the first six shipments.[167] Thus, DLE allegedly "took advantage" of Ramo's omission and claimed 100% of the invoice value.[168] By the time Ramo found out about this after reviewing the first invoice, DLE had already made three to four shipments. According to Ramo, while discussions were ongoing on the retention monies in May 2016, DLE continued claiming 100% of their invoice value on further shipments and by 31 May 2016, the sixth shipment had already departed from Vietnam.[169]

112 Thereafter, Sri sent Dennis a letter dated 7 June 2016 expressing Ramo's disappointment with the Shortfall Issue and the Unpainted Steel Issue in the first 6 shipments and proposing a 10% retention sum to be applied to *the entire contract value* and not just the remaining shipments:[170]

> …In order to have proper accountability and [guarantee] for both sides for Shipments based on 1377[mt] after omitting 6 Single Storey Buildings, we are proposing following Payment Terms for further LC,
>
> 1. 90% of the whole supply value (1377[mt] * 960USD per tonne = USD 1,321,920/-), which is USD 1,189,728/- shall be claimable upon shipping out total 1377[mt].
>
> 2. Last 10% of the amount USD 132,192/- shall be claimable [through] the LC upon submission of final acceptance certificate [from Ramo].

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167 Transcript 18 July 2019 at p 90.

168 PCS at para 86.

169 Transcript 18 July 2019 at p 91; ABD Vol 1 at p 118; SOC Annex A at p 25.

170 ABD Vol 5 at pp 342–344; Transcript 19 July 2019 at p 123.

> Please provide your acceptance for the same within 24 hours, so that we shall release Further LC immediately …

113 This position is reflected in the Letter of Credit (Amendment No. 3) dated 9 June 2016 which states, "LC to be negotiated to 90PCT of the Contract Value using Shipping Document. Balance 10PCT of the Contract Value USD132,192.00 to be negotiated …".[171] The Letter of Credit (Amendment No. 3) was not executed as DLE did not agree to it.[172]

114 According to Guna, Dennis had asked Guna to reduce the 10% retention sums as DLE was not making much profit, facing delayed shipment by Dai Dung and having to bear the cost in Malaysia to paint the unpainted materials.[173] This is consistent with an earlier Whatsapp conversation on 14 May 2016, where Dennis informed Guna that he was making margins of "[less] than 5%" and "[could not] afford retentions this way".[174]

115 On or around 16 June 2016, parties further agreed that Ramo would hold 5% retention sum on the total value of structural steel.[175] The Letter of Credit (Amendment No. 4) was revised to reflect the 5% retention sum, noting that the new credit amount was decreased to US$1,211,136.00 for the total contract value for supply of 1,328mt of structural steel material at US$912/mt, which was 95% of the original price of US$960/mt.[176]

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171 Guna's AEIC at p 188.

172 Transcript 18 July 2019 at p 102.

173 Transcript 18 July 2019 at p 96.

174 ABD Vol 1 at p 118.

175 SOC at para 13.

176 Guna's AEIC at p 189.

116 On the balance of probabilities, I find that Ramo made a mistake in failing to exercise its right to retention monies of 10% under cl 16 of the 20 January LOA. In its letter dated 7 June 2016, Ramo exercised its right under cl 16 to retain 10% of the "*whole supply value*". I find it unlikely that DLE would agree to negotiate for a *lower* retention sum of 5% as reflected in the Letter of Credit (Amendment No. 4) if parties were never bound by cl 16 in the first place. The parties negotiated down the retention sum from 10% to 5% on the basis that Ramo was originally entitled to exercise its right under cl 16 for the 10% retention sum. It would be illogical for Dennis to beg Guna to "reduce" the retention sum to 5% if parties were not *ad idem* on Ramo's original right to invoke cl 16 for the retention sum of 10%. On DLE's case, DLE could have simply refused Ramo's "proposed" new and more onerous payment terms of 5% retention monies in its letter dated 7 June 2016 if Ramo was not contractually entitled to 10% retention monies in the first place. As such, I find that the parties formed the Oral Price Agreement with the intention to be bound by cl 16 in the 20 January LOA. It is also not uncommon for construction contracts to incorporate a retention monies clause.

117 Further, DLE is asking the court to use the subsequent conduct of parties to decide on issues of contract formation. In the recent case of *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 (at [78]), the Court of Appeal cited the view of Goh Yihan, "Towards a Consistent Use of Subsequent Conduct in Singapore Contract Law" [2017] JBL 387 that where the court is ascertaining whether a contract has been formed, evidence of subsequent conduct has traditionally been regarded as admissible and relevant, although there is some instability in this rule. Notwithstanding the Singapore cases that have used subsequent conduct to decide on issues of contract formation, I am careful not to place undue weight on evidence of the parties' subsequent conduct

to ascertain their intentions at the time of contract formation. In *ARS v ART and anor* [2015] SGHC 78 at [90], the High Court stated that:

> … given the complex relationships between human beings … conduct can be explained by a number of reasons which does not have only one explanation or there may be varying degrees of weight pointing to one conclusion. …

The subsequent conduct of Ramo in failing to exercise its right under cl 16 for the first six shipments cannot point conclusively to DLE's position that there was no such right for Ramo to hold any retention sums, leading to the inference that cl 16 was non-existent and to yet another inference that overall, the signed 20 January LOA was therefore not meant to be binding on the parties even after an agreement on price was reached.

118 In light of the evidence that (a) the 20 January LOA was signed, and expressly stated to be binding on parties; and (b) an Oral Price Agreement was subsequently concluded between the parties resulting in the formation of a binding Contract which included all the terms of the 20 January LOA (including cl 16), I reject DLE's submission on this point.

Correspondence before 10.34pm on 14 February 2016

119 I now deal with the subsequent question of whether the correspondence between the parties before 10.34pm on 14 February 2016 (*ie* the 2 February Message, 4 February Message, 4 February Email and 12 February Email) altered the terms of the 20 January LOA.

120 As explained above at [69], the Oral Price Agreement and crystallisation of the Contract occurred *before* the email dated 14 February 2016 was sent. The terms enumerated in the 20 January LOA are binding on parties, pending the finalisation of the price, which occurred during the Oral Price Agreement.

Without evidence that the parties agreed to amend the terms in the 20 January LOA before 14 February 2016 at 10.34pm, it must be taken that parties agreed to the terms evidenced in the 20 January LOA when they made the Oral Price Agreement. I now turn to analyse the parties' correspondence before 14 February 2016 at 10.34pm.

121 The 2 February Message by Dennis informed Guna that DLE needed time to study the costs as the budget provided by Ramo was too low. The 4 February Email and 4 February Message evidence an offer by Dennis to Guna of US$920/mt for 1200mt of structural steel of SS400 grade and delivery terms of "CIF to Malaysia" at US$90/mt, with a delivery period of 6 to 8 weeks. According to Guna, this was DLE's initial offer to procure the fabrication and supply of the steel at a total price of US$1,100/mt on "CIF terms" which only required DLE to deliver the steel to Pasir Gudang port and not the Site.[177]

122 According to Guna, this initial offer was negotiated down to US$960/mt, which comprised US$900/mt for the steel works and US$60/mt for "the costs for shipment from Vietnam to the Pasir Gudang port, marine insurance, clearing the shipment through customs (excluding the payment of any duties or taxes which would be borne by Ramo), and local transport to site".[178] I note that the unit price of US$960/mt corresponds to the unit price evidenced by the PO, which states that DLE's obligations involved "delivery of pre engineering steel structural material to site excluding unloading at site …". DLE's offer on 4 February 2016 was not accepted by Ramo and clearly did not amend the terms of the 20 January LOA.

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177 Guna's AEIC at para 24.

178 Guna's AEIC at para 25.

123 I now turn to the 12 February Email, which DLE relies on as evidence to support its case that the obligation for customs clearance did not fall under its scope of works.[179] In the email, Dennis writes to Sri that:

> … Please note that *as our agreement*, we will fabricate, pack, ship the cargo CIF to Malaysia & handle the inland transportation to the site (need site address). *Customs clearance & duties are by [Ramo] (as you will be the consignee & importer).*
>
> …
>
> … Unloading on site including container clearance and cleaning up to be handled by [Ramo].
>
> [emphasis added]

There is a possibility that the Oral Price Agreement could have been made *before* the 12 February Email. If so, it would follow that the 12 February Email might evidence a prior oral agreement between the parties to amend the terms of the 20 January LOA, in the manner stated in the email. This is because the words "[p]lease note that as our agreement" were used in the email, noting that the allocation of the customs clearance and duties were obligations on Ramo's part.

124 However, this possibility can be disposed of easily. The express description of DLE's obligations under the PO of "… *delivery* of pre engineering steel structural material *to site excluding unloading at site* under the main contract scope…" [emphasis added]puts paid to the possibility that the terms of the Oral Price Agreement were reflected in the 12 February Email. The PO, which both parties accept forms part of the Contract, expressly enumerates DLE's obligation to deliver the steel structural material *to site*. DLE's obligation

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179 D&CC at para 33.

for the delivery of steel structural material from Vietnam to the Site in Malaysia would necessarily include the customs clearance process unless specifically excluded, which it was not. This necessarily contradicts the supposed agreement in the 12 February Email which suggests that the parties had agreed that customs clearance and duties are to be handled by Ramo. In fact, the obligation of DLE to "unload on site", which was specified in the 12 February Email, was replicated and specifically excluded from DLE's scope of work in the PO. If the parties had indeed agreed before the Oral Price Agreement that customs clearance and duties were Ramo's to undertake, there is no reason why the PO should not similarly reflect the exclusion of DLE's customs clearance obligations in its scope of work, as the PO did for DLE's obligations to "unload on site". Moreover, Dennis had testified at trial that he could not agree to "deliver material to site" in cl 1(e) and informed Guna that DLE did not want to be involved in the delivery of the materials to site since that would include clearing customs.[180] Despite Dennis' understanding that the words "delivery … materials to site" would include the obligation to clear customs, DLE signed the PO, ostensibly entrenching DLE's obligation to deliver the steel structural material "to site" (which includes customs clearing).

125 Further, Ramo did not respond to affirm the contents of the 12 February Email which suggests that Ramo would handle the customs clearance and duties. The PO clearly reaffirms the parties' intention for DLE to be responsible for the customs clearance. Even if I accept DLE's case that only the PO and the Letters of Credit form the Contract, the PO by itself indicates that DLE is still responsible for the customs clearance.

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180 Transcript 23 July 2019 at pp 36, 39.

126 For the foregoing reasons, I find that the correspondence between the parties before 14 February 2016 at 10.34pm (*ie*, the 2 February Message, 4 February Message, 4 February Email and 12 February Email) did not amend the terms of the 20 January LOA. As such, the parties agreed to the scope of works defined in the terms of the 20 January LOA when they made the Oral Price Agreement.

Correspondence from 14 February 2016 onwards

127 The parties' email correspondence from 14 February 2016 onwards (see above at [42]–[56]) also does not evidence any agreement to vary the terms of the 20 January LOA. Further, as the parties did not signify their agreement by signing the 14 February Draft and 15 February Draft, the drafts do not vary the agreed terms enumerated in the 20 January LOA. The 14 February Draft and 15 February Draft could at best only be evidence of unsuccessful negotiations between the parties to amend the 20 January LOA terms on the issue of customs clearance.

128 Moreover, Dennis' Whatsapp message to Guna on 11 March 2016, promising that "… as my commitment to you, I'll *support to coordinate and clear the customs to site* [emphasis added]" if Ramo issued the letter of credit on CIF terms (in substance), also supports the parties' agreement evidenced in the PO that DLE would be responsible for customs clearance. Ultimately, the parties' decision on the customs clearance issue was spelt out as DLE's obligation under the description in the PO, "delivery … to site" without an express exclusion of the customs clearance obligation.

Customs Clearance Obligation (cl 1(e) of 20 January LOA and PO)

129 I now turn to whether DLE is contractually responsible for the customs clearance process under the Contract.

130 As discussed above, DLE is clearly bound by cl 1(e) of the 20 January LOA and the PO (see above at [22]) to undertake customs clearance and duties, as DLE's scope of work is described as "delivery of [pre-engineering] steel structural material to *site*". The parties' agreement on the customs clearance issue was also spelt out as DLE's obligation under the description in the PO, "delivery … to site" without an express exclusion of the customs clearance obligation. I find no reason why the customs clearance process should be excluded from DLE's responsibility.

131 Moreover, Dennis had signed the PO with his own understanding of the words "deliver … to site" would include the customs clearance obligation. As mentioned earlier, Dennis had testified at trial that he could not agree to "deliver material to site" in cl 1(e) and informed Guna that DLE did not want to be involved in the delivery of the materials to site since that would include clearing customs.[181] Despite Dennis' own understanding, DLE proceeded to sign the PO which describes DLE's scope of work with the words "deliver … to site". The incontrovertible inference to be drawn is that Dennis understood that DLE had the obligation to clear customs under the terms of the PO.

132 I also found no further variations to the Contract as regards the customs clearance obligations and the parties' correspondence from 14 February 2016 onwards (see above at [42]–[56]) did not evidence any agreement to vary the

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181 Transcript 23 July 2019 at pp 36, 39.

terms of the 20 January LOA. The 14 February Draft and 15 February Draft were also not signed and did not amend the 20 January LOA terms on the customs clearance issue.

133 Further, Dennis' Whatsapp message to Guna on 11 March 2016 confirms this, stating that "… as my commitment to you, I'll *support to coordinate and clear the customs to site*" [emphasis added]. This corroborates the parties' agreement evidenced in the PO that DLE would be responsible for customs clearance and a positive affirmation of DLE's commitment to "clear the customs to site".

APPOINTMENT OF GATEWAY AND JPL

134 On the other hand, DLE argues that Gateway, who had sub-contracted the customs clearance process to JPL, was appointed by Ramo.[182] As such, DLE submits that it is not contractually responsible to carry out the customs clearance process. However, this argument must be rejected in light of the documentary evidence militating in favour of the fact that DLE had *engaged* Gateway to do both transportation and customs clearance work as a forwarder and haulier agent, and Gateway had sub-contracted JPL as its customs clearance agent.

135 First, a letter from Gateway to Ramo dated 20 June 2017 states clearly that Gateway was "*the appointed haulier agent* for [DLE]" and that Gateway had introduced JPL to DLE to "carry out the necessary paper works application with Petronas as well as to custom clear all containers arriving to Pasir Gudang Port…".[183] Second, DLE sent an email dated 4 March 2016 at 2.51pm to

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182 DCS at para 116.

183 ABD Vol 9 at p 174.

Gateway, enquiring on "their best rates for Customs Clearance and Trucking Charges in Malaysia".[184] Mr Suresh Ephraim ("Suresh"), an employee from Gateway replied at 3.21pm on 4 March 2016 that Gateway had "no problem to facilitate the custom clearance in [P]asir [G]udang and arrange [delivery] to Rapid site".[185] This shows that DLE had made queries to Gateway on its customs clearance services. Third, DLE had emailed Gateway on 7 March 2016, giving information on the Harmonised System Code required for the Petronas Rapid Project for "Customs Clearance purpose".[186] Fourth, on 24 March 2016, Mr Guna requested for a meeting between DLE, Ramo and Gateway, noting that "[t]he persons to attend are: Mr. Dennis and his person handling the import, Mr. Suresh, the clearing agency of Mr. Suresh and Ramo's representatives".[187] It is evident that Suresh was appointed by Dennis, and the clearing agency was appointed by Suresh (employee of Gateway). Fifth, an email dated 11 August 2016 from Gateway to DLE states that "[s]ince JPL are your agents for clearance therefore they only have the account with johor port and this charges will be automatically billed to them and pass on over to [DLE] via Gateway".[188]

136 I now turn to address DLE's arguments that it did not appoint Gateway, and hence JPL, for customs clearance. First, Dennis testifies that "in [DLE's] bills of payment to Gateway, there was no payment for work that JPL [was] doing".[189] Dennis goes on to testify that the person that is responsible for the

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184 PBD at p 51.

185 PBD at pp 50–51.

186 PBD at p 48.

187 PBD at p 40.

188 Plaintiff's Bundle of Affidavits of Evidence in Chief Vol 1 ("1 PBAEIC") at p 281.

189 Transcript 23 July 2019 at p 160.

custom clearance would have paid.[190] As such, the lack of proof of payment to JPL would indicate that DLE was not responsible for customs clearance. However, this is squarely contradicted by Dennis' Whatsapp message to Guna on 5 July 2016, stating that "JPL side I issue payment to them already. Just spoke to suresh this morning".[191] Further, on 4 July 2016 at 4.44pm, JPL rejected Ramo's request for information on when shipping documents were submitted to CIDB and CIDB gave its approval for custom clearance, stating "I regret that we are unable to furnish you these details simply for the fact that Ramo is not our paymaster".[192] The objective evidence indicates that DLE, not Ramo, paid the customs clearance agent, JPL.

137 Further, in support of its contention that Gateway was appointed by Ramo and not DLE, DLE relies on an email dated 7 March 2016 that Suresh had sent to representatives of DLE and Gateway, which states that "Gateway Shipping has been appointed by Ramo Industries as their Clearance agent in Malaysia, approved by Customs already however we have not obtained import licence from Ramo Industries pertaining to this importation".[193]

138 However, I find this email unhelpful for the following reasons. First, I note that Ramo was not copied in this email, which was only forwarded to Ramo by Dennis on 17 August 2016 some five months later. Second, I accept Sri's explanation that Gateway had previously undertaken customs clearance work for Ramo for other imports, such as furniture, wall panels and sanitary features,

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190 Transcript 23 July 2019 at p 160.

191 ABD Vol 1 at p 144.

192 Guna's AEIC at para 30.

193 Defendant's Bundle of Affidavits of Evidence in Chief ("DBAEIC") at p 177.

but not for structural steel.[194] This was clarified by Guna's reply to Gateway in an email dated 18 August 2016, stating that with regard to structural steel imports, Ramo had never given any confirmation to Gateway and had only introduced Gateway to DLE.[195] Thereafter, Gateway sent an email at 3.25pm on 18 August 2016 to Ramo and DLE, clarifying that "[Gateway was] introduced to DLE to handle all transportation and customs clearance formalities for this rapid project via [Ramo]".[196] Most crucially, Dennis' own testimony at trial confirmed the fact that Gateway was introduced to DLE by Ramo to handle inland transportation and the customs clearance.[197] This puts paid to DLE's argument that Ramo, not DLE, appointed Gateway and JPL for the customs clearance purposes.

139 On the balance of probabilities, I find that DLE had *engaged* Gateway to do both transportation and customs clearance work as a forwarder and haulier agent, and Gateway had appointed JPL as its customs clearance agent. On the other hand, Ramo had merely *introduced* Gateway to DLE in order to handle transportation and customs clearance work.

140 For the above reasons, I find that under the Contract, DLE is contractually responsible for customs clearance process under the Contract.

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194 Transcript 19 July 2019 at p 204.

195 ABD Vol 8 at p 50; Transcript 19 July 2019 at p 207.

196 Transcript 23 July 2019 at p 207; ABD Vol 8 at p 48.

197 Transcript 23 July 2019 at p 206.

Conclusion

141 For the foregoing reasons, I find that the Contract is constituted by the 20 January LOA, the Oral Price Agreement and the PO, with the Letters of Credit being undisputed to be a further part of their agreement. On the Contract Issue, I so hold that the terms of the 20 January LOA are binding on the parties. DLE is bound by the obligations flowing from and evidenced in writing by the 20 January LOA, the PO and the Letters of Credit.

142 More specifically, DLE is bound by cl 1(e) of the 20 January LOA and the PO (see above at [22]) to undertake customs clearance and duties; the liquidated damages clause under cl 14 of the 20 January LOA (see above at [23]); and the retention monies clause under cl 16 of the 20 January LOA (see above at [24]). Having dealt with the Contract Issue, I now turn to analyse the respective parties' claim and counterclaim under the Liability Issue.

The Liability Issue

Bifurcation of Trial: Quantum of Liability or Damages

143 In January 2019, by consent of both parties, I ordered bifurcation of the trial into two phases pursuant to Summons No 345 of 2019 ("Summons 345"): (a) the Liability Phase and (b) the Assessment of Damages Phase. Under Summons 345, I determined that in the present tranche (*ie*, the Liability Phase), the issues of the existence, scope and extent of each head of liability will be dealt with, while I will deal with issues of the quantum of damages under each head of liability in the Assessment of Damages Phase.

144 Before I deal with the substance of the Liability Issue, I first address the parties' dispute over what constitutes an issue of *liability* to be decided on in the

present judgment, and what constitutes an issue of damages to be decided on in the Assessment of Damages Phase (for the Shortfall Issue and the Unpainted Steel Issue).

145 Ramo submits that the present tranche in the Liability Phase necessitates the court's determination of the following: (a) the *extent* of the shortfall in quantities of the structural steel delivered under the Contract, in relation to the Shortfall Issue; and (b) the *extent* to which DLE is in breach of the Contract for delivering unpainted structural steel, in relation to the Unpainted Steel Issue.

146 On the other hand, DLE makes the submission that the court should only decide in the present tranche, (a) whether DLE is liable for the shortfall in quantities of the structural steel delivered under the Contract in relation to the Shortfall Issue; and (b) whether DLE is in breach of the Contract for delivering unpainted structural steel in relation to the Unpainted Steel Issue.[198] DLE bases its argument on the manner in which the issues were worded in Summons 345 for the Shortfall Issue and Unpainted Steel Issue:

> (a) whether [DLE] is liable for the shortfall in quantities of the structural steel delivered under the Contract; and
>
> (b) whether [DLE] is in breach of the Contract for delivering unpainted structural steel.

147 On this issue, I am inclined to agree with Ramo. The underlying objective of bifurcation orders is for the saving of the court's time. It would be against the underlying objective for this court to only decide in the Liability

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198 HC/SUM 345/2019 at paras 1(f) and 1(g); DCS at paras 1–8.

Phase if DLE is liable for the shortfall in quantities of structural steel delivered and in breach of delivering the unpainted structural steel, in order to strictly follow the wording of Summons 345. In order to prove or disprove that DLE is liable for the shortfall in quantities of the structural steel and delivery of the unpainted structural steel, the parties would have adduced evidence on the *extent* of the shortfall of steel and the *amount* of unpainted structural steel delivered. This is especially so since DLE has already admitted to a shortfall in quantities of structural steel material delivered and admits that DLE did deliver some unpainted steel, but disputes the extent of the shortfall of steel and the quantity of unpainted steel delivered.[199]

148 I also note that in *Beckkett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452 at [81], the Court of Appeal emphasised that a bifurcation is only a procedural order that is not binding on a trial judge and in the interests of justice, the trial judge can modify or set aside the bifurcation order if necessary. The strict wording of the bifurcation order is clearly not binding.

149 For the above reasons, I will address the issues on the extent of liability in the Liability Phase (*ie* the extent of the shortfall of structural steel material and the quantity of unpainted structural steel delivered), but not questions of the quantum of damages *arising* from that extent of shortfall of structural steel material and unpainted structural steel delivered, which will be deferred to the Assessment of Damages Phase.

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[199] DCS at paras 3 and 7.

Ramo's Claim

The Shortfall Issue

150 I first turn to the Shortfall Issue, which concerns DLE's failure to supply the requisite quantities of the structural steel and its liability for over-claiming under the Letters of Credit. The extent of shortfall of structural steel material delivered will be decided in this tranche of the hearing, the Liability Phase.

151 It is undisputed that DLE had failed to deliver some quantities of structural steel to Ramo,[200] but the quantum of that shortfall is in dispute. Parties are also in agreement that DLE had claimed for and received payment from Ramo for 1,293.21mt of structural steel through the Letters of Credit.[201] The basis of Ramo's claim in the Shortfall Issue is the *excess* steel that DLE is liable for over-claiming on the Letters of Credit, being the amount of structural steel claimed to have been delivered in the invoices (*ie*, 1,293.21mt) over the actual quantity of steel that DLE had supplied (which is lesser than 1,293.21mt of structural steel). Ramo's case is that the excess payment received by DLE should be returned to Ramo.[202] The crux of the parties' disagreement lies in the total quantity of structural steel material that was *supposed to have been supplied* by DLE for which DLE had claimed for and received payment from Ramo, and the quantity of structural steel material *actually supplied*.

152 Francis, who was stationed in Malaysia at the Site, would oversee the opening and unloading of the containers containing the structural steel which

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200 D&CC at para 15.

201 D&CC at para 15; PCS at para 131.

202 PCS at para 171.

was delivered by DLE.[203] Francis and his team would first use the packing list provided by DLE to check whether all the materials stated in the packing list for each container had been supplied. In the event of any shortfall in the quantities of the structural steel supplied, Francis and his team would note this down. The packing lists received from Ramo would state the quantity of the goods supplied by the number of steel members and weight. By comparing the information DLE stated in its packing lists against Ramo's calculation of the weight of the steel members based on the Tekla model, Francis would derive the shortfall in the quantities of the structural steel supplied by DLE.[204]

153 As it was established at trial that both parties did not physically weigh the steel actually supplied by DLE,[205] the parties agreed to adopt a "joint calculation" methodology proposed by this court to calculate the shortfall of steel supplied based on drawings from the Tekla model and theoretical calculations to estimate the weight of the steel, since the quantity of structural steel purchased from Intanco Engineering Sdn Bhd ("Intanco") is undisputed.[206] The quantities submitted by parties at trial is reflected in the following table:

	Ramo (mt)	**DLE (mt)**	**Average (mt)**
(1) Total quantity of structural steel to be supplied	1,291.85	1,280.00	1,285.93

203 Francis' AEIC at para 14.

204 Francis' AEIC at para 20–21, p 320.

205 Transcript 24 July 2019 at p 99.

206 Transcript 24 July 2019 at pp 127–128, 134, 135.

(2) Quantity of structural steel purchased from third party[207] to make up the shortfall	27.24		
(3) Actual quantity of structural steel supplied (*ie*, (1) minus (2))	1,264.61	1,252.76	1,258.69
(4) Quantity of structural steel that DLE claimed for[208]	1,293.21		
(5) Overclaim by DLE (*ie*, (4) minus (3))	28.60	40.45	34.52

154 The joint calculation methodology is as follows. First, based on the packing list of items provided by Francis, the parties each submitted the total quantity of structural steel to be supplied by DLE based on their calculations generated from running the Tekla software using the Drawings attached in Annex 2 of the 20 January LOA. Ramo calculated that the amount was 1,291.85mt, while DLE calculated that the amount was 1,280mt,[209] with Dennis

207 4 PBAEIC at p 338.

208 D&CC at para 15; PCS at para 131.

209 Transcript 24 July 2019 at p 135.

admitting that DLE's figures were "very close" to Ramo's figures.[210] As such, the total quantity of structural steel to be supplied is 1285.93mt (*ie*, average of 1,291.85mt and 1,280mt).

155 Second, Ramo purchased 27.24mt of structural steel from a third party, Intanco, in order to compensate for the shortfall of steel supplied for Labour Block 3 and Supervisor Block 3 of the Petronas Rapid Project.[211] This figure is not disputed by parties.

156 Third, the actual quantity of structural steel that was supplied would be the difference in the total quantity of structural steel to be supplied and the quantity of structural steel purchased from the third party (*ie*, 27.24mt), giving an average of 1,258.69mt.

157 Fourth, the quantity of structural steel that DLE claimed for is agreed upon at 1,293.21mt.

158 Finally, the over-claim by DLE would be the difference between the average actual quantity of structural steel supplied and the quantity of structural steel that DLE claimed for. The average over-claim by DLE is thus 34.52mt.

159 Parties agreed that it would be more cost efficient to take the average of the resultant figure of the over-claim by DLE (*ie*, 28.60mt for Ramo and 40.45mt for DLE) than to dispute in court over the minor difference in quantities of structural steel.[212] However, in a letter dated 6 August 2019, DLE submitted

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210 Transcript 24 July 2019 at p 133.

211 Sri's AEIC at pp 338–340.

212 Transcript 24 July 2019 at pp 135–136.

an amended amount of structural steel supplied from 1,252.76mt to 1,255.41mt without justifying the reasons for the amended shortfall and without utilising the "joint calculation" method.[213] In its letter, DLE provided no explanation in its submissions on the reasons for the amended amount and no supporting documents supporting the amendment. For these reasons, I reject DLE's amended figure.

160 Therefore for the Shortfall Issue, I find that DLE is liable for an over-claim of 34.52mt of structural steel material. The quantum of damages owed to Ramo will be dealt with in the Assessment of Damages Phase.

The Unpainted Steel Issue

161 I next turn to the Unpainted Steel Issue. It is undisputed that DLE has admitted liability for delivering some unpainted structural steel and the real issue in contention is the actual quantity of structural steel that was delivered unpainted.

162 DLE supplied some structural steel that did not have the finishing layer of Nippon Misty Grey paint coating, which resulted in the structural steel beams being brown in colour, instead of grey.[214] In its pleadings and closing submissions, Ramo submits that DLE is liable for supplying 439.17mt of unpainted structural steel.[215] However, based on the site claim reports prepared by Ramo that detailed (a) the shipment number; (b) the building; (c) the part number; and (d) the photographs of the unpainted materials for some of the

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213 DLE's Letter dated 6 August 2019 at pp 24–25.

214 Francis' AEIC at para 23.

215 PCS at para 135.

shipments, the total amount of unpainted structural steel amounted only to 421.41mt, with the calculations as follows:[216]

Date of Shipment	**Shipment number**	**Quantities of Unpainted Steel (mt)**
17/04/16	1	48.046
24/04/16	2	30.027
01/05/16	3	93.681
26/06/16	7	81.521
29/06/16	8	32.177
03/07/16	9	77.393
05/07/16	10	58.564
	Total	**421.41**

163 Dennis accepted at trial that the figures of Ramo's site claim reports of the quantities of unpainted structural steel delivered represent the quantities of unpainted materials.[217] Dennis also testified that DLE was not in a position to

216 7 PBAEIC at pp 249–282.

217 Transcript 24 July 2019 at p 91.

confirm or provide another way to ascertain and confirm the quantities of the unpainted structural steel provided by Ramo's site reports.[218]

164 In the absence of contradictory evidence from DLE, I find that on a balance of probabilities, the site reports prepared by Ramo prove that DLE supplied 421.41mt of unpainted structural steel, which resulted in Ramo incurring third-party costs for the painting works, internal manpower and logistics costs. The unpainted structural steel delivered has also resulted in demurrage charges incurred by Ramo, which will be dealt with below at [190]. The issue of "legitimacy and reasonableness" of third-party costs that Ramo claims for the painting works, the internal manpower and logistics costs incurred will be dealt with at the Assessment of Damages Phase.[219]

The Improper Fabrication Issue

165 Under the Improper Fabrication Issue, Ramo claims for damages as a result of the following:

(a) DLE's failure to fabricate the structural steel material in accordance with the Drawings (Invoice No. 2289/16); and

(b) DLE's failure to supply sag rods and turnbuckles (Invoice No. 2291/16).

In the present Liability Phase, I will assess the extent to which DLE had failed to fabricate the structural steel in accordance with the Drawings, and DLE's failure to supply sag rods and turnbuckles. Parties accept that all costs in relation

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218 Transcript 24 July 2019 at p 90.

219 DCS at para 24(b), 25.

to whether the costs incurred to rectify the fabrication errors were reasonable (*eg*, number of man hours incurred and the reasonableness of the repair method) are to be reserved for the Assessment of Damages Phase.[220]

Invoice No. 2289/16: Fabrication Errors

166 Before I turn to analyse each category of fabrication error alleged by Ramo under Invoice No. 2289/16, I begin with some preliminary observations.

167 DLE concedes that there are some fabrication defects with the structural steel supplied.[221] Ramo provides an invoice detailing the types of fabrication errors compiled by Francis (Invoice No. 2289/16), claiming $99,491.78 for the costs of rectifying and modifying the structural steel supplied. The invoice encloses illustrative photographs of each type of error in fabrication, where Ramo marks out the issues with the fabrication of the structural steel and rectification works required. The Invoice No. 2289/16 and the accompanying photographs were sent to DLE on 12 October 2016 at 3.52pm.[222]

168 On the other hand, DLE provides no helpful evidence to contradict Invoice No. 2289/216. As per Ramo's request, DLE sent two personnel from Dai Dung to the Site in Malaysia for inspection of the missing items and the modification works in August 2016. However, the two personnel were only present on site for 30 minutes, according to Francis.[223] Having looked at the report produced by the Dai Dung personnel, I found the report inconclusive and

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220 Transcript 16 July 2019 at pp 142–143; Defendant's Reply at para 70; PCS at para 150.

221 Transcript 16 July 2019 at pp 119–120.

222 ABD Vol 8 at pp 244-245.

223 Transcript 17 July 2019 at pp 32–33.

unhelpful in verifying the accuracy of the errors of fabrication of the structural steel stated in the Invoice No.2289/16.[224]

169 Instead, DLE takes issue with Ramo's proof of the fabrication errors due to their "lack of specificity" and Ramo's failure to correlate the alleged defects to the drawings for the steel structures that were to be fabricated.[225] In that respect, I have taken DLE's argument into consideration, when appropriate, in my decision.

170 Additionally, DLE took issue with the fact that Ramo did not provide photographs of every single fabrication defect.[226] However, I note that it is not strictly necessary for Ramo to measure and provide photographs of every single defect. To require Ramo to do so would result in an unreasonably onerous burden of proof. In *Millenia Pte Ltd (formerly known as Pontiac Marina Pte Ltd) v Dragages Singapore Pte Ltd (formerly known as Dragages et Travaux Publics (Singapore) Pte Ltd) and others (Arup Singapore Pte Ltd, third party)* [2019] 4 SLR 1075 at [298], the High Court accepted evidence of a witness' testimony on the number of oversized pin holes in the panels, who had measured pin holes on 81 out of 240 panels and extrapolated from the sample. Such a pragmatic approach will similarly be adopted in the present case.

171 With that in mind, I turn to analyse the various categories of alleged fabrication errors detailed in Invoice No. 2289/16.[227]

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224 DLE's letter dated 6 August 2019, pp 5–6.

225 DCS at para 135.

226 DCS at para 137; Transcript 17 July 2019 at p 63; DCS at para 142(c).

227 7 PBAEIC at p 284.

COLUMN GIRDER BEAM NEW HOLE DRILLING WORK

172 For the Column Girder Beam New Hole Drilling Work category, Ramo asserts that 324 holes on the girder beams supplied by DLE had been drilled in the wrong place, resulting in slanted beams when they were installed.[228] According to Francis, the 324 holes had been drilled at the wrong place and had to be re-drilled (18 holes per column for 18 columns).[229] Ramo provided a photograph of a slanted horizontal girder beam when the girder beam bolt holes were used, demonstrating that the girder beam hole was drilled in the wrong place.[230] Ramo also provided the locations where the columns had new holes drilled, according to the Drawings.[231] As a result, Ramo had to conduct modification works to ensure that the horizontal girder beams were straight instead of slanted.

173 With Francis' testimony, the invoice, an illustrative photograph of a slanted horizontal girder beam as a result of the mismatched location of the bolt holes and the absence of contradictory evidence from DLE, I accept Ramo's evidence on a balance of probabilities that DLE is liable for the wrongly drilled 324 holes.

STAIRCASE STRINGER MODIFICATION WORK

174 For the Staircase Stringer Modification Work, Ramo submits that the stringer beams supplied by DLE for the staircase were too short and

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228 PCS at para 145.

229 Transcript 17 July 2019 at pp 7–9; PBD 19.

230 7 PBAEIC at p 291.

231 PBD at p 19.

misaligned,[232] with 60 stringers out of 84 stringers that were faulty and required modification as they were out of alignment.[233] Francis provided photographs of the staircase modification work that demonstrated the mismatching dimensions of the stringers and the misalignment.[234] It is in evidence that DLE managed to supply 24 stringers out of the 84 stringers which were functional and manufactured in accordance with the Drawings.[235] There were also no problems with the stringers supplied by another third party contractor, who was similarly provided the same specifications as in the Drawings.[236] As such, I reject DLE's allegation that the Drawings must have been wrong. There is no evidence adduced by DLE to show that the Drawings themselves were wrong. To my mind, it is more likely than not that the Drawings provided by Ramo were accurate. If it had been the case that Ramo was claiming that all 84 stringers were faulty, it would have been plausible that the Drawings provided by Ramo had the wrong specifications and DLE had manufactured all 84 stringers in accordance with inaccurate Drawings which resulted in the misalignment for all the stringers. However, this is not the case. There were fabrication errors in *some* of the stringers, and not *all* of the stringers. Hence, I find it far more likely that it was DLE's poor quality control and manufacturing (rather than inaccurate Drawings) which resulted in the faulty 60 stringers out of 84 stringers manufactured. DLE is thus liable for the faulty 60 stringers.

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232 Transcript 16 July 2019 at pp 149–150.

233 Transcript 17 July 2019 at pp 72, 74.

234 7 PBAEIC at p 292.

235 Transcript 17 July 2019 at p 75.

236 Transcript 17 July 2019 at p 75.

TIE BEAM AND GIRDER HOLE DRILLING WORK

175 Under this category of fabrication errors, there were some holes that were too small and had to be enlarged, while there were some additional holes that were in the wrong place and had to be drilled for the tie beams and girders.[237] It is in evidence that some of the holes were, however, accurately drilled.[238] In total, Ramo claims that 2106 holes were too small or were in the wrong place for the blocks.[239] Holes of 18mm should have been drilled,[240] based on the requirements of a hole size for M 16 bolts that were specified in the Drawings.[241] However, the photographs attached to the invoice show that the measurements of the holes drilled were only 16mm in diameter, when it should have been 18mm.[242] Again, I reject DLE's argument that Ramo was required to take photographs of and measure every single hole that was allegedly wrongly drilled.[243] Based on the evidence before me, I find that DLE is liable for the fabrication errors in relation to the 2106 holes.

STAIRCASE TIE BEAM MODIFICATION WORK

176 The fabrication errors for the Staircase Tie Beam Modification Work are similar to defects in the tie beam and girder: there were holes that were too small that had to be enlarged, and new holes that were required to be drilled due to their wrong placement. In total, there were 288 holes that were defective, and

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237 Transcript 17 July 2019 at pp 58, 84.

238 Transcript 17 July 2019 at p 86.

239 Transcript 17 July 2019 at pp 83–86; PBD at p 23; 7 PBAEIC at pp 291, 297–300.

240 Transcript 17 July 2019 at p 59.

241 DB at p 11; PBD at pp 23–24.

242 7 PBAEIC at p 298.

243 DCS at para 142(c).

photographs of the locations of some of the holes that had to be drilled were taken.[244] Based on the evidence before me, I also find DLE liable for the fabrication errors in relation to the 288 holes on a balance of probabilities.

COLUMN HEIGHT MODIFICATION WORK

177 There were fabrication errors with two columns out of over 300 columns supplied by DLE that required column height modification works.[245] The length of the two defective columns were too long for the first column and too short for the second column. Both columns had to be modified to the correct length.[246] Photographs of defective column heights were also adduced.[247] Based on the evidence, I find DLE liable for the fabrication errors for these two columns.

CONNECTING BEAM MODIFICATION WORK

178 Under this category of defects, the beam lengths for 12 connecting beams supplied by DLE were too short and "could not [be] attach[ed] to the weight".[248] The beam lengths for the 12 beams were shorter than what was specified by 30 to 40mm.[249] A photograph was provided to evidence the gap that resulted. With the gap, the connecting beam could not be attached to the weight due to the wrong length of the connecting beam.[250] Ramo had to weld an

244 Transcript 17 July 2019 at p 87.

245 Transcript 17 July 2019 at pp 87–88.

246 Transcript 17 July 2019 at p 88.

247 7 PBAEIC at p 294.

248 Transcript 17 July 2019 at p 88.

249 Transcript 17 July 2019 at p 89.

250 7 PBAEIC at p 290.

extension piece to each beam before the beams could be bolted.[251] On a balance of probabilities, I find that DLE is liable for the modification work required for the 12 short beams.

COLUMN BASE PLATE ADDITIONAL HOLE DRILLING WORK

179 Ramo claims that there were 156 holes which were in the wrong place for the column base plates. However, upon comparing the position of the holes drilled after modification works had been carried out in the photographs provided with the positions of the holes specified by Ramo in Drawings, I find that the position of the top two holes in the photograph and the Drawings do not match.[252] It is evident that the defect arose from the specifications in the Drawings, and not DLE's manufacturing.

180 In fact, I find that the location of the top two holes specified in the Drawings more similar to DLE's manufactured holes for the column base plate than the location of the top two holes in Ramo's post-modification works. It is more likely than not that the specifications of the location of the holes in the Drawings provided by Ramo were inaccurate and resulted in the alleged fabrication error. As such, I find that the alleged fabrication defects were not a result of DLE's manufacturing errors. For the foregoing reasons, I find that Ramo has not proven DLE's liability for this category of defects on a balance of probabilities.

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251 Transcript 17 July 2019 at p 89.

252 PB at p 19.

PURLIN STIFFENER MODIFICATION WORK

181 Ramo claims that four purlin stiffeners were wrongly located and not connected to the purlin. This resulted in the stiffeners having to be cut, moved closer to the purlin and welded.[253] A photograph was provided to show the wrong location of the stiffeners.[254] I find that Ramo has proven DLE's liability for this category of defects.

BRACING CASATE PLATE MODIFICATION WORK

182 For this category of defects, Ramo claims that the casate plates were longer than they should have been, affecting the fixing of the beams.[255] The casate plates were in the wrong location and the beams could not be fixed. As a result, the casate plates had to be cut and welded nearer to the beams.[256] Photographs of this fabrication error were provided and demonstrated the location of the casate plates.[257] I find that Ramo has proven DLE's liability for this category of fabrication errors.

183 In summary, I find that Ramo has proven DLE's liability for the fabrication defects for all categories, save for the category of Column Base Plate Additional Hole Drilling Work.

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253 Transcript 17 July 2019 at pp 100–101.

254 7 PBAEIC at p 296.

255 Transcript 17 July 2019 at p 104.

256 Transcript 17 July 2019 at p 104.

257 7 PBAEIC at p 295.

Invoice No. 2291/16: Failure to supply sag rods and turnbuckles

184 Ramo further claims for its additional purchase of sag rods and turnbuckles, as a result of DLE's failure to supply these requisite quantities of materials in accordance with the Drawings. Ramo provides Invoice No. 2291/16, an invoice of the additional purchase of these materials from third parties.[258] DLE has not provided evidence to the contrary and I find DLE liable for the failure to supply the sag rods and turnbuckles.[259]

185 The assessment of the quantum of Ramo's claim for the Improper Fabrication Issue will be dealt with in the Assessment of Damages Phase.

The Demurrage Issue

186 Under the Demurrage Issue, Ramo's case is that demurrage charges of RM624,420.43 arose from the delay resulting from (a) DLE's delayed submission of shipping documents in the customs clearance processes; and (b) DLE's failure to deliver painted structural steel. Ramo submits that DLE is liable to reimburse Ramo for the demurrage payments of RM624,420.43 that Ramo had made on DLE's behalf to ensure the release of the structural steel from the port.[260] As DLE refused to pay for the demurrage charges at the time that they were being incurred, Ramo paid for the demurrage charges first on DLE's behalf in order not to further delay the delivery of the structural steel to the Site and to mitigate its losses and prevent further demurrage charges from being incurred.[261] Ramo made payments for the container deposits to FM Global

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258 Francis' AEIC at paras 28–30; PBD pp 128–134.

259 Transcript 24 July 2019 at p 14.

260 PCS at para 10.

261 Guna's AEIC at para 69.

Logistics ("FM Global") by way of cheque,[262] from which demurrage and detention charges were deductible, on DLE's request as DLE did not have a Malaysia bank account and was not able to issue cheques for payments in Malaysian Ringgit.[263] It is this sum that Ramo is seeking a reimbursement of from DLE.

187 For the purposes of this section, I find that DLE had caused some delay, resulting in the demurrage charges incurred. Parties agreed that DLE's liability should be decided in the Liability Phase (*ie*, the present judgment) and the quantum of demurrage charges that the Ramo is entitled to seek reimbursement from DLE will be a matter for the Assessment of Damages Phase.[264] For the Demurrage Issue, should I find DLE liable for the reimbursement of the demurrage payments, the determination of the specific *extent* of the delays caused and the resulting demurrage charges will be deferred to the Assessment of Damages Phase.

188 In the Liability Phase, Ramo has not quantified and particularised the exact number of days of demurrage charges incurred as a result of (a) DLE's delays caused in the customs clearance process; and (b) DLE's failure to deliver painted structural steel. I also note that Ramo reserves the right to prove the full amount of the demurrage payments incurred at the Assessment of Damages Phase.[265] DLE also agrees that the quantum of demurrage that Ramo is entitled

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262 Mahe's AEIC at para 23.

263 Mahe's AEIC at paras 16–24.

264 DCS at para 132(c); PCS at para 138; Guna's AEIC at para 68; Tab 3 at 3 PBAEIC at pp 116–117.

265 Guna's AEIC at para 68.

to seek reimbursement from DLE is also a matter for the Assessment of Damages Phase.[266]

189 Taking that into account, this court will decide on DLE's liability on the demurrage charges, but the extent of the delay (*ie*, number of days of delay caused) for each of DLE's actions and the quantum of demurrage charges incurred as a result will be deferred by consent of the parties to the Assessment of Damages Phase.

Delay from failure to deliver painted structural steel

190 I first start with the delay caused by DLE's supply of some unpainted structural steel material. As I found earlier at [164], DLE supplied 421.41mt of unpainted structural steel. This resulted in the containers carrying the shipments to be transported first to a yard for painting works to be carried out, before they were delivered to the work site in Pengerang.[267] The containers were retained at the painting yard so that they could be used to send the painted materials to the work site, before returning the empty containers to Pasir Gudang port. However, as more unpainted materials arrived from incoming shipments, the painting yard had insufficient storage space for these containers.[268] The shipping liner refused to release the 11th to 13th shipments from the port, until the containers for ninth and tenth shipments were returned to the port.[269] Ramo was unable to return the containers for the ninth and tenth shipments to the port as the painting works

266 DCS at para 132(c).

267 SOC at para 67.

268 Mahe's AEIC at para 37.

269 SOC at para 66; Guna's AEIC at p 45.

had to be carried out on the unpainted structural steel first.[270] As a result, the steel being unpainted caused demurrage fees to be incurred. At trial, Dennis accepted that demurrage charges were incurred as the containers containing unpainted structural steel had to be transported to the painting yard and could not be returned on time until the painting was completed.[271]

191 As such, I find that DLE is liable for the demurrage fees incurred for its failure to deliver painted structural steel for the ninth and tenth shipment. The exact extent of the delay caused and the quantum of demurrage charges incurred as a result of DLE's delivery of unpainted structural steel will be dealt with in the Assessment of Damages Phase.

Delays in the customs clearance process

192 Next, I turn to the demurrage charges incurred as a result of the delays caused by DLE in the customs clearance process. I found earlier that DLE is contractually liable for the customs clearance process under the Contract (see above at [140]).

193 To recap, DLE appointed Gateway as its haulier agent and Gateway appointed JPL as the customs clearing agent for the shipments who would "carry out the necessary paper works application with Petronas as well as to custom clear all containers arriving to Pasir Gudang Port once obtained the Exemption" (see above at [135]).[272]

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270 SOC at para 67.

271 Transcript 24 July 2019 at p 158.

272 ABD Vol 9 at p 174.

194 Upon arrival, the shipments for prefabricated structural steel had to undergo clearance at the Malaysian customs. For the prefabricated structural steel imported from Vietnam, DLE was required to obtain the COA and an import licence from the CIBD in Malaysia before the prefabricated structural steel shipments could be released. DLE's role involved coordinating the customs clearance and obtaining the COA and the import licence from CIBD to ensure that the release of the shipments and the return of the containers were completed within the 28-day laytime (*ie*, without any additional fees being incurred beyond the 14-days free period for demurrage and 14-days free period for detention).[273] DLE was aware that the estimated time for obtaining the COA and customs clearance was about 9–13 days, such that it was required to obtain 28-day laytime (*ie*, 14-days demurrage, 14-days detention) from the shipping liner to accommodate this timeline.[274] This is evidenced by an email dated 14 April 2016 at 6.29pm from Gateway to DLE, informing DLE of the need for the 28-day laytime:[275]

> 3. Please prepare the 2nd set Draft BL and request confirmation and approval from shipping Line before vessel sail to ensure No issues from their documentation team, otherwise JPL won't be able to clear the shipments [on time].
>
> 4. There will be local charges at Port of discharge eg (Terminal handling charges, Documentation fee, Import service/agency fee and also EDI fee for transmitting, as well as switch BL fee etc) All this charges must be arranged Either To Gateway Shipping or JPL in advance enable us to collect the CONTAINER DELIVERY NOTE (CDN) to arrange our haulier to pull laden Containers from Inside port CY to customs check point for custom clearance etc. If there are delays than port demurrage will kick in.

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273 Sri's AEIC at para 45; SOC at para 56.

274 Sri's AEIC at para 45.

275 Sri's AEIC at paras 45–46, 5 PBAEIC at pp 175–176.

> 5[.] Please request supplier to apply *at least 14 days free demurrage at port of destination as well as free detention of At least 14 days free use of containers in case there are any discrepancies with customs.*
>
> [emphasis added]

The shipments could only be released for delivery to the Site upon the successful clearance of the customs processes, as spelt out under Steps 8, 9 and 10 of the agreed procedure between parties in the email dated 20 April 2016 (see above at [65]):

> Step 8: Gateway shipping shall handover the Switch BL to JPL for customs clearance and releasing the containers. *Correct*
>
> Step 9: JPL shall be liaising with the Pasir Gudang customs and get it cleared. *Correct*
>
> Step 10: Upon clearing the customs, JPL shall approach the liner's local releasing agent 'BBB' for releasing of the containers. *Correct*

195 In order to obtain the COA, DLE had to prepare or procure the Certificate of Origin and the Original Manufacturer's Certificate (*ie*, the mill test certificate) so that the documents could be submitted to CIDB.[276] DLE's obligation to prepare the Certificate of Origin was evidenced by DLE's email to JPL dated 5 April 2016 at 2.15pm enquiring specifically as to whether the Certificate of Origin was required in light of PRPC's tax exempt status.[277] A further email dated 5 April 2016 at 4.23pm from DLE to JPL confirms that "[DLE] will prepare Certificate of Origin … consignee as PRPC".[278] The e-mail

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276 Guna's AEIC at paras 51–52; Tab 19.

277 Guna's AEIC at para 54; 2 PBAEIC at p 376.

278 Guna's AEIC at para 55; 2 PBAEIC at p 371.

dated 20 April 2016 from JPL to DLE explains the process of obtaining the COA from CIDB and customs clearance for the prefabricated structural steel:[279]

> I wish to bring to your attention the process flow for this clearance.
>
> 1. Apply for COA upon receipt of manufacturing letter and Mills.
>
> 2. Proceed to CIDB to pay over the counter for the application.
>
> 3. Upon approval, insert the CIDB number onto the Customs form register online.
>
> 4. Once Customs form is registered, request GST bank draft from PRPC.
>
> 5. Once BD is received, cargo is cleared through Customs, Gateway will arrange deliver.
>
> *The time span.*
>
> 1. CIDB- approx. *5-7 working days*. Need to go to Tampoi for payment.
>
> 2. Request for BD from PRPC-*3–5 working days*. Cheque is issued in KUL. Need to collect and courier to PGU.
>
> 3. Customs clearance- *1 day*.
>
> Thus, I hope that you have requested sufficient free time with the shipping line.
>
> [emphasis added]

196 DLE's failure to relay shipment documents is first evidenced by the 20 June 2017 letter by Gateway to Ramo, which states that JPL had faced *long delays* from DLE in relaying the shipment documents which resulted in the demurrage charges:[280]

> In order for JPL to carry out the exemption process they require full set of documentation such as Original Bills of Lading, Cargo packing List, Invoices/Mill Certificate etc. which DLE Solutions must compile all this within a very short time and hand over to

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279 Guna's AEIC at para 72, Tab 19.

280 ABD Vol 9 at p 174.

> [JPL] to perform the process of application for Tax Exemption. However, JPL was *facing long delays from DLE Solutions in relaying the shipment documents thus causing a long delay for containers to be pulled out from Pasir Gudang port.* In view of this PORT STORAGE/ EXTRA Movement Charges as well as Container DEMURRAGE/DETENTION has [arisen]. [emphasis added]

I note that this letter is a general allegation by Gateway of DLE's delay in relaying of shipment documents and was sent almost a year after the alleged delays occurred. The letter also does not particularise the shipment documents, number of days of delay and the dates in which DLE failed to send the shipment documents in time for each shipment. With that, I turn to analyse other documentary evidence that is more contemporaneous in time with the acts of delay caused by DLE for each shipment document.

197 An email dated 28 May 2016 from Ramo to DLE records the following:[281]

> With regards to enclosed invoices, we are settling the payment now to expedite the trucking out of containers from port.
>
> All these happened because of incomplete overseas shipment procedure followed by Vietnam side. *Mill cert provided by them is from a non-accredited body. This has delayed beyond the free demurrage period and still counting.* These charges shall be reimbursed from your side.
>
> [emphasis added]

This shows that the delay in customs clearance was caused by DLE submitting the wrong mill test certificates which were from a non-accredited body such that it had to be rectified, thereby delaying the customs clearance and exceeding the 28-day laytime.[282]

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281 Sri's AEIC at para 53; Tab 30.

282 Sri's AEIC at para 53.

198 On 27 April 2016, JPL also complained about the delay in the customs clearance process as the mill certificates submitted by DLE were illegible and required time to be rectified.[283] A Whatsapp group conversation on 27 April 2016 with representatives from JPL, Gateway, DLE and Ramo records the following messages:[284]

> 4/27/16, 12:34 PM - Dennis DLE: The Switched BL should be available by tomorrow if we can get the Original BL cleared by today. We chased UOB already as documents from Vietnam arrived UOB on monday. Mahe please follow up to push UOB Singapore pls. We have been chasing every hour also
>
> 4/27/16, 12:48 PM - Bernard JPL: Mr. Suresh, the mills were sent to me on Fri 22/4. I can only check on Mon 25/4. *The print is almost [illegible]. I hv to get a covering letter frm PRPC n then only submit to CIDB. That was yesterday. Now I hv to send some1 to CIDB to make cash payment so that no time is wasted when we get the approval.* When the approval is obtained, we hv to insert the approval number onto the Customs 1 n submit. Upon registration of the KI, apply to PRPC for the BD. I hv done my best n even more. I est by end of next week. *Future shipment, pls send all relevant docs before ETA vessel.* I m sorry i sound harsh but i m not sitting on my hands.
>
> 4/27/16, 12:50 PM - Suresh Gateway Malaysia: Hi Bro. *Noted on this delays and consequences arising.* .
>
> 4/27/16, 12:50 PM - Dennis DLE: bernard, we have all the mill certs already and they are all the same for the whole project
>
> 4/27/16, 12:51 PM - Dennis DLE: so we send you in a batch you can use them
>
> 4/27/16, 12:51 PM - Dennis DLE: for the rest of the application
>
> 4/27/16, 12:52 PM - Bernard JPL: Aporeciate [*sic*] if u pls send it together with the CIPL n BL.
>
> 4/27/16, 12:54 PM - Dennis DLE: CIPL And BL internal document I have them ready
>
> 4/27/16, 12:56 PM - Bernard JPL: Ok.

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283 Guna's AEIC at para 44.

284 ABD Vol 3 at pp 53–54.

> 4/27/16, 2:43 PM - Guna: Hi guys.. It seems the container going to lie in the yard for more than three weeks. Try your level best to speed up. And,*Dennis can you submit all the documents in advance to them, for further shipments. This is delaying the project a lot.* All the erector set are mobilized to site and sitting idle. Dennis, you know how difficult to get skilled manpower in Malaysia. that too get them inducted in Rapid. *So,kindly support us to avoid further delay...*
>
> 4/27/16, 2:45 PM - Dennis DLE: *Yes sir.*
>
> 4/27/16, 2:45 PM - Dennis DLE: *I will personally see to the documents to be ready in advance.* Now we have all the requirements very clear
>
> [emphasis added]

JPL suggested that all relevant shipping documents should be submitted before the estimated time of the vessel's arrival at Pasir Gudang for future shipments.[285] Dennis agreed and promised to personally see that the documents would be ready in advance for future shipments, impliedly admitting that DLE was at fault and that he now had "all the requirements very clear".

199 Further, Ramo argues that Dai Dung's late submission of documents to the bank resulted in delays that ate significantly into the 28-day laytime. Parties had agreed that the payments under the Sub-Contract were to be effected by the Letter of Credit issued by UOB. Whenever each shipment departed from Vietnam, Dai Dung, *on DLE's behalf*, would first present the bill of lading and the other relevant shipping documents together with the Letters of Credit to its bank in Vietnam for eventual payment to DLE as beneficiary under the Letters of Credit.[286] This is under Steps 4 and 5 of the agreed procedure between parties in the email dated 20 April 2016 (see above at [65]), reproduced as follows:[287]

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285 Guna's AEIC at para 44.

286 Guna's AEIC at para 74.

287 ABD Vol 2 at p 176.

> Step 4: Dai Dung collects the Master HOUSE BL from the liner in Vietnam and submitting to BANK for discounting the LC. Since, it is a LC based shipment, the consignee shall be the LC issuing bank in Singapore- In this case it is UOB. *Correct*
>
> Step 5: Upon receiving of LC discount documents from Vietnam, UOB clears the payment formalities and releasing the shipping documents to RAMO in Singapore. *Correct*

200 Ramo submits that Dai Dung would "generally sit on submitting DLE's claim to the bank".[288] At times, Dai Dung would only submit the shipping documents to UOB 10 to 15 days after the shipment had departed from the Ho Chi Minh port.[289] Upon submission of the shipping documents to the bank, the said documents would take about another five days to reach DLE's bank in Singapore.[290] Thereafter, DLE would collect these documents and replace the invoice issued by Dai Dung to DLE with an invoice issued by DLE to Ramo, which DLE would then submit to Ramo's bank in Singapore for payment.[291] Only when Ramo's bank made payment to DLE would Ramo's bank then handover the original shipping documents to DLE, who would then approach the shipping liner to procure a switch bill of lading which would show the consignee as PRPC, before the shipping documents including the switch bill of lading could be handed to JPL to process the customs clearance work.[292] DLE was also responsible for procuring the switch bill of lading.[293]

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288 Guna's AEIC at para 75.

289 Guna's AEIC at para 75.

290 Guna's AEIC at para 75.

291 Guna's AEIC at para 75.

292 Guna's AEIC at para 75.

293 Guna's AEIC at paras 48–50.

201 Dai Dung's delay in submission of DLE's claim to the bank is evidenced by a table submitted by Ramo that outlines the number of days between the Departure date from Ho Chi Minh port and Date of Release of Shipping Documents from UOB, supported by the dates on the bills of ladings and UOB collection notices for each shipment, summarised as follows:[294]

Shipment No.	Days between the Departure date from Ho Chi Minh port and Date of Release of Shipping Documents from UOB
1	12
2	12
3	12
4	11
5	7
6	13
7	15
8	19
9	15
10	30

[294] Guna's AEIC at para 76; Tab 28.

11	19
12	16
13	8

Ramo argues that evident from the table, the delay caused by the late submission of shipping documents ate significantly into the 28-day laytime, whereas DLE had to ensure delivery of the structural steel without additional port charges.[295] I further note that in its submissions, DLE does not dispute the figures submitted by Ramo in the above table. Dai Dung is also DLE's manufacturer of structural steel material, and any delays in the process caused by Dai Dung would thus be attributed to DLE through vicarious performance: *Chitty on Contracts* (HG Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at para 19-082. As such, I find DLE liable for the delay caused by Dai Dung's late submission of documents, on DLE's behalf, to the bank.

202 Finally, I turn to Dennis' concessions at trial. First, Dennis accepted that the demurrage charges would be incurred for any delay arising in the customs clearance process.[296] Dennis was aware that Ramo was receiving invoices from FM Global and also agreed that Ramo had no choice but to make payments for the demurrage charges to FM Global in order to avoid the containers for subsequent shipments from being "stuck in the port".[297] Most crucially, Dennis

295 Guna's AEIC at para 77.

296 Transcript 24 July 2019 at pp 157–160.

297 Transcript 24 July 2019 at p 160.

admitted that if the Court finds DLE responsible for the customs clearance process, the demurrage payments should be reimbursed by DLE to Ramo.[298]

203 At trial, Dennis alleged that Ramo had also caused delay in the customs clearance process by retrieving the shipping documents from the bank and passing it to DLE to switch the bill of lading.[299] In support of this argument, DLE presents a table of dates documenting when DLE had allegedly submitted shipping documents to Ramo for the purposes of custom clearance.[300] However, Dennis admitted under cross-examination that he did not have any supporting documents for the purported dates in the table. Taking into account Dennis' lack of credibility, the table of dates adduced must be given its due weight. Dennis eventually conceded that he was not asserting that Ramo had caused any delay in liaising with the bank, but merely that he wanted to show no delay on DLE's part.[301]

204 Having considered Dennis' admissions at trial and the aforesaid documentary evidence, I find DLE liable for causing the delay in the customs clearance process, which in turn caused the demurrage charges to be incurred. The exact quantification of the number of days delayed and the quantum of demurrage charges will be dealt with in the Assessment of Damages Phase.

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298 Transcript 24 July 2019 at p 160.

299 Transcript 24 July 2019 at pp 53–54.

300 DBAEIC at p 223.

301 Transcript 24 July 2019 at p 173.

The Delay Issue

205 For the Delay Issue, Ramo's claim is that DLE is responsible for the delay in the delivery of the structural steel for 270 days from 10 April 2016 to 4 January 2017 (4 January 2017 inclusive) and is liable for liquidated damages at RM10,750 per day, amounting to RM2,889,000. DLE's extent of liability (*ie*, the extent of DLE's delay in delivering the structural steel in accordance with the delivery schedule) will be dealt with in the present tranche and the quantum of liquidated damages will be deferred to the Assessment of Damages Phase.

Delivery Schedule

206 I start with the delivery schedule that binds both parties based on the Contract. As regards the obligations that arise between the parties for the delivery schedule of the structural steel, I find that DLE is bound by the delivery schedule stated in cl 9 of the 20 January LOA, which states that "DLE [is] to note that the entire work has to be executed in strict accordance with [Ramo's] building programme and/or such other programme and schedule issued to DLE to enable [Ramo] to complete the Main Contract Works for the handing over to the Employer by the contractual Completion Date". I note that the 20 January LOA did not enumerate the specific delivery dates as Dennis had to make further queries with Dai Dung on the dates that DLE could commit to.

207 However, Dennis accepted at trial that Ramo could dictate the terms of the delivery schedule, if the 20 January LOA is found to be binding on parties and part of the Contract.[302] As mentioned earlier, commercial freedom allows Ramo, the party with a stronger bargaining power, to impose onerous terms and

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302 Transcript 24 July 2019 at p 33.

the party with the weaker bargaining power has to decide whether it wishes to accept them to win the contract. DLE had accepted these terms once the price was agreed upon by parties before 10.34pm on 14 February 2016.

208 After the Contract was crystallised when the price was finalised and agreed by the parties, the delivery schedule was "issued to DLE to enable [Ramo] to complete the Main Contract Works" as per cl 9 of the 20 January LOA, in the delivery schedule enumerated in cl 9 of the 14 February Draft, which states that the commencement of works would start on 15 February 2016 and the final shipment date would be ***10 April 2016*** (*ie*, spanning a period of 7 to 8 weeks).[303] This delivery schedule is reasonable and consistent with DLE's estimated delivery schedule. In an email dated 4 February 2016, Dennis stated that the delivery period for 1200 MT of structural steel could be done in "6 to 8 weeks" and that the first delivery could be within "4 to 5 weeks".[304]

209 DLE submits that the delivery schedule set out in the 14 February Draft should not be adopted as it was not signed by the parties. However, the fact that parties did not sign the 14 February Draft is immaterial. All that is required of Ramo is to issue a delivery schedule to DLE (see cl 9 of 20 January LOA) as Ramo could dictate the terms of the delivery schedule. Ramo dictated the terms of the delivery schedule once the delivery schedule was communicated to DLE via the 14 February Draft sent by Ramo. The dates encapsulated in cl 9 of the 14 February Draft represented the determinative delivery schedule issued by Ramo to DLE for purposes of the Contract. Further, Dennis had also conceded

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303 ABD Vol 1 at p 7.

304 ABD Vol 1 at p 113.

at trial that if the 20 January LOA is found to be binding and part of the Contract, the schedule stated by Ramo in the 14 February Draft would be binding on DLE.[305] In any event, I note that Ramo had not taken undue advantage of DLE by issuing an unreasonably short delivery schedule pursuant to cl 9 of 20 January LOA, which DLE would have difficulty in complying with (see [208]).

Delay caused by DLE

210 DLE delivered 14 shipments in total, with the 14th shipment received by Ramo on 11 December 2016.[306] It was discovered through Ramo's site inspections at Dai Dung's factory in Vietnam that Dai Dung had not engaged sufficient manpower and this caused a delay in DLE's delivery of structural steel.[307] On 9 May 2016, Ramo emailed DLE stating that "the manpower engaged for fabrication work still not enough to meet our target… This will affect our overall master schedule, results delay the further activities which we can do only after the structural steel erection".[308] DLE was aware of the fact that they were behind schedule. At trial, Dennis also admitted to being aware that Dai Dung failed in its obligation to provide the steel in a timely manner.[309] Dennis also accepted that any delay that occurred as a result of Dai Dung's fault would be DLE's responsibility.[310] Dennis even sent a Whatsapp message on

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305 Transcript 24 July 2019 at p 48.

306 Sri's AEIC at para 32.

307 Sri's AEIC at para 34.

308 ABD Vol 2 at p 18.

309 Transcript 24 July 2019 at p 155.

310 Transcript 23 July 2019 at p 104.

18 June 2016 to Guna saying that he was regretful and ashamed of the delay in delivery of the shipments.[311]

211 Due to the shortfall in structural steel delivered, Ramo also had to procure the remaining structural steel that was outstanding from Intanco, a third party that was responsible for installing the structural steel on the Accommodation Camp. The remaining structural steel that was required for the Accommodation Camp arrived in the 15th and 16th shipment and was only received by Ramo on ***4 January 2017***.[312]

212 As per cl 14 of the 20 January 2016 LOA on liquidated damages, DLE is liable for RM10,750.00 per day for each day the works remain incomplete (Sundays and Public Holidays inclusive) for any delay in completion of the project caused by DLE. I disagree with Ramo that the last date (4 January 2017) should be included in the calculation of the number of days of delay in delivery of the structural steel material. I find that DLE is liable for liquidated damages for the delay in the delivery in the completion of the Accommodation Camp for 269 days from 10 April 2016 to 4 January 2017 (not inclusive of the last date) and not 270 days.

DLE's Counter-claim

The Retention Monies Issue

213 DLE counterclaims that it is entitled to the retention monies amounting to US$35,936.16. This is with reference to the parties' agreement on 16 June 2016 for Ramo to withhold 5% retention monies at US$48/mt (*ie*, 5%

311 Transcript 23 July 2019 at p 170.

312 Sri's AEIC at para 33.

of US$960/mt = US$48/mt) for the total quantity of structural steel material supplied as evidenced in Letter of Credit (Amendment No. 4) (see above at [115]).[313] Guna admitted at trial that DLE was entitled to the sum and that it could be used to set off against Ramo's claim for the breaches by DLE.[314] I find that DLE has succeeded in its counterclaim for being entitled to the 5% retention monies for the total quantity of structural steel material supplied. The quantification of the retention sum, which will be used to set off against Ramo's claim, will be deferred to the Assessment of Damages Phase.

The Bolts Issue

214 DLE also counterclaims for the connection bolts supplied to Ramo for a sum of US$5,040.42, which Dennis claims is outside the scope of the Contract and was supplied at the request of Ramo. DLE argues that since the bolts were not included in the Drawings, "the weight of the bolts must be separately paid for".[315] Dennis testifies that Ramo is indebted to DLE for the value of the bolts based purportedly on the unit rate of US$960 per metric tonne of bolts supplied. Dennis simply asserts that the weight of the bolts came to five tonnes to justify DLE's claim of US$5,040.42. Save for Dennis' bare assertions, DLE provides no documentary evidence on the purported request of Ramo outside the scope of the Contract for DLE to supply the bolts separately. There is also no documentary evidence to show that the weight of all the bolts supplied amounts to five tonnes. Taking into consideration Dennis' credibility and the absence of documentary evidence, I find that DLE has not proven that it is entitled to a separate payment for the five tonnes of bolts. I find that the Drawings do in fact

313 ABD Vol 10 at p 186.

314 Transcript 19 July 2019 at p 104.

315 Dennis' AEIC at para 99.

show the requirements for the bolts including their dimensions and the required grade. I accept Ramo's submission that the supply of the bolts is within the scope of the Contract and included in the contract price of US$960 per metric tonne of prefabricated structural steel. I do not believe that there was a separate request by Ramo to DLE to supply the bolts under another supply contract.

Conclusion

215 In conclusion, I make the following findings for Ramo's claim. For the Contract Issue, Ramo has succeeded in proving that the 20 January LOA is binding and part of the Contract, along with the Oral Price Agreement, the PO and Letters of Credit. For the Liability Issue, I find DLE liable for the following:

(a) the Shortfall Issue: DLE's over-claim of 34.52mt of structural steel;

(b) the Unpainted Steel Issue: DLE's supply of 421.41mt of unpainted structural steel;

(c) the Improper Fabrication Issue: All categories of the alleged fabrication defects supplied by DLE save for the Column Base Plate Additional Hole Drilling Work (Invoice No. 2289/16), and DLE's failure to supply sag rods and turnbuckles (Invoice No. 2291/16);

(d) the Demurrage Issue: the demurrage charges incurred as a result of DLE's failure to deliver painted structural steel and delays caused by DLE in the customs clearance process; and

(e) the Delay Issue: 269 days of delayed delivery of the structural steel (from 10 April 2016 to 4 January 2017).

216 As for DLE's counterclaim, I find that DLE succeeds on the Retention Monies Issue, but fails on the Bolts Issue.

217 The quantum of damages for Ramo's claim and DLE's counterclaim will be assessed at the Assessment of Damages Phase. DLE's counterclaim is to be set off against Ramo's claim.

218 Costs will be reserved to the court hearing the Assessment of Damages.

Chan Seng Onn
Judge

Moiz Haider Sithawalla and Yong Manling Jasmine (Tan Rajah & Cheah) for the plaintiff;
Quek Seng Soon Winston and Gan Guo Bin (Winston Quek & Company) for the defendant.
