IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 160

Suit No 186 of 2018

Between

CIMB BANK BHD

… *Plaintiff*

And

ITALMATIC TYRE &
RETREADING EQUIPMENT
(ASIA) PTE LTD

… *Defendant*

JUDGMENT

[Banking] – [Lending and security]

[Contract] – [Assignment]

[Debt and Recovery] – [Right of set-off] – [Insolvency set-off]

[Evidence] – [Witnesses] – [Attendance]

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CIMB Bank Bhd
v
Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd

[2020] SGHC 160

High Court — Suit No 186 of 2018
Vinodh Coomaraswamy J
24, 25, 30, 31 July 2019; 11 March; 2 April 2020

30 July 2020 Judgment reserved.

Vinodh Coomaraswamy J:

1 In this action, the plaintiff seeks to recover US$2.43m plus contractual interest from the defendant. The plaintiff claims to be entitled to recover that sum as the assignee of its customer's contractual rights against the defendant.

2 For the reasons which follow, I allow the plaintiff's claim.

Factual background

3 The plaintiff is a bank. One of the plaintiff's customers was a company known as Panoil Petroleum Pte Ltd ("Panoil"). Panoil sold marine fuel.[1] The defendant is one of Panoil's trading counterparties.[2] Panoil is now in liquidation.

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1 Bundle of AEICs, Vol 1 at p3, paras 3 to 4

2 Defence at para 1

4 In June 2016, the plaintiff granted trade financing facilities to Panoil.[3] In July 2016, as security for the facilities, Panoil executed an all-monies debenture ("the Debenture") in favour of the plaintiff. The Debenture gave the plaintiff a security interest in Panoil's goods financed by the plaintiff and in all of Panoil's receivables and documents representing goods financed by the plaintiff.[4]

5 In July and August 2017, Panoil entered into and performed seven contracts under which it sold and delivered seven cargoes of marine fuel to the defendant's order ("the Contracts"). Each Contract is evidenced by a sale confirmation and an invoice issued by Panoil. Each delivery is evidenced by a bunker delivery note ("BDN") issued by an independent inspector. A sale confirmation together with the corresponding invoice and BDN constitutes the documentary evidence for each Contract.[5]

6 Arising from the Contracts, the defendant owed Panoil a total of US$2.43m together with contractual interest at 2% per month from the due date of each invoice until payment ("the Debt").[6] The plaintiff's claim in this action is that it is entitled to recover the Debt from the defendant as Panoil's assignee under cll 3.1(c) and 3.1(e) of the Debenture (set out at [53] below).[7]

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[3] Statement of Claim (Amendment No. 2) at para 3; Agreed Bundle of Documents, Vol 1, tabs 3, 4 and 8

[4] Statement of Claim (Amendment No. 2) at para 3; Agreed Bundle of Documents, Vol 1, tab 5

[5] Notes of Evidence (24 July 2019), p163(4) to 164(1), p166(7) to 166(19); Notes of Evidence (30 July 2019), p66(24) to 67(8)

[6] Statement of Claim (Amendment No. 1) at para 8

[7] Plaintiff's Opening Statement at para 6

7 In August 2017, the Maritime and Port Authority of Singapore ("the MPA") discovered that Panoil had tampered with its delivery mechanism in order to inflate the amount of marine fuel which Panoil actually delivered to its customers.[8] The MPA took immediate steps to revoke Panoil's licences.[9] Panoil could not continue in business without these licences.

8 On 29 August 2017, the plaintiff sent by fax and by courier a notice of assignment to the defendant ("the Notice"). The Notice informed the defendant of the contents and effect of the Debenture and asked the defendant to pay the Debt to the plaintiff.[10] To evidence the Debt, the Notice attached copies of the invoices arising from the Contracts.[11] It is not disputed that the defendant received the Notice by fax on 29 August 2017 and by courier on 30 August 2017.[12]

9 On 30 August 2017, Panoil applied to the High Court to place itself in judicial management. On 2 October 2017, Panoil's application was granted and judicial managers were appointed.[13] Panoil's debts could not be restructured and its business could not be rehabilitated. In April 2019, Panoil went into insolvent liquidation. The judicial managers continued as Panoil's liquidators.[14]

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8 Agreed Bundle of Documents, Vol 2, p606

9 Agreed Bundle of Documents, Vol 2, at p301 to 301A; p302 to 303

10 Bundle of AEICs, Vol 1, at p243; Defendant's Opening Statement at para 3(d)

11 Bundle of AEICs, Vol 1, at p185 to 193

12 Notes of Evidence (24 July 2019), p112(1) to 112(23); Bundle of AEICs, Vol 1, at p486

13 Statement of Claim (Amendment No. 2) at para 2

14 Plaintiff's Opening Statement at para 4

10 Meanwhile, in October 2017, the plaintiff demanded that the defendant pay the Debt to the plaintiff as Panoil's assignee.[15] The defendant failed to do so. The plaintiff now seeks to recover the Debt from the defendant.[16]

11 The defendant denies liability to the plaintiff. The defendant's case is that, even before the plaintiff served the Notice on the defendant, Panoil and the defendant had agreed to extinguish the Debt by setting it off against Panoil's debt to the defendant ("the Set-off Defence"); in the alternative, that Panoil had cancelled the Debt ("the Cancellation Defence").[17]

Preliminary issues

12 Before I analyse these two defences, I must first deal with two preliminary issues: (a) whether the Contracts incorporate Panoil's standard terms and conditions of trading; and (b) whether Panoil's assignment of the Debt to the plaintiff is effective.

The Contracts incorporate Panoil's terms and conditions

13 The plaintiff relies on cl 8.2 of Panoil's Terms and Conditions for the Sale of Marine Fuel ("Panoil's T&Cs") to meet the Set-off Defence. The defendant denies that the Contracts incorporate cl 8.2 of Panoil's T&Cs. Clause 8.2 of Panoil's T&Cs expressly obliges the defendant to pay Panoil under the Contracts without deduction, set-off or counterclaim:[18]

> Payment for each delivery of marine fuel shall be in United States Dollars or Singapore Dollars as *specified in the invoice*

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[15] Khoo May May Evelyn Vanessa's AEIC at p225

[16] Statement of Claim (Amendment No. 2) at para 12

[17] Defendant's Opening Statement at para 4

[18] Bundle of AEICs, Vol 1, p406A

> *and such payment shall be made by the Buyer free and clear of any deduction, set-off, counter claims, whatsoever* on cash in advance or by telegraphic transfer to Seller's bank after each delivery is completed as directed by Seller on the date show on the invoice.
>
> [emphasis added]

The parties' arguments

14 The plaintiff's primary submission is that each Contract expressly incorporates Panoil's T&Cs, and therefore cl 8.2.[19] It relies on the following endorsement which appears under a column headed "Terms" in each sale confirmation:[20]

> This sales [*sic*] is subjected [*sic*] to the standard terms and conditions of Panoil which is [*sic*] updated from time to time.

15 The plaintiff's alternative submission is that each Contract incorporates cl 8.2 of Panoil's T&Cs by the parties' prior course of dealings or as an implied term. Between April 2017 and June 2017, the parties entered into six transactions, identical in structure to those underlying the Contracts. In that course of dealing, consistently with cl 8.2, the defendant paid Panoil in full

[19] Statement of Claim (Amendment No. 2) at para 5; Plaintiff's Opening Statement at para 9

[20] Plaintiff's Opening Statement at para 11; Bundle of AEICs, Vol 1, p212 to 218

within the number of days after delivery stipulated in the invoice, free and clear of any deduction, set-off or counterclaim.[21]

16 The plaintiff's final alternative submission is that a clause excluding set-off is common in the marine fuel trade.[22]

17 The defendant's submission is that it is not bound by cl 8.2 of Panoil's T&Cs[23] because: (a) the sale confirmations on which the plaintiff relies are fabricated; (b) even if they are not fabricated, the defendant did not sign and stamp the confirmations; (c) even if the defendant did sign and stamp the confirmations, a final draft of Panoil's T&Cs was not in existence when Panoil issued the confirmations; (d) even if a final draft of Panoil's T&Cs was in existence at that time, Panoil did not make those terms and conditions known to the defendant; (e) the defendant received the confirmations by email from Panoil long after Panoil had delivered the marine fuel; and (f) the defendant would never have accepted a term excluding set-off.[24]

18 For the reasons which follow, I reject each of the defendant's submissions. I therefore accept the plaintiff's submission that the Contracts incorporate Panoil's T&Cs and, in particular, cl 8.2.

The law on incorporation of contractual terms

19 The "law adopts an objective approach towards questions of contractual formation and the incorporation of terms" (*R1 International Pte Ltd v Lonstroff*

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[21] Reply (Amendment No. 2) at para 5(a)

[22] Plaintiff's Closing Submissions at para 107

[23] Defendant's Opening Statement at para 4(b); Defendant's Closing Submissions at para 6

[24] Defendant's Closing Submissions at paras 11 to 14

AG [2015] 1 SLR 521 at [51] ("*Lonstroff*")). Whether a term is incorporated into a contract therefore turns, as is usual in matters of contract, upon ascertaining the parties' objective intentions from their communications and conduct in light of the relevant background at the time they entered into the contract.

20 The relevant background includes the industry in which the parties are in business, the character of the document which contains the terms in question as well as the course of dealings between the parties (*Lonstroff* at [51]). For example, if the parties ordinarily agree on a set of essential terms first while continuing negotiations on the other, more detailed terms, the terms agreed later will be more readily found to have been incorporated into their contract (*Lonstroff* at [52]). Further, even if a party does not expressly communicate acceptance of the terms in question, the party's positive, negative or even neutral conduct is capable of evincing acceptance (*Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [50] and [52]).

21 Terms may also be incorporated by notice. As the learned authors of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") observe at para 7.22, incorporation by notice "is, by its very nature, heavily dependent on the particular facts of the case concerned". Actual notice is not required, and notice which is objectively reasonable will suffice.

22 *Circle Freight International Ltd (trading as Mogul Air) v Medeast Gulf Exports Ltd (trading as Gulf Export)* [1988] 2 Lloyd's Law Reports 427 illustrates these principles. In that case, the English Court of Appeal held that the standard terms and conditions of an industry body were incorporated into the parties' contract by reference and by a course of dealing. Each invoice which

the plaintiff issued to the defendant carried the following express endorsement: "all business is transacted by the company under the current trading conditions of the Institute of Freight Forwarders, a copy of which is available on request". The plaintiff sent an invoice bearing this endorsement to the defendant on at least 11 occasions over six months preceding the consignment which gave rise to the dispute. The English Court of Appeal held that the contract covering the disputed consignment incorporated the industry body's trading conditions. As Taylor LJ said at 433:

> [I]t is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request. Other considerations apply if the conditions or any of them are particularly onerous or unusual.

23 Taylor LJ's final point is echoed in the observation of Belinda Ang J in *Wartsila Singapore Pte Ltd v Lau Yew Choong and another suit* [2017] 5 SLR 268 at [122]. Ang J noted there that, where a term is onerous or unusual, there is an enhanced standard for ascertaining whether a party was given reasonable notice of it. The defendant does not suggest that cl 8.2 of Panoil's T&Cs is an onerous or unusual term. In any event, for the reasons set out at [39]–[42] below, I accept that clauses which exclude set-off are common in the marine fuel industry.

The sale confirmations are not fabricated

24 As a threshold issue, the defendant submits that the sale confirmations are fabricated. In particular, the submission is that the defendant's company stamp and countersignature on the sale confirmations are not genuine. For this submission, the defendant relies on the evidence of Mr Parry Yeo ("Mr Yeo").

Mr Yeo was the defendant's managing director at the material time.[25] Mr Yeo testified that the defendant's genuine company stamp is 2 mm smaller than that which appears on the sale confirmations.[26] He also testified that the countersignature on the sale confirmations is not that of any of the defendant's authorised signatories.[27]

25 The defendant also called Panoil's managing director at the material time, Mr Yong Chee Ming ("Mr Yong"). He testified that Panoil had an oral agreement with the defendant which allowed Panoil to apply the defendant's company stamp to its sale confirmations and to sign sale confirmations for the defendant.[28] Mr Yong later gave a different version. He said that it was not in fact an agreement. He said instead that Panoil's staff had told the defendant unilaterally that Panoil would apply the defendant's company stamp and sign the sale confirmations for the defendant, allegedly to comply with financing requirements imposed by the plaintiff.[29] Mr Yong does not suggest that the defendant ever objected to the practice he described in his second version. The defendant denies both versions.[30]

26 I accept Mr Yong's evidence and reject Mr Yeo's evidence. Mr Yong's evidence is more consistent with the objective evidence and the inherent probabilities.

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[25] Reply (Amendment No. 2) at para 7(c)

[26] Notes of Evidence (24 July 2019), p183(4) to 183(14)

[27] Yeo Kok Hai Parry's AEIC at para 5; Exhibit "YKH-1"

[28] Notes of Evidence (30 July 2019), p39(23) to 41(1)

[29] Notes of Evidence (30 July 2019), p47(23) to 48(14)

[30] Notes of Evidence (30 July 2019), p46(14) to 46(16)

27 The difference in the size of the company stamp is meaningless. It is not uncommon for a company to have more than one company stamp and for there to be minor variations between them, including as to size. I also note that the seven sale confirmations underlying the Contracts bear the same company stamp as appears on the six earlier sale confirmations which comprise the parties' prior course of dealings (see [15] above).[31] The defendant certainly has never challenged the authenticity of its company stamp on these earlier sale confirmations, whether after receiving them or in the course of this litigation.

28 I reject any attempt on the defendant's part to attack Mr Yong's credibility. Mr Yong was the defendant's own witness. At common law, a party may not attack the credibility of its own witness and cross-examine the witness unless certain conditions are met. This common law rule is given statutory expression in s 156 of the Evidence Act (Cap 97, 1997 Rev Ed) (see *PP v BAU* [2016] 5 SLR 146 at [24]). The reason for the rule is that a party who calls a witness at trial is deemed to put the witness forward as a witness of truth. The party accordingly vouches to the court for the honesty of the witness (see *Alexander v Gibson* (1811) 2 Camp. 555). A party cannot resile from this and discredit its own witness unless specific conditions are met. The rule places a salutary burden on a party to choose its witnesses carefully.

29 On Mr Yong's evidence, whichever of his two versions at [25] above is true, the defendant cannot now allege that the defendant's acceptance of the sale confirmations is fabricated. On the first version, Panoil applied the defendant's company stamp and signed the confirmations for the defendant with the defendant's express agreement. On the second version, Panoil did so with the

[31] Defendant's Bundle of Documents at pp19, 24, 28, 32, 36 and 38; Bundle of AEICs, Vol 1, p344, 349, 354, 359, 364, 369

defendant's knowledge and acquiescence. Mr Yeo's evidence that none of the defendant's authorised signatories signed the sale confirmations for the defendant is immaterial.[32] The defendant was and is bound by the sale confirmations.

30 It follows that I also reject the defendant's submission that it is not bound by Panoil's T&Cs because it did not sign and stamp the sale confirmations. In any event, there is no legal requirement at common law that a contractual counterparty either sign or stamp a document in order to be bound by the contract which the document embodies. All that is required is that the contractual counterparty signify somehow that it *accepts* the contractual terms. A signature or a company stamp on the document may be the strongest evidence of acceptance. But it is by no means a legal requirement at common law (*The Law of Contract in Singapore* at para 06.019). The defendant cites no authority to the contrary. The defendant clearly accepted the terms set out and incorporated in the sale confirmations. If nothing else, it did so by conduct.

Panoil's T&Cs came into existence as early as June 2016

31 Second, I do not accept the defendant's submission that the final draft of Panoil's T&Cs came into existence only after Panoil had issued the sale confirmations to the defendant. The plaintiff's Director of Commercial Banking at the material time was Ms Vanessa Khoo ("Ms Khoo"). The plaintiff's relationship manager in charge of Panoil's account at the material time was Ms Lai Shing Joo ("Ms Lai"). Both of them gave evidence at trial. Their evidence is that Panoil gave a copy of Panoil's T&Cs to the plaintiff at the outset of their

[32] Notes of Evidence (24 July 2019), p184(19) to 184(22)

banking relationship, *ie*, in June 2016. The plaintiff then placed the copy in Panoil's credit file.[33]

32 I accept Ms Khoo's and Ms Lai's evidence. The defendant attempts to cast doubt on their evidence by pointing to a WhatsApp exchange between Ms Lai and Mr Yong in September 2017. The defendant's case is that Ms Lai asked Mr Yong for a copy of Panoil's T&Cs in this exchange.[34] The defendant submits that Ms Lai's request in September 2017 would not have been necessary if Panoil had indeed given the plaintiff a copy of Panoil's T&Cs in June 2016.

33 I reject this submission. In the WhatsApp exchange, Ms Lai did not ask for a copy of Panoil's T&Cs. Rather, she asked "for the sales contract of various suppliers". Mr Yong responded with a copy of Panoil's T&Cs. I accept that Ms Lai was simply trying to ascertain the specific terms of the Contracts in view of Panoil's deteriorating solvency in September 2017. Thus, she replied that she was not asking for Panoil's T&Cs. She said: "Not this one, we need the sales contract from your suppliers", mentioning the defendant by name. Mr Yong understood this. That is why he replied to Ms Lai to say that Panoil only has the sale confirmations and Panoil's T&Cs.[35] This WhatsApp exchange does not contradict the plaintiff's evidence that Panoil gave a copy of its T&Cs to the plaintiff in June 2016.

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[33] Lai Shing Joo's AEIC at para 14; Notes of Evidence (24 July 2019), p87(6) to 88(15), p102(15) to 102(25)

[34] Bundle of AEICs, Vol 1, p409 to 410

[35] Bundle of AEICs, Vol 1, p409 to 410; Notes of Evidence (24 July 2019), p89(22) to 90(25)

34 I therefore find that Panoil's T&Cs, including cl 8.2 in its current form, were in existence as early as June 2016, well before Panoil and the defendant entered into the Contracts in July and August 2017.[36]

35 The defendant relies on Mr Yong's suggestion that the document setting out Panoil's T&Cs which the plaintiff adduced in evidence at trial is not the "final copy of the standard terms and conditions" as they stood in July and August 2017.[37] This suggestion is, to my mind, immaterial. Mr Yong does not deny that a set of Panoil's T&Cs existed in July and August 2017 which governed the contractual relationship between Panoil and the defendant.[38] Further, each sale confirmation expressly provides that it is governed by Panoil's T&Cs as they may be "updated from time to time" (see [14] above).[39] This language suffices to capture and incorporate the existing version of Panoil's T&Cs into each Contract.

36 Mr Yong also points out that Panoil's T&Cs were amended and updated. But the update was merely to correct a grammatical error in cl 8.5. He confirmed that cl 8.2 had remained "untouched" by the update.[40] It is in any event, not the defendant's case that there was ever a version of Panoil's T&Cs which did not contain cl 8.2.

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[36] Notes of Evidence (24 July 2019), p100(11) to 101(2)

[37] Notes of Evidence (30 July 2019), p72(1) to 72(8), p217(12) to 217(15)

[38] Notes of Evidence (30 July 2019), p68(12) to 68(18)

[39] Notes of Evidence (30 July 2019), p74(7) to 74(11)

[40] Notes of Evidence (30 July 2019), p73(21) to 73(24)

Immaterial that the sale confirmations followed delivery

37 Third, even though Panoil sent the sale confirmations to the defendant *after* the marine fuel had been delivered,[41] this does not mean that the Contracts did not incorporate Panoil's T&Cs. This is because the common law acknowledges that it is "not uncommon for parties to first agree on a set of essential terms which the parties may be bound by as a matter of law and on the basis of which they may act, even while there may be ongoing discussions on the incorporation of other usually detailed terms" (*Lonstroff* ([19] *supra*]) at [52]).

38 Further, the defendant's argument that the Contracts would have been performed and discharged by the time the defendant received the sale confirmations is factually misconceived. The Contracts have never been discharged by *bilateral* performance. Under the Contracts, the defendant was obliged to pay the plaintiff under the Contracts within either 35 days (under six of the Contracts) or 45 days (under one of the Contracts) *from* the date of delivery.[42] It is undisputed that the defendant has never paid Panoil under the Contracts. Subject only to the Set-off Defence, which I analyse and reject at [76]–[137] below, the defendant's contractual obligation to pay Panoil has never been discharged by performance.

No set-off clauses are common in the industry

39 Fourth, I accept the plaintiff's submission that a no set-off clause is a common clause in the marine fuel industry. The plaintiff refers to the English Court of Appeal decision of *CMA-CGM Marseille v Petro Bunker International*

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[41] Defendant's Bundle of Documents, p39 to 63

[42] Bundle of AEICs, Vol 1, p286 to 292

(formerly known as Petroval Bunker International) [2011] EWCA Civ 461. In that case, Tomlinson LJ referred to Steel J's decision below in refusing leave to appeal, in which he observed that a no set-off clause is "commonplace in the oil supply industry" (at [13], citing *Totsa Total Oil Trading SA v Bharat Petroleum Corp Ltd* [2005] EWHC 1641 (Comm)).

40 The prevalence of no set-off clauses is also illustrated by the General Terms and Conditions published by an international shipping association, The Baltic and International Maritime Council ("BIMCO"). Clause 8(b) of the BIMCO Standard Terms and Conditions provides that "payment shall be made in full, without set-off, counterclaim, deduction and/or discount, and free of bank charges".[43] The defendant did not challenge this point either at trial or in its submissions. It thus should be taken to accept it (*Chan Lie Sian v Public Prosecutor* [2019] 2 SLR 439 at [65]).

41 Given that a no set-off clause is common in the industry, it is not necessary to apply an enhanced standard to ascertain whether Panoil gave the defendant reasonable notice of the term (see [22]–[23] above). I find that Panoil did give reasonable notice to the defendant of the no set-off clause in all the circumstances. Panoil and the defendant are experienced commercial parties. Their commercial relationship stretches back to 2015.[44] Each sale confirmation makes *express reference* to Panoil's T&Cs under its "Terms" column. The reference is not only express but also clear and prominent. It is not, as sometimes happens, illegible or hidden in fine print. The sale confirmation is itself a brief document. It does not claim to spell out in detail the terms of the parties' agreement. Even though there is a column headed "Additional Terms" in each

[43] Khoo May May Evelyn Vanessa's Supplementary AEIC at paras 15 to 18; p43

[44] Notes of Evidence (24 July 2019), p142(13) to 143(1)

sale confirmation, only a few additional terms are listed there. Any experienced commercial party would be aware that the detailed terms governing the whole of the contractual relationship between the parties must be set out in the separate document which is expressly referred to in the sale confirmations *ie,* Panoil's T&Cs.

42 It is true that the sale confirmations do not have an express provision obliging Panoil to supply a copy of Panoil's T&Cs to the defendant upon request. But I do not think that this affects the analysis. Panoil and the defendant are in the same industry. They have a course of dealing with each other. The absence of an express provision to this effect does not mean that the defendant has *no* right to ask Panoil for a copy of Panoil's T&Cs or that Panoil would refuse to supply a copy if asked. It is telling that the defendant never once did ask Panoil for a copy. Indeed, the defendant never even asked Panoil for a summary of the contents of Panoil's T&Cs.[45] The defendant must be taken to have accepted Panoil's T&Cs.

The defendant's subjective intention is immaterial

43 Finally, the defendant attempts to disclaim cl 8.2 of Panoil's T&Cs by asserting that it would never have agreed to such a term. I reject the attempt. The defendant's subjective intent is legally irrelevant on the objective approach to contract and to the incorporation of terms. This argument is nothing more than a self-serving afterthought.

[45] Notes of Evidence (25 July 2019), p104(18) to 104(23)

Conclusion

44 In the absence of fraud and misrepresentation, a party is bound by all of the terms of a contract that it signs, even if that party did not read or understand those terms (*Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 at [58]). That is true whether the contract sets those terms out in its body or incorporates those terms by reference. I am therefore satisfied that, on the objective approach, each of the Contracts incorporates Panoil's T&Cs. The defendant is accordingly obliged by cl 8.2 of Panoil's T&Cs to pay the Debt to Panoil without deduction, set-off or counterclaims.

Panoil's assignment of the Debt to the plaintiff is effective

45 The plaintiff's case against the defendant rests on the fundamental proposition that Panoil assigned the Debt to the plaintiff.[46] The defendant, in response, does not suggest that the plaintiff has failed to satisfy any of the legal requirements for an assignment which is effective to support the plaintiff's claim in this action, including the requirement of notice.[47] Instead, the defendant focuses its attack on the Debenture.

46 The defendant submits that: (a) the defendant has no knowledge of the Debenture;[48] (b) the defendant would never have agreed to the assignment under the Debenture;[49] (c) there is no receivable due to Panoil from the defendant on which cl 3.1(c) of the Debenture can operate; and (d) cl 3.1(e) of the Debenture

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[46] Plaintiff's Opening Statement at paras 36 and 37

[47] Defendant's Closing Submissions at para 3(c)

[48] Defendant's Opening Statement at para 3(b)

[49] Defendant's Closing Submissions at para 3(b)(ii); Notes of Evidence (30 July 2019), p75(17) to 76(10)

is not wide enough to capture Panoil's *future* contractual rights, such as the Debt.

47 All of these submissions are misconceived.

Defendant's knowledge of the Debenture immaterial

48 The defendant's first attack[50] on the assignment is that the defendant was unaware of the Debenture. This attack is misconceived. The defendant does not challenge either the authenticity or validity of the Debenture. The defendant must thus be taken to accept that the Debenture binds the plaintiff and Panoil in accordance with its terms.

49 Given that, whether the defendant was or was not aware of the Debenture or of its terms is immaterial in law to whether Panoil's assignment of the Debt to the plaintiff is effective.

Defendant's agreement to assignment unnecessary

50 The defendant then submits that Panoil was precluded from assigning the Debt to the plaintiff because Panoil's obligor, in this case the defendant, would never agree to assignment under the Debenture.[51] This argument is likewise misconceived.

51 The consent of the obligor *at the time of the assignment* is not one of the legal requirements for an effective assignment. Simply put, an assignor's right

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[50] Defendant's Closing Submissions at para 3(b)(ii); Notes of Evidence (30 July 2019), p75(17) to 76(10)

[51] Defendant's Closing Submissions at para 3(b)(ii); Notes of Evidence (30 July 2019), p75(17) to 76(10)

to assign a contractual right is subject only to any restrictions on the right of assignment which the obligor may have bargained for in the contract out of which that right arises. The defendant does not suggest that the Contracts contained any provision barring Panoil from assigning the Debt, whether under the Debenture or otherwise.

Debenture covers book debts and receivables gross

52 The defendant next makes the submission that the Debt does not fall within the terms of the Debenture. The first ground on which the defendant makes this submission is that there is no "book debt" or "receivable" due from the defendant to Panoil on which the Debenture can operate because Panoil's books show that the defendant was a *creditor* of Panoil rather than a *debtor*. This submission too is misconceived.

53 Clauses 3.1(c) and 3.1(e) of the Debenture provide as follows:[52]

> 3.1 The Borrower as legal and beneficial owner and as a continuing security for the payment and discharge of the Secured Obligations:
>
> …
>
> (c) assigns and charges to the Bank by way of first fixed security all *Receivables and all other present and future book debts* and other debts and all moneys whatsoever, for the time being due, owing or payable to the Borrower relating to or arising from any and all Goods and Relevant Agreements by any person whatsoever, and the benefit of any of any Encumbrances and securities for the time being held by the Borrower in respect of any such debts or moneys;
>
> …
>
> (e) assigns and charges to the Bank by way of first fixed security all present and *future contract rights,*

[52] Bundle of AEICs, Vol 1, at p78

> *receivables, book and other debts* and monetary claims now or at any time hereafter due or owing to the Borrower, in consideration of or against which the Bank has extended or may hereafter extend banking or credit facilities or accommodation of any kind, together with the full benefit of guarantees and securities therefor and indemnities in respect thereof and all Collateral Instruments, liens, reservations of title, rights of tracing and other rights enabling the Borrower to enforce such contract rights, receivables, debts or claims;
>
> …
>
> [emphasis added]

54 By referring to "book debts", cl 3.1(c) of the Debenture makes clear that the clause operates whether or not the defendant is recorded as a creditor or a debtor in Panoil's books. "Book debts" are different from net debts or a net position. Until and unless the parties take a settled account and arrive at a net position, the debts on each side remain distinct. As such, they are liable to be paid and recovered gross.

55 In that sense, this aspect of the defendant's submission places the cart before the horse. Whether the defendant is recorded as a creditor or a debtor in Panoil's books depends on whether the debts due from the defendant to Panoil under the Contracts have been extinguished by being set off against debts due from Panoil to the defendant. This argument therefore presupposes that the defendant's Set-off Defence has succeeded. I analyse and reject the Set-off Defence at [76]–[137] below.

56 Further, I accept the plaintiff's submission that each Contract and its associated invoice gives rise to a book debt. A book debt is a debt which arises in the ordinary course of a company's business (*Jurong Data Centre Development Pte Ltd (provisional liquidator appointed) (receivers and managers appointed) v M+W Singapore Pte Ltd and others* [2011] 3 SLR 337

at [80]). Moreover, a "book debt" is a debt which should be entered in such books as should be kept in the business and as would, if properly kept, sufficiently disclose the company's business transactions and financial position from time to time (*Duncan, Cameron Lindsay and another v Diablo Fortune Inc and another matter* [2018] 4 SLR 240 at [43], citing *Motor Credits Ltd v WF Wollaston Ltd* (1929) 29 SR (NSW) 227 at 244).

57 In determining whether a particular debt is a "book debt", the court looks at whether it is the practice to enter the debt in question in well-kept books of account in the ordinary course of a company's business. It is not, however, necessary that the debt be actually entered in the company's books. A debt which is omitted from the books does not by that fact alone cease to be a book debt (*Paul & Frank Ltd v Discount Bank (Overseas) Ltd* [1967] Ch 348 at 360F – 361C). It is also the common understanding that each account receivable is a book debt (*Dawson v Isle* [1906] 1 Ch 633 at 637; *In re Stevens* [1888] W.N 110 at 116).

58 I therefore agree that each Contract and its associated invoice constitutes a book debt for the purposes of cl 3.1(c) of the Debenture. These debts ought to be entered into well-kept books of account in the ordinary course of Panoil's business and is *prima facie* enforceable by action by Panoil directly against the defendant. The Debt therefore comprises seven book debts.

Debenture covers future debts

59 The second ground on which the defendant submits that Panoil's rights under the Contracts do not fall within the terms of the Debenture is that the terms of the Debenture capture only Panoil's contractual rights which were in existence at the time Panoil executed the Debenture in July 2016 and not

Panoil's future contractual rights, such as the Debt, which arose only in July and August 2017.

60 Clause 3.1(c) of the Debenture assigns to the plaintiff, by way of fixed security, "all … *future* book debts" [emphasis added]. Clause 3.1(e) further assigns "all … *future* contract rights, receivables, books and other debts and monetary claims now or *at any time hereafter* due, owing or payable to the Borrower" [emphasis added]. The explicit references to the "future" and to "any time hereafter" make the defendant's argument misconceived. Both clauses clearly cover book debts and contractual rights which come into existence after Panoil granted the plaintiff the Debenture.

61 The Debenture accordingly captures the Debt even though it did not exist at the time of the Debenture.

Conclusion

62 I am satisfied that the Debenture is effective to assign all of Panoil's rights against the defendant under the Contracts to the plaintiff. I therefore reject the defendant's submission that the plaintiff has no right to bring this action as Panoil's assignee under the Debenture.

The Defences

63 As I have mentioned, the defendant raises two substantive defences to the plaintiff's claim: (a) the Set-off Defence; and (b) the Cancellation Defence. I summarise them now.

64 The Set-off Defence runs as follows. Panoil and the defendant entered into a set-off agreement on 1 July 2015 ("the Set-off Agreement").[53] The Set-off Agreement permitted each party to set off its undisputed invoices against the other party's undisputed invoices. The effect was to nullify contractually cl 8.2 of Panoil's T&Cs. By an exchange of letters on 13 August 2017, both parties agreed to apply the Set-off Agreement to their intercompany balances. All of the debts owing between Panoil and the defendant as at 13 August 2017 have accordingly been set off by agreement. This includes the Debt. The Debt was therefore extinguished by discharge well before the defendant received the Notice on 29 August 2017.

65 The Cancellation Defence runs as follows. Panoil cancelled all seven of the invoices issued under the Contracts on 18 August 2017. The Debt was therefore extinguished by cancellation well before the defendant received the Notice on 29 August 2017.

66 The plaintiff's case in reply is that the documents which form the basis of both the Set-off Defence and the Cancellation Defence are fabrications, *ie*, they do not reflect any actual set-off or cancellation effected in August 2017 or at all.[54] The defendant has brought these documents into existence purely to be adduced as evidence in these proceedings.

67 If the documents are indeed fabrications, both defences must necessarily fail.

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[53] Bundle of AEICs, Vol 1, at p241

[54] Reply (Amendment No. 2) at para 8

The plaintiff puts in issue the authenticity of the defence documents

68 The question of authenticity is an evidential issue that must be kept conceptually distinct from the more usual evidential issues of admissibility, relevance and weight. Evidence which is fabricated is not really evidence at all. It is incapable of being relevant to any fact in issue (other than to prove the fabrication itself). Without relevance, the question of admissibility does not even arise. As I observed in *Super Group Ltd v Mysore Nagaraja Kartik* [2018] SGHC 192 ("*Super Group*") at [53]:

> Authenticity is a *necessary condition* of admissibility. It is true that formal proof of authenticity is commonly dispensed with in civil cases, but that should not be allowed to obscure the *fundamental evidential point that, until authenticity is established, admissibility has no meaning.* Evidence which has been fabricated is no evidence at all: it is incapable of proving anything other than, perhaps, the very fact that it has been fabricated.
>
> [emphasis added]

69 A document cannot be admitted in evidence until its authenticity has been established (*Singapore Tourism Board v Children's Media Ltd and others* [2008] 3 SLR(R) 981 at [78], citing *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 at 381). And even after authenticity has been established, it is still necessary to prove the truth of the contents of the document by admissible evidence (*Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 ("*Jet Holding*") at [76]).

70 The authenticity of a document must be proved by admissible evidence: s 106 the Evidence Act. A witness who proves a document must do so by evidence as to the circumstances in which the document was created which is either: (a) direct evidence of those circumstances within the meaning of s 62 of the Act; or (b) within one of the exceptions to the requirement in s 62 of the Act,

principally those in s 32 of the Act. That ordinarily means, for all practical purposes, that a witness who proves a document must either be the maker of the document or someone who was present when the maker created the document.

71 A litigant is entitled to object to the authenticity of documents adduced in evidence by its opponent and to require the opponent to prove them in accordance with the Evidence Act (see *Jet Holding* at [51]). However, pursuant to O 27 r 4(1) of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("the Rules of Court"), a party is deemed to admit the authenticity of a document in its opponent's list of documents unless that party issues a notice of non-admission in respect of that document within the time stipulated in O 27 r 4(2) of the Rules of Court (*Jet Holding* at [73]). The purpose of this notice is to forewarn the opponent that it will be required to prove the document at trial.

72 The plaintiff duly filed and served on the defendant a notice of non-admission under O 27 r 4(2) of the Rules of Court in respect of all of the key documents which the defendant relies upon for the Set-off Defence and the Cancellation Defence.[55] The authenticity of these documents have validly been put in issue.

73 It is the defendant who asserts that these documents are authentic. Under s 105 of the Evidence Act, the burden is squarely upon the defendant to prove that assertion. Under s 106 of the Act, the defendant must prove the documents' authenticity by evidence which is itself admissible.

74 I note here that, with one exception, all of the documents which the defendant adduces to support its two defences are not originals. The defendant

[55] Plaintiff's Notice of Non-Admission, 4 July 2018

has failed to establish that any of the exceptions in s 67 of the Evidence Act permitting secondary evidence of these copy documents applies. Defendant's counsel nevertheless submits that all of these copies fall within s 32(1)(b*)(iv)* of the Act, being documents "compiled by a person acting in the ordinary course of a trade, business, profession or occupation based on information supplied by other persons".[56] This may be so, but s 32(1)(b)(*iv*) goes to admissibility, not authenticity. This section neither dispenses with the defendant's burden to establish the anterior evidential issue of authenticity nor establishes authenticity *ipso facto*.

75 I now analyse the Set-off Defence and the Cancellation Defence in turn. In the course of that analysis, I will consider the authenticity of the underlying documents.

The Set-off Defence

76 The Set-off Agreement is fundamental to the Set-off Defence. The defendant's case is that Panoil and the defendant entered into the Set-off Agreement on 1 July 2015. On 13 August 2017, the defendant and Panoil effected a set-off by an exchange of letters ("D's 13 August Letter" and "Panoil's 13 August Letter" respectively; collectively, the "13 August Letters").[57] This exchange of letters set off and extinguished by discharge the amounts Panoil and the defendant owed each other on that date. This set-off was reflected in Contra Statement No. IP-001 dated 15 August 2017 ("the Contra Statement"). The defendant prepared the Contra Statement and both the defendant and Panoil signed it.[58] The defendant therefore no longer owed the

[56] Oral Closing Submissions, 10 March 2020

[57] Defence at para 5(b)(i)

[58] Bundle of AEICs, Vol 2, at p514

Debt to Panoil when it received the Notice on 29 August 2017. This set-off is why Panoil's accounts reflect the defendant as a creditor of Panoil rather than a debtor.[59]

77 In response, the plaintiff disputes the authenticity of:[60] (a) the Set-off Agreement;[61] (b) the 13 August Letters; and (c) the Contra Statement.[62] The plaintiff's grounds are as follows. Panoil's judicial managers found the Set-off Agreement in Panoil's books and records in October 2017. They forwarded a copy to the plaintiff's solicitors in November 2017.[63] In the first half of 2018 and again in August 2018, the plaintiff asked the judicial managers to look for the 13 August Letters and the Contra Statement in Panoil's records.[64] On both occasions, the judicial managers could not find any of these documents.[65] On this basis, the plaintiff submits that these documents are fabrications. Clause 8.2 of Panoil's T&Cs has not been nullified by contract. It continues to bind the defendant and precludes it from effecting or purporting to effect any set off.[66]

78 In the alternative, the plaintiff argues that, even if these documents are not fabrications, the defendant is precluded from relying on the set-off purportedly effected on 13 August 2017 because it participated in Panoil's wrongdoing by effecting the set-off. As I have held that the plaintiff succeeds

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59 Defendant's Opening Statement at paras 11 and 12; Notes of Evidence (24 July 2019), p47(4) to 48(22)

60 Plaintiff's Opening Statement at para 23; Plaintiff's Closing Submissions at para 31

61 Lin Yueh Hung's AEIC at para 11; Notes of Evidence (30 July 2019), p152(16) to 152(19)

62 Reply (Amendment No. 2) at para 8

63 Lim Yueh Hung's AEIC at para 11

64 Bundle of AEICs, Vol 1, p423 at paras 6(a) and 7

65 Bundle of AEICs, Vol 1, p427, at para 16

66 Reply (Amendment No. 2) at para 7(a)(ii)

on the first argument, it is not necessary for me to consider the remaining arguments in detail. I do nevertheless make some observations on the plaintiff's alternative argument at [125]–[137] below.

The contents of the underlying documents

79 In the Set-off Agreement, Panoil and the defendant agreed that each party would be entitled to set off its own invoices against the other party's invoices from time to time without reference to the other party:[67]

> In consideration of our continuing to transact with each other hereafter, we, the undersigned companies, hereby mutually agree that each party is entitled to set off its invoices against the other party's invoices from time to time, without further reference to the other party, and the set-off is binding on both parties.
>
> The set-off is only applicable for undisputed amounts in the invoice. Where there is a dispute as to the amount, this will not be used to offset the balances and the parties will try to resolve the dispute amicably through negotiations with respective heads of companies whilst at all times retaining their rights to pursue any legal action if necessary.

80 In 2017, by D's 13 August Letter, the defendant proposed to Panoil that the balances between the two companies be immediately set off in view of Panoil's financial difficulties:[68]

> Dear Mary
>
> Re: Panoil Petroleum Pte Ltd
>
> We understand from our market contacts that Panoil's licenses are affected and your banking lines may be affected.
>
> Our current supply arrangement will cease with immediate effect due to this uncertainty.

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[67] Bundle of AEICs, Vol 1, p259

[68] Defendant's Bundle of Documents, p63; Bundle of AEICs, Vol 1, p242

> We are prepared to support your company with the tyre oil after we receive strong warranties on payment.
>
> In the meantime, we are proposing to offset the inter company balances and settle all outstanding [sic] by month end.
>
> Adrian Lum
>
> Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd

81 Panoil's 13 August Letter in response confirmed a set-off of the intercompany balances in accordance with the two-page statement attached to the letter:[69]

> Attn: Mr Adrian
>
> We confirm the contra as per Panoil Petroleum's statement of contra attached.
>
> Yours faithfully,
>
> Mary Chua
>
> On behalf of Panoil Petroleum Pte Ltd

82 The Contra Statement is a separate document dated 15 August 2017. It is signed by Mr Yeo on behalf of the defendant and Mr Yong on behalf of Panoil. It shows that the defendant, after the purported set-off, is a net creditor of Panoil in the sum of US$2,100.[70]

The Set-off Agreement is authentic

83 I am satisfied that the Set-off Agreement is authentic. In other words, I accept that was in fact created and signed by or on behalf of the parties to the agreement on or about the date that it bears. I am also satisfied that it is not a sham. In other words, I accept that the parties executed the Set-off Agreement in order to represent in documentary form an actual agreement which they had

[69] Bundle of AEICs, Vol 1, p260

[70] Bundle of AEICs, Vol 2, p514

reached on or about 1 July 2015. It is significant to me, in making these findings, that Panoil's judicial managers were able to find the Set-off Agreement in Panoil's books and records.[71]

84 The Set-off Agreement, however, is of no consequence to my decision on the Set-off Defence. I say that for four reasons.

85 First, the Set-off Agreement does not provide that *all* debts owing between Panoil and the defendant in the future will be *automatically* set off against one another. It merely *entitles* either party to effect a set-off "from time to time, without further reference to the other party".[72] The Set-off Agreement therefore contemplates that a party must take a further step to exercise its entitlement and actually to set-off the intercompany debts. Until that further step is taken, there is no set-off.

86 Second, none of the Contracts subjects the Debt to the Set-off Agreement.[73] Further, the Set-off Agreement does not refer specifically to the Debt. Indeed, it could not: the Debt did not exist when the parties entered into the Set-off Agreement in July 2015.

87 Finally, the specific terms of the Contracts are inconsistent with the Set-off Agreement. As I have found, the Contracts incorporate cl 8.2 of Panoil's T&Cs. This provision requires the defendant to pay Panoil the Debt without deduction, set-off or counterclaim. Clause 8.2 operates contractually to preclude the defendant from exercising its entitlement under the Set-off Agreement.

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71 Bundle of AEICs, Vol 1, p425 at para 11

72 Bundle of AEICs, Vol 1, p241

73 Notes of Evidence (25 July 2019), p152(16) to 153(9)

88 That is not, of course, the end of the matter. It was within the power of Panoil and the defendant to vary the Contracts by nullifying cl 8.2 of Panoil's T&Cs. The parties do not dispute this. But it is not the defendant's case that the 13 August Letters effected any such variation. That is no doubt because the essential element of consideration is lacking to support the variation: Panoil was either insolvent or near insolvency in August 2017 and gained nothing from a set-off.

The 13 August Letters are fabrications

89 The issue of whether Panoil and the defendant effected a set off of the Debt does not therefore turn on the authenticity of the Set-off Agreement. It turns only on the authenticity of the 13 August Letters and the Contra Statement. I find these documents to be fabrications. I make two observations of general application on this issue before giving my specific reasons for this finding.

90 First, the defendant failed to prove the 13 August Letters and the Contra Statement at trial. The defendant did not call the two signatories of the two 13 August Letters to prove them. It did not call the maker of the Contra Statement to prove it. It attempted to prove these documents through the oral evidence of Mr Yeo and Mr Yong. But neither of these men is the maker of either of these documents.[74] Neither man could give any evidence which is admissible to prove these documents.

91 Second, Mr Yeo was a wholly unsatisfactory witness. He was less than forthcoming in cross-examination. His evidence lacked clarity and consistency

[74] Notes of Evidence (25 July 2019), p115(23) to 116(1)

and was entirely self-serving. The defendant's evidence on the authenticity of these documents, even if admissible, was bereft of credibility.

92 I now set out five specific reasons for rejecting the Set-off Defence and for my finding that the 13 August Letters and the Contra Statement are fabrications.

(1) Circumstances leading up to the set-off

93 Mr Yeo's evidence about the lead up to the set-off was wholly unsatisfactory. It was inconsistent not only with Mr Yong's evidence but also – and more importantly – with the contents of the 13 August Letters themselves.

94 According to Mr Yeo, it was Panoil who proposed a set-off to the defendant, following discussions on or about 13 August 2017:[75]

> Q: So of course you would need to take care of your company to ensure that either you are paid or perhaps the invoices are set off, so that you don't still owe the company based on invoices which have been issued by Panoil?
>
> …
>
> Q: The outstanding is how much again?
>
> A: At that point in time was over $2-over million. That's why *they propose to do this set-off, to try to use this consignment to sell to their nominated customer to set it off.* Of course, if we could have gotten that, and to clear our debts, we would be happy. *But when that party did not want to accept that cargo, we had no choice but to cancel it off.*
>
> [emphasis added]

I note in passing that this passage is most telling. In it, Mr Yeo testified that a condition precedent for the set-off failed to eventuate. According to him, that is

[75] Notes of Evidence (25 July 2019), p85(4) to 85(21)

why the plan turned from set-off to cancellation. That implies that the proposed set-off never actually took place.

95 Mr Yong's evidence and the terms of the 13 August Letters both contradict Mr Yeo. Mr Yong's evidence was unequivocally that it was the defendant who suggested the set-off[76] by D's 13 August Letter. The plain language of that letter supports Mr Yong. The defendant states in that letter that "*we are proposing* to offset the inter company balances" [emphasis added].[77] Only when he was cross-examined further on this point was Mr Yeo willing to concede that "in [D's 13 August Letter], it's my proposal. *I propose[d] to offset*" [emphasis added].[78]

96 That the defendant proposed the set-off to Panoil is also far more consistent with the inherent probabilities and the commercial incentives in August 2017. Mr Yeo confirmed that the defendant was concerned at that time about Panoil's ability to pay its debts in light of the MPA's disciplinary action.[79] The defendant had every incentive to protect its interests by approaching Panoil and suggesting a set-off. Panoil had no incentive to approach the defendant and suggest a set-off.

97 In fact, it was also Mr Yeo's evidence that it was *he* who went to Panoil's office to insist that Panoil issue a cover letter for its two-page statement. That cover letter is Panoil's 13 August Letter. He considered the two-page statement

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[76] Notes of Evidence (30 July 2019), p151(7) to 151(11), 159(18) to 159(24), 199(15) to 199(21)

[77] Defendant's Bundle of Documents, p63

[78] Notes of Evidence (25 July 2019), p150(11) to 150(16)

[79] Notes of Evidence (25 July 2019), p83(1) to 84(24)

alone to be "nothing" but "just a statement" if it were not accompanied by an explicit confirmation by Panoil that it "agreed on [the] arrangement".[80] Yet, Mr Yeo did not explain how he even came to be in possession of the two-page statement *before* Panoil's 13 August Letter was created, in order to be in a position to insist that Panoil create a cover letter to accompany it.

98 Further, Mr Yeo's evidence on this point was internally inconsistent. Although he said that Panoil created Panoil's 13 August Letter only because he insisted upon it,[81] he also said that he went to Panoil's office on 13 August 2017 *because* someone had asked him to do so.[82] Later in his evidence, he changed his story and said that when he went to deliver D's 13 August Letter: "they were not expecting me to keep going to look for them, but I went there to deliver letters and ask them to settle the invoices we asked".[83]

(2) The documents are missing from Panoil's books and records

99 The defendant did not challenge the judicial manager's evidence that they were unable to find originals or copies of the 13 August Letters or of the Contra Statement in Panoil's books and records. The absence of these documents in Panoil's books and records is peculiar given the substantial financial significance to Panoil and the defendant of setting off the Debt. The defendant failed to suggest any explanation as to why these documents would not be amongst Panoil's books and records. This failure is peculiar given that the defendant called Mr Yong as a defence witness. As a director of Panoil, Mr

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[80] Notes of Evidence (25 July 2019), p99(3) to 99(7)

[81] Notes of Evidence (25 July 2019), p99(3) to 99(7)

[82] Notes of Evidence (25 July 2019), p83(1) to 83(3)

[83] Notes of Evidence (25 July 2019), p147(20) to 148(10)

Yong has far more personal knowledge of what is and is not in Panoil's books and records than the judicial managers.

100 It might perhaps be plausible to say that Panoil handed the original of Panoil's 13 August Letter to the defendant but failed to make a copy for its own records. But I cannot believe that Panoil would have received D's 13 August Letter and not have retained the original in its books and records. The Contra Statement is an even more important document than the 13 August Letters. It purports to evidence a settled account between the two companies establishing that the defendant is no longer a debtor of Panoil. A settled account of this nature is a critical document for both the defendant and Panoil. This is so even if Panoil had never assigned its rights under the Contracts to the plaintiff. It is therefore of substantial commercial and accounting significance, quite apart from this litigation.

101 The defendant's evidence is that it realised the critical nature of the Contra Statement in August 2017. Mr Yeo's evidence is that the defendant created the Contra Statement in order to have documentary proof of the set-off on the defendant's own letterhead "for the directors to sign".[84] According to him, the defendant drew up the Contra Statement because, at the time it did so, it had only Panoil's record of the set-off in the form of Panoil's 13 August Letter[85] and "the letter from Panoil may not [have been] sufficient, so we need[ed] a director to sign it".[86] Mr Yeo thus signed the Contra Statement on 15 August 2017 and went to Panoil's office on the same day to get Mr Yong to sign

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[84] Notes of Evidence (25 July 2019), p114(20) to 114(24)

[85] Notes of Evidence (25 July 2019), p114(1) to 114(5)

[86] Notes of Evidence (25 July 2019), p115(6) to 115(13)

it.[87] It is only reasonable to expect that Panoil would retain an important document such as this amongst its books and records, if for no reason other than to allow its accounts to be drawn up properly. If it had done so, the judicial managers would have been able to find it.

102 The absence of *all* three of these documents in Panoil's books and records, whether as originals or copies, is to my mind evidence that the documents were not exchanged in August 2017 as Mr Yeo and Mr Yong would have me believe. This is particularly the case given that the judicial managers were able to find the Set-off Agreement in Panoil's books and records. There is no reason why Panoil should have been more concerned about retaining the Set-off Agreement in its books and records for the future than about retaining the 13 August Letters and the Contra Statement in its books and records for the future. After all, it is the 13 August Letters and the Contra Statement which actually effected the set-off.

103 My finding that the Contra Statement is fabricated is underscored by the defendant's belated disclosure of the Contra Statement in this action. In October 2017, after Panoil's judicial managers sent a letter of demand to the defendant, the defendant and Panoil's judicial managers exchanged correspondence through solicitors. In that exchange, the defendant raised the Set-off Defence but never disclosed or made reference to the Contra Statement, even in passing. Given the legal and commercial significance of the Contra Statement to the claim asserted against the defendant and to the Set-off Defence, it is beyond belief that the defendant or its solicitors would have had it in October 2017 and yet have failed to deploy it in the correspondence. This suggests to me very strongly that the Contra Statement did not exist in October 2017.

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[87] Notes of Evidence (25 July 2019), p111(1) to 111(23)

104 So too in March 2018,[88] when the defendant's solicitors wrote to the plaintiff's solicitors, the former made no mention whatsoever of the Contra Statement.[89] If it were genuine, producing it at that time would again have disposed of the plaintiff's claim against the defendant. The defendant's failure to deploy the Contra Statement in response to the plaintiff's demands suggests to me very strongly once again that it did not exist even as late as March 2018.

105 Mr Yeo's evidence is that the defendant gave the Contra Statement to its solicitors before the October 2017 correspondence with the judicial managers.[90] If that were true, it is incredible that its solicitors would have failed to make any mention of the Contra Statement in that correspondence. Even if I were to accept this evidence, it nevertheless fails to explain why the Contra Statement was not disclosed in the March 2018 correspondence with the plaintiff's solicitors, close to *five months* after the defendant had allegedly given a copy to its solicitors.

106 I reject Mr Yeo's attempt to blame the defendant's solicitors for the failure to deploy the Contra Statement in the correspondence.[91] The defendant does not require legal advice to appreciate that the Contra Statement is central to the claims made both by the judicial managers and the plaintiff. If the Contra Statement were indeed genuine, and if the defendant had indeed given a copy to its solicitors as early as October 2017, I would have expected the defendant positively to instruct its solicitors to deploy the Contra Statement in both the October 2017 correspondence and in the March 2018 correspondence, rather

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88 Bundle of AEICs, Vol 1, at p250

89 Notes of Evidence (25 July 2019), p109(10) to 109(20)

90 Notes of Evidence (25 July 2019), p108(12) to 109(9)

91 Notes of Evidence (25 July 2019), p109(18) to 109(20)

than to leave it to its solicitors to decide whether to do so. Mr Yeo's blame directed at the defendant's solicitors does not cause me to doubt my finding that, even as late as March 2018, the Contra Statement did not in fact exist.

107 The defendant also relies on Mr Yong's evidence. The defendant argues that it corroborates Mr Yeo's evidence that the Contra Statement was in existence on 15 August 2017. Mr Yong testified that it was Mr Yeo who brought the Contra Statement to Panoil's office for Mr Yong to sign on or about 15 August 2017. Mr Yong then signed the document.[92]

108 This evidence is, however, contradicted by a series of WhatsApp messages which Mr Yong sent to Ms Lai.[93] Ms Lai messaged Mr Yong on 15 August 2017 to ask whether he was in Singapore. Mr Yong messaged in response that he would be "[b]ack on Thursday" *ie,* 17 August 2017.[94] This implies that Mr Yong was not in Singapore on 15 August 2017. That, of course, is the date on which Mr Yong claims he signed the Contra Statement. When confronted with this discrepancy in cross-examination, Mr Yong was suddenly unable to recall the exact date on which he signed the Contra Statement. Instead, he suggested that he "could [have been] departing on the 15th" instead.[95] This explanation is unsatisfactory. I reject it.

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92 Notes of Evidence (30 July 2019), p204(6) to 204(23)

93 Lai Shing Joo's AEIC at paras 7 to 9, p12 to 13

94 Lai Shing Joo's AEIC at p13

95 Notes of Evidence (30 July 2019), p211(8) to 211(21)

(3) The date of the set-off

109 The defendant's pleaded case is that the set-off took place by the exchange of letters on 13 August 2017.[96] Yet, this is contradicted by the Contra Statement. It states "Contra on: 15/08/2017". It thereby purports to record that the "contra", a commercial synonym for a set-off, took place on 15 August 2017.[97] Mr Yong readily accepted this at trial.[98]

110 When Mr Yeo was pressed on the discrepancy in the dates, he sought to attribute the mistake to the maker of the Contra Statement:[99]

> Q: You have this document, which in case you have forgotten, the bank disputes the authenticity of. We have this document now from you, saying that the contra, took place on 15 August. So can you tell the court which is the real date, in your mind, that the contra, or the set-off took place?
>
> A: The contra set-off took place on the 13th, as per the affidavit. This statement that we gave you was done on the 15th as a followup request from my company for the directors to sign for my accounting record of the contra.
>
> …
>
> Q: Would you agree with me, when you look at this so-called contra statement, based on your evidence, can I suggest to you that a more accurate -- in fact, the only accurate – way of describing what you have said are the events that took place would be contra on 13 August 2017?
>
> A: Yes.
>
> Q: So this is not accurate?
>
> A: *You put it that way that means the wording is put wrongly. The person who prepared this did not put it correctly.*
>
> [emphasis in italics]

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96 Defence at para 5(b)(i)

97 Bundle of AEICs, Vol 2, at p514

98 Notes of Evidence (30 July 2019), p203(20) to 204(3)

99 Notes of Evidence (25 July 2019), p113(15) to 113(25), p115(16) to 116(1)

This was not the first time that Mr Yeo sought to explain away inconsistencies in his evidence by attributing a mistake to the maker of a document. I note also that the defendant neither identified the maker of the Contra Statement nor called the maker as a witness.

111 Even if I were to accept Mr Yeo's evidence that the Contra Statement was prepared on 15 August 2017, there is no reason that it could not have accurately recorded that the set-off was actually effected on 13 August 2017. Contrary to Mr Yeo's suggestion, that does not amount to back-dating the document.[100] It would simply record in the body of the Contra Statement that it was brought into existence on 15 August 2017 to reflect a set-off which had been effected two days earlier.

(4) Net position after the set-off

112 I also find striking the defendant's inability to state accurately the net amount owed by Panoil to the defendant after effecting the purported set-off. The obvious and critical question for two parties who are setting off their debts is the net position after the set-off has been effected. Calculating this is a simple question of arithmetic. Yet, the defendant's witnesses were unable to provide any clear answer on this point. The documentary evidence was likewise inconsistent.

113 At trial, Mr Yeo took wholly different positions on this critical question. He first relied on the two-page statement attached to Panoil's 13 August Letter to assert that the result of the set-off was that Panoil owed the defendant

[100] Notes of Evidence (25 July 2019), p115(6) to 115(13)

US$2,400.12.[101] This is, however, contradicted by an email from the defendant's solicitors to the plaintiff's solicitors on 23 October 2017. In that email, the defendant's solicitors took the position that "[Panoil] still owes [the defendant] about US$600,000 or more", alleged to be evidenced by the documents attached to the email.[102]

114 When this discrepancy was put to Mr Yeo, he referred to a statement of account from the defendant dated 31 August 2017. That statement shows Panoil owing the defendant a net sum of just over US$2.6m.[103] He said that this "statement showed that they actually have outstanding of 2.6 million, which is more than 600,000".[104] But that is not the point. Mr Yeo could not explain how the US$600,000 figure in the defendant's solicitors' email could be derived from this document.[105]

115 To try and explain the US$600,000 figure, Mr Yeo relied on an invoice which the defendant issued to Panoil on 15 August 2017 showing that Panoil owed a sum of just over US$431,000 to the defendant.[106] He added to this a sum of approximately US$70,000 which he claimed Panoil was obliged to reimburse the defendant for payments on Panoil's behalf.[107] Yet, these adjustments bring the figure to the region of US$501,000, not US$600,000. And the US$431,000 figure is in any event inconsistent with a statement of account dated 31 August

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[101] Bundle of AEICs, Vol 2, p512 to 513; Notes of Evidence (25 July 2019), p4(12) to 5(14)

[102] Bundle of AEICs, Vol 1, p235

[103] Bundle of AEICs, Vol 2, p526 to 527

[104] Notes of Evidence (25 July 2019), p8(7) to 8(17)

[105] Notes of Evidence (25 July 2019), p9(5) to 10(5)

[106] Bundle of AEICs, Vol 1, p244

[107] Notes of Evidence (25 July 2019), p11(22) to 12(8); Bundle of AEICs, Vol 1, p245 to 248

2017 which was also in evidence, which suggests that Panoil made a payment to the defendant of US$50,000 against the sum due under this invoice.[108]

116 Mr Yeo eventually sought to disavow the US$600,000 figure in the defendant's solicitors' email of 23 October 2017. He claimed that it "maybe was a mistake". But the defendant's solicitors prepared their email advancing the US$600,000 figure on Mr Yeo's instructions.[109]

117 What is more puzzling is that Mr Yeo later testified that, around 13 August 2017, all that Panoil owed the defendant was "$2-over million".[110] Yet, if this were true, bearing in mind that the Debt was US$2.43m, the set-off would actually result in Panoil being a *net creditor* of the defendant rather than a *net debtor*, as is the defendant's case.

118 Yet another figure appears in the Contra Statement dated 15 August 2017. The settled account under that document shows that Panoil owes the defendant the sum of US$2,100.[111]

119 The widely discrepant evidence as to the net position between Panoil and the defendant after the purported set-off, coupled with Mr Yeo's inability to explain any of the discrepancies, also leads me to my finding that the 13 August Letters and the Contra Statement are fabrications.

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[108] Bundle of AEICs, Vol 2, p527

[109] Notes of Evidence (25 July 2019), p12(17) to 12(22)

[110] Notes of Evidence (25 July 2019), p85(13) to 85(21)

[111] Bundle of AEICs, Vol 2, p514

(5) Mr Yeo and Mr Yong's close ties

120 Finally, my finding is bolstered by the relationship between Mr Yong and Mr Yeo. This relationship supplies the motive for the fabrication. It gave Mr Yong every incentive to favour the defendant as Panoil slid into insolvency.

121 Mr Yong and Mr Yeo have had a close personal and professional relationship spanning a few decades. They met for the first time in secondary school and grew closer during national service.[112] They then went into a series of business ventures together. They were partners in an engineering firm and shareholders in a food and beverage outlet.[113] Further, Mr Yong was a director of a wholly-owned subsidiary of the defendant from 2008 to 2012.[114]

122 It is noteworthy that neither Mr Yong nor Mr Yeo deny the close nature of their relationship.[115] The best evidence of this is a series of four letters which Panoil sent between February 2017 and August 2017 to its ship management company relating to the unauthorised alterations which had led to the MPA's disciplinary action against Panoil. At that time, Mr Yong and Mr Lim Zhisheng ("Mr Joe Lim"), were the only two directors of Panoil. Mr Yeo was neither a director nor an employee of Panoil.[116] Mr Yong drafted these four letters. But neither he nor Mr Joe Lim signed the letters. Instead, Mr Yong asked Mr Yeo to sign the letters, drawing on his close relationship with Mr Yeo.[117] As further

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[112] Notes of Evidence (25 July 2019), p118(12) to 118(18)

[113] Khoo May May Evelyn Vanessa's AEIC at para 86

[114] Khoo May May Evelyn Vanessa's AEIC at p309

[115] Notes of Evidence (25 July 2019), p133(5) to 133(7)

[116] Notes of Evidence (25 July 2019), p122(11) to 122(17); Notes of Evidence (30 July 2019), p188(20) to 189(3)

[117] Notes of Evidence (25 July 2019), p89(11) to 89(15); Notes of Evidence (30 July 2019), p190(18) to 191(5)

evidence of their close relationship, Mr Yeo readily agreed to Mr Yong's request. He therefore signed these four letters for Panoil and applied Panoil's company stamp to them even though he had no involvement in Panoil or in the subject-matter of the letter.

123 When asked to explain, Mr Yong said that he had asked Mr Yeo to sign the letters to exert pressure on the ship management company to continue managing Panoil's ships by giving it the impression that Panoil had employed an external consultant.[118] Mr Yeo gave a different reason. He said that he thought it was possible that the ship management company was connected to Mr Yong and Mr Joe Lim. So he thought that Mr Yong had sought Mr Yeo's help to avoid involving Mr Yeo and Mr Joe Lim's names and thereby giving the appearance of a conflict of interest.[119] Ultimately, the actual reason does not matter. What matters is that Mr Yong and Mr Yeo's relationship was so close in 2017, when Panoil was insolvent or near insolvency, that Mr Yong asked Mr Yeo to sign four letters for Panoil and Mr Yeo agreed even though he had no involvement in Panoil.

Conclusion on the Set-off Defence

124 Given my findings, I am satisfied that no set-off took place in August 2017. The documents on which the defendant relies for the Set-off Defence are fabrications. They were created for the purposes of defending a claim on the Contracts. Accordingly, I hold that Set-off Defence fails.

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[118] Notes of Evidence (30 July 2019), p189(3) to 189(12)

[119] Notes of Evidence (25 July 2019), p131(15) to 132(18)

Is the defendant barred from relying on the Set-off Defence?

125 Given my rejection of the Set-off Defence, it is strictly speaking unnecessary for me to consider the plaintiff's alternative submission. That submission is that, if a set-off had indeed been effected in August 2017, upholding the set-off in this action would impermissibly allow the defendant to take advantage of its own wrong. Nevertheless, as the plaintiff made detailed submissions on this point, I shall analyse this point. For the purposes of my analysis, I shall assume – contrary to my finding – that the Debt was in fact set off in August 2017.

126 In my view, this alternative submission would not have succeeded had it been necessary for the plaintiff to rely on it.

127 The plaintiff's submission is straightforward. The plaintiff accepts that Panoil and the defendant had it within their power to agree to nullify cl 8.2 of Panoil's T&Cs. However, by reaching such an agreement, the defendant dishonestly assisted Mr Yong in breaching his fiduciary duties as a director of Panoil.

128 The breach of fiduciary duties arises in this way. By August 2017, Panoil was insolvent or near-insolvent. Panoil's directors then owed a "fiduciary duty to take into account the interests of the company's creditors when making decisions for the company" (*Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 at [48]). The defendant was contractually bound by cl 8.2 of Panoil's T&Cs not to effect a set-off. By agreeing to nullify cl 8.2 of Panoil's T&Cs and by permitting a set-off, Mr Yong placed the defendant in a better position than it would have been in Panoil's liquidation. The corollary is that the set-off prejudiced Panoil's other creditors in the liquidation. Mr Yong thereby breached his fiduciary duty to take into

account the interests of Panoil's creditors. The defendant agreed to the set-off with knowledge of its effect. The defendant thereby dishonestly assisted Mr Yong's breach. To allow the defendant to rely on the Set-off Defence would therefore amount to allowing it to rely on its own wrong.[120] This, the plaintiff says, is impermissible as a matter of law. It relies on the maxim, *nullus commodum caper potest de injuria sua propria*.[121]

129 This maxim is described in R.H Kersley, *Broom's Legal Maxims* (Sweet & Maxwell, 10th Ed, 1939) at 191 as follows:

> It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.

This maxim and the well-established maxi*m ex turpi causa non oritur actio* are two facets of the same fundamental principle: the court should not lend its assistance to a wrongdoer. The classic statement of the *ex turpi causa* doctrine can be found in *Holman v Johnson* (1775) 1 Cowp 341. In that case, Lord Mansfield CJ stated that "[n]o court will lend its aid to a man who founds his cause of action on an immoral or an illegal act" (at 343).

130 This fundamental principle applies equally to defences as it does to claims. In *Montefiori v Montefiori* (1762) 1 Wm Bl 363, Lord Mansfield noted that "no man shall set up his own iniquity as a defence, any more than as a cause of action" (at 364, cited in *Takhar v Gracefield Developments Ltd and others* [2019] UKSC 13 at [92]).

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[120] Plaintiff's Closing Submissions at paras 164 to 166

[121] Plaintiff's Closing Submissions at para 167

131 For the plaintiff to rely on this maxim successfully, it must establish each of the following propositions:

(a) Panoil was insolvent or near insolvent in August 2017;

(b) Mr Yeo acted dishonestly when he assisted Mr Yong to nullify cl 8.2 of Panoil's T&Cs and to effect the set-off;

(c) as a result of the set-off, the defendant was placed in a better position than it would otherwise have been in in Panoil's liquidation;

(d) Mr Yeo's dishonest assistance constitutes sufficient turpitude to invoke the maxim; and

(e) the defendant, in asserting its Set-off Defence, relies on that turpitude.

132 The central difficulty with the plaintiff's alternative submission is proposition (c). It is undisputed that, in Panoil's liquidation, insolvency set-off would have applied as between Panoil and the defendant under s 88 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) read with s 327(1) of the Companies Act (Cap 50, 2006 Rev Ed).

133 The essential question on proposition (c) is therefore the effect of cl 8.2 of Panoil's T&Cs in Panoil's liquidation. Does cl. 8.2 bind Panoil even in liquidation so as to prevent insolvency set-off from taking effect? Or does cl 8.2 yield to insolvency set-off? If the latter is correct, it cannot be said that effecting a pre-insolvency set-off put the defendant in a better position post-insolvency. That is because insolvency set-off would in any event have operated post-insolvency to the same economic effect. As Vaughan Williams J noted in *Re Washington Diamond Mining Company* [1893] 3 Ch 95, "[y]ou cannot prefer a

man…by merely putting him in the very position in which he would be if a bankruptcy followed" (at 104).

134 Two propositions of law on insolvency set-off are well-established. First, insolvency set-off is mandatory. Parties are not permitted contractually to exclude its effect (*Good Property Land Development Pte Ltd v Societe-Generale* [1996] 1 SLR(R) 884 at [10]; *National Westminster Bank v Halesowen Presswork & Assemblies Ltd* [1972] AC 785 at 805). Second, it is automatic. Insolvency set-off is a self-executing procedural directive. It takes effect without the need for further intervention and arises automatically by operation of law. And it does so irrespective of the wishes of the parties (*Stein v Blake* [1995] 2 All ER 961 at 967).

135 The mandatory nature of insolvency set-off means that a pre-insolvency agreement excluding set-off, such as cl 8.2 of Panoil's T&Cs, yields to insolvency set-off once insolvency intervenes. Thus, in *Coca-Cola Financial Corpn v Finsat International Ltd* [1996] 3 WLR 849, Neill LJ characterised the "statutory obligation to set off mutual debts as an exception to the general principle that someone may renounce the benefit or other right introduced entirely in his favour" (at 857). Goh Joon Seng J cited this proposition with approval in *Citibank NA v Lee Hooi Lian and another* [1999] 2 SLR(R) 1 at [62]. As Rory Derham, author of *Derham on the Law of Set-Off* (Oxford University Press, 4th Ed, 2010) notes at 127:

> The question of contractual exclusion has arisen in relation to other forms of set-off (apart from legal set off). Courts have permitted an equitable set-off to be expressly excluded providing that clear words are used. By contrast, however, they will not permit set-off arising in bankruptcy or liquidation to be excluded as this form of setoff is regarded as mandatory and hence they will strike down contractual arrangements which purport to exclude or restrict that set-off.

136 If the plaintiff had had to rely on its alternative submission, proposition (c) would therefore not have been established. Insolvency set-off prevails over cl 8.2 of Panoil's T&Cs in Panoil's liquidation. In economic terms, insolvency set-off operating automatically post-insolvency is indistinguishable from a set-off agreed between Panoil and the defendant in August 2017, pre-insolvency. The agreed set-off would not have placed the defendant in a better position than it would otherwise have been in in Panoil's liquidation. There would have been no breach of fiduciary duty by Mr Yong for Mr Yeo dishonestly to have assisted.

137 Had it been necessary for my decision, therefore, I would have answered this essential question on proposition (c) in the defendant's favour. On this ground alone, the plaintiff's alternative submission could not have succeeded, had it been necessary for the plaintiff to rely on it.

The Cancellation Defence

138 The defendant's alternative defence is that Panoil cancelled the invoices which represent the Debt.

139 The defendant on sold the marine fuel which it purchased from Panoil under the Contracts to a company called Eastern Pacific Tankers Sdn Bhd ("Eastern Pacific"). The defendant's case is that it received a copy of a letter from Eastern Pacific to Panoil dated 17 August 2017 ("EP's 17 August Letter") in which Eastern Pacific notified Panoil that Panoil should bill the Debt directly to Eastern Pacific.[122] Panoil accepted Eastern Pacific's request by letter the following day ("Panoil's 18 August Letter"), copied to the defendant. Panoil then cancelled the invoices it had issued to the defendant representing the Debt,

[122] Bundle of AEICs, Vol 2, p556

thereby cancelling the Debt.[123] On the same day, the defendant wrote to Panoil asking Panoil to reflect the cancellation of the Debt ("D's 18 August Letter").[124]

140 The Cancellation Defence has always been framed as relying on Panoil *cancelling* the Debt. However, in the defendant's oral closing submissions, counsel for the defendant raised the issue of novation for the first time. When pressed, he confirmed that the defendant's position is that Panoil cancelled the invoices as part of a broader transaction involving a novation – understood in its strict legal sense of a tripartite agreement – under which Eastern Pacific entered into a fresh contract with Panoil, taking over the defendant's obligation to pay the Debt to Panoil.[125]

141 In response, the plaintiff challenges the authenticity of EP's 17 August Letter, Panoil's 18 August Letter, D's 18 August Letter and the two-page statement account dated 31 August 2017 attached to this letter.[126] It argues that none of these documents were among Panoil's records handed over to the judicial managers. Further, two of these letters were found much later in suspicious circumstances.[127]

142 The plaintiff also points out that Panoil never actually cancelled the invoices issued to the defendant and never issued any fresh invoices to Eastern Pacific.[128] Further, given that Panoil's financial difficulties were well known by

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[123] Bundle of AEICs, Vol 2, p557

[124] Defendant's Opening Statement at para 4(b)(iii)

[125] Oral Closing Submissions, 10 March 2020

[126] Reply (Amendment No. 2) at para 8(a)

[127] Plaintiff's Opening Statement at para 33; Lin Yueh Hung's AEIC at paras 6(a) – (c) and 7

[128] Plaintiff's Opening Statement at para 30

August 2017, it makes no commercial sense for Eastern Pacific to prefer to deal directly with Panoil instead of the defendant.[129]

The documents

143 The Cancellation Defence is premised on three key documents: (a) EP's 17 August Letter; (b) Panoil's 18 August Letter; and (c) D's 18 August Letter and the attached two-page statement of account dated 31 August 2017.

144 EP's 17 August Letter is addressed to Panoil and copied to the defendant. It asks Panoil to bill Eastern Pacific directly for the marine fuel delivered under the Contracts:[130]

> Dear sir,
>
> For the above shipments, to avoid delays in delivery and payment. Our management will not deal with [the defendant] as the trading house for the delivery of the cargo from Panoil.
>
> Panoil should bill directly to our company. We will not accept invoices or take possession of cargo on behalf of [the defendant].
>
> Please act with immediate effect to avoid any delay in payment.
>
> Eastern Pacific Tankers Sdn Bhd
>
> (Authorised Signatory)

145 In response, Panoil's 18 August Letter was addressed to Eastern Pacific and copied to the defendant. Panoil informed Eastern Pacific that it had no objection to its request: [131]

> Dear sir,
>
> With reference to BDN No 013167, 0131170, 013161, 013154, 013160, 013156, 013151

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[129] Khoo May May Evelyn Vanessa's AEIC at para 61

[130] Bundle of AEICs, Vol 2, p556

[131] Bundle of AEICs, Vol 2, p524

> We have no objection to your proposal stated in your letter dated 18 Aug 17.
>
> Best Regards
>
> Mary on behalf Of PANOIL PETROLEUM PTE LTD

It is curious that this letter refers to Eastern Pacific's letter "dated 18 August 2017". The preceding email from Eastern Pacific was actually dated 17 August 2017. The parties did not address this discrepancy in any admissible evidence. Mr Shaik Saleem ("Mr Saleem"), a witness for the defendant, suggested in his affidavit of evidence in chief that this was the result of a typographical error.[132] However Mr Saleem's affidavit of evidence in chief was never admitted in evidence because he did not attend to be cross-examined on it (see [153] below). I am content nevertheless to assume that this is a mere typographical error. Certainly, there is no suggestion that there is some other letter or email dated 18 August 2017 from Eastern Pacific to Panoil which has not been disclosed.

146 D's 18 August Letter is addressed to Panoil and seeks an updated statement of deliveries and payments: [133]

> Dear Mary
>
> RE: PANOIL PETROLEUM PTE LTD
>
> We refer to our letter of 13 Aug 2017.
>
> …
>
> We have already paid up fully for item 1 as per payment proof.
>
> However, we will not accept invoices 2 to 8. This is because until now we did not receive the cargo/goods for all these 7 invoices at all.
>
> Please send us a statement urgently reflecting the updated status.

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[132] Bundle of AEICs, Vol 2, p553 para 3

[133] Bundle of AEICs, Vol 1, p253

> We attached [*sic*] our statement to you reflecting the above cancellation of the 7 invoices.
>
> Best regards
>
> Adrian Lum

147 The defendant has failed to discharge its burden of proving that the documents supporting the Cancellation Defence are authentic. I therefore reject these documents as fabrications. I have seven reasons for arriving at this conclusion.

The defendant failed to call the makers of the 18 August letters

148 First, as with the 13 August Letters, the defendant failed to call the makers of either Panoil's 18 August Letter or D's 18 August Letter to prove them at trial. Again, the defendant relies on Mr Yong's and Mr Yeo's evidence to prove these letters, even though neither of them were the makers of these letters or could give admissible evidence as to their authenticity.

149 To prove EP's 17 August Letter, the defendant relies on the evidence of Mr Tony Chan Kim Hock ("Mr Chan"). Mr Chan was Eastern Pacific's authorised representative in Singapore at the material time. The defendant submits that, as an authorised representative of Eastern Pacific, Mr Chan's evidence suffices *ipso facto* to prove EP's 17 August Letter.[134] I reject this submission. The admissibility of evidence is not a matter of authority or agency. It is, first and foremost, a matter of personal knowledge.

150 Under s 62 of the Evidence Act, a witness of fact is ordinarily required to give direct evidence only, *ie,* evidence only of facts which are broadly speaking within his personal knowledge. Mr Chan had "nothing to do with the

[134] Oral Closing Submissions, 10 March 2020

content of the letter". He did not draft it. He did not type it. He did not sign it. He did not send it. By his own admission, he was not even involved in the decision-making process which allegedly led to Eastern Pacific bringing EP's 17 August Letter into existence in the first place.[135] He was not, on any view of the matter, the maker of EP's 17 August Letter.[136] He was in no position to give direct evidence as to its authenticity.

151 Mr Chan did, however, testify that he had seen EP's 17 August Letter in the past.[137] That is undoubtedly direct evidence within the meaning of s 62 of the Evidence Act. But this too is insufficient to prove EP's 17 August Letter. Mr Chan stated that he had been briefed the day before giving evidence, *ie,* on 30 August 2019, by one of Eastern Pacific's directors, Mr Nurman Junaidi bin Janny ("Mr Nurman"). Mr Chan testified that Mr Nurman had *specifically* briefed him on EP's 17 August Letter.[138] In response to the plaintiff's question as to how he came "to know about [EP's 17 August Letter]", Mr Chan replied that "[it] was briefed by the management" just "yesterday… [with] all the exact document".[139] I understand this answer to mean that Eastern Pacific's management had briefed Mr Chan about the background to the letter the day before he took the stand. His answer is not direct evidence of the authenticity of the letter, let alone of its contents.

152 When Mr Chan was asked specifically whether he had seen EP's 17 August Letter on or around the date which it bears, his evidence was at best

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[135] Notes of Evidence (31 July 2019), p66(17) to 67(20)

[136] Notes of Evidence (31 July 2019), p66(8) to 66(12)

[137] Notes of Evidence (31 July 2019), p36(21) to 37(1), 38(25) to 41(12)

[138] Notes of Evidence (31 July 2019), p64(2) to 64(7)

[139] Notes of Evidence (31 July 2019), p64(16) to 64(20)

equivocal. He said that, out of all of the documents he was briefed upon on the day before he took the stand, he remembered only "some of the documents".[140] And even when he was referred to EP's 17 August Letter itself, his response was not definitive. He said "I *think* I have seen it before but it wasn't sent by me, it was by the company" [emphasis added].[141] Eventually, Mr Chan conceded that he did not see EP's 17 August Letter "immediately after it was sent out on 17 August" and that he may have only seen it "on the later part of [2017]". [142]

153 Mr Chan was not the defendant's first choice of a witness to testify from the perspective of Eastern Pacific. The defendant initially applied for Mr Saleem to give this evidence. At the eleventh hour – just a day before Mr Saleem was scheduled to take the stand – the defendant asked for leave to call Mr Chan instead of Mr Saleem. According to Mr Chan, Mr Nurman had given Mr Chan a copy of Mr Saleem's affidavit of evidence in chief and told him that Mr Nurman was briefing Mr Chan because Mr Chan was "supposed to be [Eastern Pacific's] representative to affirm that" *ie*, the contents of Mr Saleem's affidavit.[143]

154 Mr Chan explained that Mr Nurman was part of Eastern Pacific's management and that "would be one of the people who would make decisions for Eastern".[144] It is reasonable to assume that Mr Nurman would have personal knowledge of EP's 17 August Letter, if it were genuine, and could have given

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[140] Notes of Evidence (31 July 2019), p64(5) to 65(5)

[141] Notes of Evidence (31 July 2019), p66(8) to 66(12)

[142] Notes of Evidence (31 July 2019), p78(8) to 78(14)

[143] Notes of Evidence (31 July 2019), p61(3) to 62(10)

[144] Notes of Evidence (31 July 2019), p55(19) to 55(22)

direct evidence as to its authenticity or contents. Nevertheless, the defendant did not call Mr Nurman as a witness.

155 Mr Nurman was clearly available to the defendant to call as a witness at trial. He was actually sitting in the gallery and observing the proceedings while Mr Chan testified on 31 July 2019.[145] When asked why Mr Nurman was not giving evidence, Mr Chan speculated that the reason could be his inability to "speak well in English or something, so he may fumble".[146]

156 I am not persuaded. Witnesses give evidence every day through interpreters. I therefore draw an adverse inference against the defendant from its failure to call Mr Nurman to prove EP's 17 August Letter. I am satisfied that the circumstances of the case warrant me to do so under s 116(g) of the Evidence Act. I bear in mind especially that EP's 17 August Letter is absolutely central to the Cancellation Defence (see *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [50]) and that Mr Nurman was available to the defendant as a witness.

The Cancellation Defence is an afterthought

157 Second, I find that the Cancellation Defence is an afterthought. The defendant raised the Cancellation Defence for the first time at a very late stage of this action. The first mention of the Cancellation Defence came in the defendant's solicitors' email of 16 March 2018 to the plaintiff's solicitors ("16 March 2018 Email"). This was the deadline for the defendant to file its defence in this action. Even then, the email made no reference to Eastern Pacific whatsoever. It merely stated that "neither [the defendant] nor their customers

[145] Notes of Evidence (31 July 2019), p48(12) to 49(14)

[146] Notes of Evidence (31 July 2019), p49(21) to 50(2)

have received the goods or cargoes which are the subject of all but the first item in paragraph 8 of the Statement of Claim".[147] It was only on 19 March 2018, when the defendant filed its defence, that the identity of Eastern Pacific was disclosed to the plaintiff for the first time.[148]

158 This was despite the numerous opportunities for the defendant to have communicated the Cancellation Defence either to the plaintiff or to the plaintiff's solicitors before the plaintiff commenced this action on 22 February 2018.[149] For example, in its response dated 9 October 2017 to a letter of demand issued by the plaintiff's solicitors on 4 October 2017, the defendant said only that it had "already settled all the outstanding via telegraphic transfers and offset with an Offset Agreement".[150] In other words, the defendant referred only to the Set-off Defence. There was no reference whatsoever to the Cancellation Defence. The defendant made no mention of the Cancellation Defence in the correspondence which followed in October 2017.[151]

159 I find it incredible that – if the documents evidencing the Cancellation Defence had been brought into existence on the dates which they bear, and were in the defendant's possession from those dates – the defendant would not have deployed them at the earliest opportunity. This is especially given that the cancellation of the invoices, if true, would have disposed of the plaintiff's claim against the defendant.

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147 Bundle of AEICs, Vol 1, at p250

148 Notes of Evidence (25 July 2019), p37(17) to 37(21)

149 Statement of Claim & Writ of Summons dated 22 February 2018

150 Bundle of AEICs, Vol 1, at Exhibit "KMMEV-16", p228

151 Bundle of AEICs, Vol 1, p232 and Exhibit "KMMEV-19"

160 At trial, Mr Yeo accepted that, as early as August 2017, the defendant considered the Cancellation Defence to be a strong defence to any potential claim for the Debt by Panoil or its assignee.[152] Yet, Mr Yeo was unable to explain satisfactorily why the defendant failed to mention the Cancellation Defence and the underlying facts in its 9 October 2017 letter. Mr Yeo's evidence was that although the defendant did intend to include the Cancellation Defence in its 9 October 2017 letter, it had chosen not to do so after receiving Panoil's advice, via Panoil's financial controller at the time Ms Mary Chua ("Ms Chua"), that the amounts owing under the Contracts were already set off.[153]

161 I find this implausible. Mr Yeo's evidence amounts to saying that the defendant allowed Panoil to dictate the defendant's decision to abandon an available alternative defence. The defendant was itself directly and materially affected by the purported cancellation of the invoices. The cancellation allegedly extinguished its own obligation to pay the Debt. As a rational commercial party, the defendant would thus have had its own understanding of the economic consequences of the invoices being cancelled. Why then would it rely on Panoil's advice to abandon the Cancellation Defence? Furthermore, Ms Chua was not even a director of Panoil. And the defendant did not call Ms Chua as a witness to corroborate Mr Yeo's explanation. And none of the correspondence between the defendant and Panoil was disclosed in evidence.

162 The defendant repeatedly failed to raise the Cancellation Defence when any rational commercial party would have done so. The defendant's letter to the plaintiff's solicitors on 13 October 2017 merely reiterates its 9 October 2017

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[152] Notes of Evidence (24 July 2019), p193(23) to 193(25); Notes of Evidence (25 July 2019), p34(2) to 34(18)

[153] Notes of Evidence (24 July 2019), p195(3) to 196(8)

letter and attaches a copy of the Set-off Agreement.[154] By 23 October 2017, the defendant had appointed solicitors. Yet, the defendant's position remained only that the Debt had been set off. The defendant's solicitors' email to the plaintiff on 23 October 2017 stated "what our client owes your client has been fully settled". It makes no reference to the Cancellation Defence.[155] The defendant finally alluded (albeit obliquely) to the Cancellation Defence for the first time only by its solicitors' 16 March 2018 Email (see [165] below). Yet, this email still made no reference whatsoever to Eastern Pacific's involvement. This is surprising given Mr Yeo's testimony that the defendant informed its solicitors of Eastern Pacific's involvement "somewhere in maybe February to March [2018]".[156]

163 I draw from this repeated failure a particularly strong adverse inference against the defendant. The Cancellation Defence is a clear afterthought.

The inconsistent bases for the Cancellation Defence

164 Third, the defendant's witnesses were unable clearly to articulate the basis for Panoil's decision to cancel the Debt. They offered bases which were either internally inconsistent or contrary to the documentary evidence.

(1) Failure to deliver cargoes

165 One basis may be gleaned from the defendant's solicitors' 16 March 2018 Email addressed to the plaintiff's solicitors. There, the defendant's solicitors refer to D's 18 August Letter and state that the defendant owes Panoil

[154] Bundle of AEICs, Vol 1, p232

[155] Bundle of AEICs, Vol 1, p235

[156] Notes of Evidence (25 July 2019), p35(24) to 36(10)

no money under the invoices because Panoil failed to deliver all but one cargo of marine fuel: [157]

> Furthermore, we have been instructed by our client that subsequent to the said set-off, our client which is only a trader realised that in fact, *neither they nor their customers have received the goods or cargoes which are the subject of all but the first item in paragraph 8 of the Statement of Claim.* Accordingly, on 18 August 2017, our client notified Panoil Petroleum so, by way of a letter dated the same. A copy of the letter is attached herewith.
>
> [emphasis added]

166 This line of defence was consistent with D's 18 August Letter, in which the defendant informed Panoil that it would not accept the invoices as it "did not receive the cargo/goods for all these 7 invoices at all". It is thus clear from D's 18 August Letter that the basis then for rejecting the invoices is that Panoil had not delivered marine fuel under the Contracts. The defendant made no reference to Eastern Pacific whatsoever or to the fact that the request for cancellation emanated from Eastern Pacific.[158] Be that as it may, this basis was also reflected in the defendant's opening statement at trial, in which the defendant said that the defendant cancelled the invoices as "effectively no cargo was received by the [d]efendant".[159]

167 But this allegation is factually wrong. Mr Yeo conceded that Panoil did, in fact, deliver all seven cargoes of marine fuel to the order of the defendant's client, Eastern Pacific.[160] The delivery is evidenced by the seven BDNs. Mr Yeo did not dispute the contents of the BDNs. Further, he agreed that they

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[157] Bundle of AEICs, Vol 1, p250

[158] Notes of Evidence (25 July 2019), p67(15) to 67(23)

[159] Defendant's Opening Statement at para 4(b)(iii)

[160] Notes of Evidence (25 July 2019), p29(11) to 29(24), p41(8) to 41(16), p57(4) to 57(19)

constituted independent evidence that Panoil had indeed delivered the marine fuel in accordance with the Contracts.[161] Mr Yeo thereby accepted that Panoil had performed its part of the bargain under the Contracts. Not only that, he also confirmed that the cargoes had all been delivered *well before* D's 18 August Letter asserting the contrary.[162] The reason advanced in D's 18 August Letter for cancelling the invoices is false.

168 The defendant dropped this false allegation in its pleaded defence. The defence filed on 19 March 2018 makes no allegation that Panoil failed to deliver all but one cargo of marine fuel or that the defendant or its customer rejected the delivery. The defence simply asserts an arrangement for Panoil to bill Eastern Pacific "directly with regards" to the Contracts.[163]

169 Mr Yeo was adamant that both D's 18 August Letter and the defendant's solicitors' 16 March 2018 Email set out the true basis for the cancellation. As for D's 18 August Letter, Mr Yeo alleged that the defendant really meant that it had "not receive[d] those BDNs"[164] because Eastern Pacific failed to "acknowledge that [the defendant were] the ones selling to them".[165] I do not accept this strained interpretation of the letter. The letter refers expressly to "cargo/goods" and not to BDNs. And the defendant is an intermediary and not an end user. It would *never* personally take physical delivery of the marine fuel.

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[161] Notes of Evidence (25 July 2019), p32(3) to 32(9)

[162] Notes of Evidence (25 July 2019), p41(8) to 41(16)

[163] Defence at para 5(b)(ii)

[164] Notes of Evidence (25 July 2019), p29(17) to 29(18)

[165] Notes of Evidence (25 July 2019), p44(9) to 44(15)

But it would nevertheless be obliged to pay Panoil upon delivery to the end user.[166]

170 In any event, it is also undisputed that Panoil sent copies of the BDNs to the defendant on 15 August 2017, a few days before D's 18 August Letter.[167] Mr Yeo prevaricated by explaining that D's 18 August Letter arose because Panoil and Eastern Pacific did not follow the defendant's instructions for delivery. On Eastern Pacific's part, it did not "follow [the defendant's] instructions for delivery, which was that once they received the cargo, they have to acknowledge that [the defendant] are [*sic*] the ones selling to them".[168] On Panoil's part, it failed "to get Eastern to accept [the defendant's] invoice".[169]

171 I am unable to accept Mr Yeo's evidence. It was a bare assertion. There was no independent evidence suggesting that Panoil was contractually obliged to get Eastern Pacific to accept the defendant's invoice.

172 As for the defendant's solicitors' 16 March 2018 Email, Mr Yeo had another explanation. He claimed that the phrase "neither they nor their customers", referred to *the defendant* and its customers and asserted that Eastern Pacific was "not my customer because they don't have a contract with us to be our customer". As such, even though Panoil had delivered the marine fuel to Eastern Pacific's order, neither the defendant nor its customers had received the "goods or cargoes".[170]

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166 Notes of Evidence (25 July 2019), p30(23) to 31(6)

167 Defendant's Bundle of Documents, p39

168 Notes of Evidence (25 July 2019), p44(9) to 44(15)

169 Notes of Evidence (25 July 2019), p44(19) to 15(4)

170 Notes of Evidence (25 July 2019), p54(11) to 54(18)

173 This was nothing more than a disingenuous attempt to create linguistic confusion. This is because Mr Yong confirmed that although Eastern Pacific was a customer that Panoil had "farmed out to [the defendant]", this nevertheless meant that on paper, Eastern Pacific *was* the defendant's customer and its contractual counterparty.[171] Eastern Pacific would not cease to be the defendant's contractual counterparty and would not cease to be bound to pay the defendant under invoices already in existence by the mere fact of its unilateral desire to deal with Panoil.

174 In any event, the defendant's solicitors' 16 March 2018 Email was drafted on Mr Yeo's express instructions. Mr Yeo himself admitted that he had told the defendant's solicitors that Eastern Pacific was the customer that received the marine fuel. Clearly, this sentence in the defendant's solicitors' 16 March 2018 Email was intended to convey to the plaintiff that Eastern Pacific had not received the cargoes. This is simply untrue as evidenced by the BDNs. It was only after protracted prevarication that Mr Yeo finally conceded, after reviewing the defendant's solicitors 16 March 2018 Email, that "it's not correct".[172]

(2) Negative publicity and complaints

175 A second basis for the cancellation can be found in Mr Yong's email dated 23 July 2018 addressed to Panoil's judicial manager. In the email, Mr Yong informs the judicial manager that the invoices were cancelled due to

[171] Notes of Evidence (30 July 2019), p82(7) to 82(20)

[172] Notes of Evidence (25 July 2019), p57(16) to 57(19)

Eastern Pacific's desire to deal directly with Panoil in light of delivery issues and the negative publicity surrounding Panoil:[173]

> Dear Mr Lin,
>
> In light of what has happened recently (see letter from [the defendant]), we would like to clarify the following for all parties.
>
> During the period of Aug 2017, Panoil traded ex-wharf and bunkers to [the defendant] which was in turn traded with Eastern pacific…This is a common practice in our trade known as sleeving.
>
> *Due to the many complaints of specifications and quantity, and coupled with the negative news in the media about Panoil*. Eastern Pacific wants [*sic*] terminate the arrangement of using [the defendant] as a trader and *deal directly with Panoil*.
>
> *The staff that was handling this matter at the point could not do anything but to accede to the clients [sic] request*. As the invoice was already submitted for invoice financing, the staff did not know how to handle. [The defendant] is unaware that their invoices are being used to finance with CIMB, the facilities given by CIMB does not require us to notify the customers.
>
> *During that period, there were many requests to offset and cancel invoices*. The directors of the company was also very tied up in seeking solutions for the company, including managing Maritime Port Authority, negotiating with customers and banks, and seeking new investments, and a possible Judicial Management as such *this matter only came to our attention at a much later time, and we do not have time to act on it until the JM steps in.*
>
> As mentioned by our staff, the copies of the correspondence are inside the boxes of documents that was handled over to JM previously.
>
> [emphasis added]

176 Mr Yong confirmed at trial that the complaints and the negative news about Panoil were the *only* operative reasons compelling Eastern Pacific to terminate its relationship with the defendant.[174] He rejected the suggestion that

[173] Bundle of AEICs, Vol 1, p461

[174] Notes of Evidence (30 July 2019), p83(24) to 84(2)

Eastern Pacific's decision could not have been motivated by its desire to avoid delays in the deliveries and shipments because the deliveries had already been made and Panoil's contractual obligations under the Contracts duly performed.[175] He also rejected the suggestion that Eastern Pacific was seeking to cut out the defendant as a middleman to avoid paying the defendant's commission.[176]

177 Mr Yong explained that if there were any problems relating to quantity or specification in the delivery of the cargoes, only issues of quantity would be reflected on the BDN. Specification issues would not be reflected in the BDNs, because these issues can be established only by sending samples to a laboratory for testing.[177] These complaints, as Mr Yong testified, came from Eastern Pacific and were relayed to Mr Joe Lim, who was in charge of Panoil's operations.[178] Yet, when pressed on the existence of these complaints, Mr Yong was unable to provide any specifics.[179] Even if I were to accept Mr Yong's evidence, none of the BDNs reveal any grievances on Eastern Pacific's part regarding the quantity of the marine oil delivered by Panoil. Further, there is little support for any assertion by Eastern Pacific that the marine fuel did not meet specifications.

178 In this regard, if Panoil's delivery of the cargo had been in any way deficient, it would be reasonable to assume that Panoil would, at the very least, ascertain or verify such deficiencies. After all, a failure to deliver the cargo in

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[175] Notes of Evidence (30 July 2019), p130(12) to 130(22)

[176] Notes of Evidence (30 July 2019), p140(18) to 140(24)

[177] Notes of Evidence (30 July 2019), p86(8) to 87(7)

[178] Notes of Evidence (30 July 2019), p140(10) to 140(17)

[179] Notes of Evidence (30 July 2019), p84(20) to 85(3)

accordance with the contractual specifications would constitute a breach of contract and expose it to liability. This is no small issue as it might entail an adjustment in price or a refund. Yet, Mr Yong was unable to confirm if Panoil had done so at all[180] and thus could not confirm whether such complaints were made at all or, if made, were justified.[181]

179 More fundamentally, it makes no commercial sense for Eastern Pacific to say that its motivation for wanting to "deal directly with Panoil" was the complaints and negative publicity surrounding Panoil. The negative publicity arose well before the story broke in the press on 15 August 2017. There had been negative market rumours and online articles about Panoil, its business practices and its financial standing from as early as February 2017.[182] The negative publicity would, if anything, motivate Eastern Pacific to cut *Panoil* – rather than the defendant – out of the transactions and to insist that it deal directly and only with the defendant. After all, the defendant was untainted by the negative publicity about Panoil.

180 Mr Yong's explanation is that dealing directly with Panoil would allow Eastern Pacific to reduce its accounts receivable and accounts payable risk. I reject this explanation.[183] Given the substantial deterioration in Panoil's commercial and financial reputation by August 2017, insisting on creating new contractual rights with Panoil would actually increase Eastern Pacific's risk, as compared to retaining and enforcing its existing contractual rights against the defendant.

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[180] Notes of Evidence (30 July 2019), p87(8) to 90(22)

[181] Notes of Evidence (30 July 2019), p92(4) to 93(8)

[182] Notes of Evidence (30 July 2019), p108(18) to 109(12)

[183] Notes of Evidence (30 July 2019), p114(6) to 115(9)

181 It is telling that Mr Yong was unable specifically to recall if he had ever tried to allay the concerns of Eastern Pacific and to persuade it to deal directly with Panoil.[184] Mr Yong's explanation is all the more incredible in light of his own admission that Panoil was facing financial difficulties as early as July 2017[185] and was close to insolvency towards the end of August 2017.[186] A decision in those circumstances to cancel the invoices in order to reduce risk makes little or no commercial sense. Moreover, by then, Panoil had already performed the Contracts. All that was left was for the defendant to pay the Debt to Panoil within the time specified in the invoices. There is no evidence of any outstanding issues on late delivery, failure to meet specification or quantity.

(3) Avoiding delays in shipment

182 Yet a third reason for allegedly cancelling the invoices is set out in EP's 17 August Letter. In this letter addressed to Panoil, Eastern Pacific asks to deal directly with Panoil in order to avoid delays in delivery and payment:[187]

> Dear sir,
>
> For the above shipments, *to avoid delays in delivery and payment*. Our management will not deal with [the defendant] as the trading house for the delivery of cargo from Panoil.
>
> Panoil should bill directly to our company. We will not accept invoices or take possession of cargo on behalf of [the defendant].
>
> Please act with immediate effect to avoid any delay in payment.
>
> [emphasis added]

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184 Notes of Evidence (30 July 2019), p115(15) to 116(6)

185 Notes of Evidence (30 July 2019), p124(14) to 126(2)

186 Notes of Evidence (30 July 2019), p121(3) to 121(6)

187 Bundle of AEICs, Vol 2, p556

183 Yet, Mr Yong unequivocally disavowed this as the reason for Eastern Pacific's alleged desire to deal directly with Panoil. Given that the cargoes had already been delivered, delay was no longer a risk to be mitigated.[188] However, when Mr Yong was referred to EP's 17 August Letter, he characterised the reasons set out in it as being consistent with his 23 July 2018 email to the judicial manager. In his view, this was Eastern Pacific's "cordial way" of communicating its dissatisfaction with specifications and quality of the cargo delivered.[189]

184 I cannot accept Mr Yong's evidence. The plain words of EP's 17 August Letter expressly refer to a desire to "avoid delays in delivery and payment". Flowing from the fact that the cargoes were all duly delivered before 17 August 2017, as evidenced by the respective BDNs (see [167] above), as well as Mr Yong's own concession that the "deliveries have already been made",[190] Mr Yong's interpretation of the words in EP's 17 August Letter is disingenuous at best.

185 I similarly accept the plaintiff's submission that the reason given in EP's 17 August Letter for its desire to deal directly with Panoil is untenable, in light of the contradictory documentary evidence.

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[188] Notes of Evidence (30 July 2019), p130(12) to 130(22)

[189] Notes of Evidence (30 July 2019), p135(1) to 135(8)

[190] Notes of Evidence (30 July 2019), p130(12) to 130(22)

(4) Eastern Pacific disagreed with the set-off

186 A fourth reason given for cancelling the invoices was Eastern Pacific's supposed disagreement with Panoil and the defendant's decision to set-off the Debt.[191] Mr Yeo explained as follows:

> Q: On 13 August itself you were still thinking of cancelling the invoices, that's based on what you have said?
>
> A: No. In the first place, whether it was cancelling or set-off, we need to talk to them to find out what's their position on this transaction and what's their position on the client, which they nominated, so they came back to us, and to them they said set-off would be easy, so we went for set-off. *We did the set off. Subsequently Eastern did not agree to that.* They wanted to deal directly based on what we heard through the letters they gave to us. So we went ahead with it and we agreed with them also, whichever that they felt, because we just wanted this transaction to be completed in the sense, that means either it's through a set off or a cancellation which all the parties can come to agreement to.
>
> [emphasis added]

Mr Yeo's explanation raises more questions than it answers.

187 First, I fail to understand why Eastern Pacific would reject any agreement between Panoil and the defendant to set off the Debt. As the defendant's buyer, Eastern Pacific's contractual rights and obligations would remain entirely unaffected by any such set-off. The contracts between Panoil and the defendant and the contracts between the defendant and Eastern Pacific were separate contracts entered into between separate entities, albeit linked commercially. A set-off between Panoil and the defendant would leave Eastern Pacific's rights against the defendant completely unaffected.

[191] Notes of Evidence (25 July 2019), p81(22) to 82(15)

188 Further, there is no commercial reason for Panoil to cancel the Debt if the Debt had been set-off. A set-off would have extinguished the Debt. No debt would remain in existence after the alleged set-off for Panoil to "cancel". Even Mr Yong accepted that a debt "cannot be cancelled after it has been fully settled".[192] It makes no commercial sense for the parties to have intended *both* to set off *and* to cancel the very same debt.

Inconsistencies in the statement of account

189 Fourth, there are also certain very curious features in the two-page statement of account dated 31 August 2017 attached to D's 18 August Letter.[193]

190 The statement of account purports to show that Panoil's invoices to the defendant were cancelled on 12 August 2017. This is inconsistent with the defendant's pleaded assertion that the invoices were cancelled only on 18 August 2017, only after *Panoil* had allegedly approved the cancellation.[194] Indeed, when this was put to him, Mr Yeo accepted that the documentary evidence contradicted the defendant's pleaded case.[195] He tried to explain this contradiction by speculating that it might have been the defendant's internal accounting practice to record the cancellation in its accounting records "a couple of days earlier" *ie,* before Panoil accepted the request for cancellation by way of Panoil's 18 August Letter.[196]

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[192] Notes of Evidence (30 July 2019), p161(11) to 162(16)

[193] Khoo May May Evelyn Vanessa's AEIC at p255 to 256

[194] Defence at para 5(b)(ii)(b)

[195] Notes of Evidence (25 July 2019), p70(5) to 71(2)

[196] Notes of Evidence (25 July 2019), p59(12) to 59(20)

191 This is a contrived explanation. I reject it. Mr Yeo did not explain how the defendant learned of Eastern Pacific's request to deal directly with Panoil as well as Panoil's agreement to the request by 12 August 2017. Eastern Pacific's request to Panoil was communicated to Panoil no earlier than EP's 17 August Letter. Panoil accepted the request by its 18 August Letter. By Mr Yeo's own admission, the defendant only ever contacted Eastern Pacific through Panoil.[197] More importantly, he said that the defendant was made aware of Eastern Pacific's desire to deal directly with Panoil "based on what we heard through the letters [Eastern Pacific] gave to us".[198] In essence, it was Panoil who "got hold of Eastern"[199] and everything was handled by Panoil and "not by [the defendant]".[200]

192 Moreover, I find it highly unlikely that the defendant's accounting personnel would make a factually false entry in the defendant's accounting records. Reflecting the cancellation of the invoices as having taken effect on 12 August 2017 when Panoil agreed to the cancellation only on 18 August 2017 means that the defendant's records would not present a true and fair view of its financial position for almost a week. Mr Yeo accepted this.[201] His weak justification was that preparing the statement "for the whole month, so the month would have all the recordings of what we did inside our company…Panoil can object and say why did you do it on the 12th, but they did not object". This clearly does not address the undesirable gap between the financial position reflected in the defendant's books and the defendant's actual

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[197] Notes of Evidence (25 July 2019), p49(7) to 49(16)

[198] Notes of Evidence (25 July 2019), p81(22) to 82(15)

[199] Notes of Evidence (25 July 2019), p48(7) to 48(24)

[200] Notes of Evidence (25 July 2019), p40(9) to 40(21)

[201] Notes of Evidence (25 July 2019), p61(14) to 61(18)

financial position.[202] In fact, it is telling that when confronted on this point, Mr Yeo abdicated responsibility, saying that he would have to check with the defendant's accounts personnel as he did not control the dates that they recorded in the defendant's books "and maybe they would have read it wrongly".[203]

193 Another fact supporting my finding that the documents are fabrications is that the two-page statement of account attached to D's 18 August Letter contains transactions up to 31 August 2017. Why would the defendant, in a covering letter dated 18 August 2017, enclose a statement of account post-dated by 13 days? And how would the defendant have known on 18 August 2017 what transactions would take place in the future, *ie*, between 18 August 2017 and 31 August 2017?

194 Mr Yeo's response was not persuasive. He merely speculated that the defendant's personnel in charge of its accounts had "prepared all the documents to be included inside there, to close the accounts for the month-end"[204]. He merely guessed, without personal knowledge of the matter,[205] that this was possible because two invoices with dates after 18 August 2017 and which are reflected in the statement were "issued in advance…so these were transactions that were already done, they are [*sic*] going to invoice them on this [*sic*] days". He gave the same explanation for a payment of US$2,400 to Panoil which was recorded in the statement as taking place on 22 August 2017.[206]

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[202] Notes of Evidence (25 July 2019), p61(19) to 61(24)

[203] Notes of Evidence (25 July 2019), p64(1) to 64(9)

[204] Notes of Evidence (25 July 2019), p77(16) to 77(25)

[205] Notes of Evidence (25 July 2019), p76(3) to 76(7), p77(18) to 77(25)

[206] Notes of Evidence (25 July 2019), p74(10) to 74(15)

195 Mr Yong accepted that the issue with the dates was, on its face, a discrepancy which would have warranted Panoil asking further questions of the defendant, as the recipient of D's 18 August Letter.[207] In fact, he went even further, agreeing with a suggestion from plaintiff's counsel's that the two-page statement of account "could not possibly be the correct enclosure to [the] purported letter of 18 August".[208]

The documents were discovered in suspicious circumstances

196 Fifth, the circumstances surrounding the defendant's disclosure in this action of the documents supporting the Cancellation Defence cast serious doubts as to their authenticity.

197 Panoil's records were initially kept at its Albert Street premises (the "AS Premises"). The lease for the AS Premises was due to expire in or around October 2017. Ms Chua informed the judicial managers in January 2018 that, in anticipation of the lease expiring, Panoil's records had been moved to premises at Lower Delta Road (the "LDR Premises"). It was not until July 2018 that Mr Yong informed the judicial managers for the first time that some additional records of Panoil were stored at premises in Lim Chu Kang (the "LCK Premises").

198 The judicial manager confirmed all this at trial. The defendant did not challenge his evidence in cross-examination. Mr Yong was asked whether he informed the judicial managers in October 2017, when they were appointed, that Panoil had stored some of its property at the LCK Premises. He first said that

[207] Notes of Evidence (30 July 2019), p186(7) to 187(3)

[208] Notes of Evidence (30 July 2019), p187(23) to 188(3)

he "really cannot recall"[209] and that he did not know.[210] He was then referred to the judicial manager's evidence in his affidavit of evidence in chief that Mr Yong had told the judicial managers about the LCK Premises for the first time in July 2018. Mr Yong then said that "we definitely have informed them prior to this". He qualified his response by saying that he told the judicial managers that the LCK Premises contained "mainly…furnitures [*sic*]".[211] He concluded by recalling that he had "definitely informed [the judicial manager] way before, yes, way before".[212] I accept the judicial manager's evidence and reject Mr Yong's evidence.

199 It is only at the LCK Premises that the judicial managers found copies of EP's 17 August Letter and Panoil's 18 August Letter. The judicial managers have never found the originals of these documents.[213] The judicial managers have also never found an original or a copy of D's 18 August Letter in either the LDR Premises or the LCK Premises. What is even more striking is that the tenant of the LCK Premises is a company in which Mr Yong and Mr Yeo are the shareholders.[214]

200 The judicial manager's evidence is consistent with Mr Yong's 23 July 2018 email to the judicial manager. In that email, Mr Yong said that "the copies of the correspondence are inside the boxes of documents that was [*sic*] handed over to JM previously". This was a few days after Mr Yong first informed the

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[209] Notes of Evidence (30 July 2019), p171(2) to 171(11)

[210] Notes of Evidence (30 July 2019), p172(11) to 172(15)

[211] Notes of Evidence (30 July 2019), p173(6) to 173(14), 174(11) to 174(13)

[212] Notes of Evidence (30 July 2019), p174(11) to 174(13)

[213] Bundle of AEICs, Vol 1, p426 at para 14

[214] Khoo May May Evelyn Vanessa's AEIC at para 70

judicial managers of the LCK Premises. In any event, the key point is that the copies of the documents were discovered only *after* Mr Yong informed the judicial managers of the LCK Premises. Mr Yong's evidence is not inconsistent with this. I accordingly accept that the documents were discovered only after Mr Yong told the judicial managers for the first time of the LCK Premises. I also find that this was July 2018. Moreover, the fact that the original of EP's 17 August Letter and more importantly, the original of Panoil's 18 August Letter, was not found at the LCK Premises suggests very strongly that the documents are not authentic.

201 Once MPA took disciplinary action against Panoil in August 2017, its business was doomed. This was public knowledge. Mr Yeo had every incentive to improve the defendant's position against Panoil. Mr Yong no longer had any incentive to safeguard Panoil's position. I have detailed above at [120]–[123], Mr Yong and Mr Yeo's close personal and commercial relationship. That gave them every incentive to collude. The documents found at the LCK Premises are critical documents. They exonerate the defendant of any liability for the Debt. They were found belatedly in premises leased to a company of which both Mr Yong and Mr Yeo are directors in these circumstances. I do not accept that this is a coincidence. I do not accept that the documents are genuine.

Mr Yong's 23 July 2018 Emails

202 Sixth, two emails sent by Mr Yong to the judicial manager and Mr Yeo on 23 July 2018 cast doubt on whether EP's 17 August Letter was created on the date that it bears.

203 In his email to the judicial managers on 23 July 2018, Mr Yong stated that "this matter only came to our attention at a much later time, and we do not

have time to act on it until the JM steps in". As to what "this matter" meant, he testified at trial that this referred to Eastern Pacific's request to deal directly with Panoil, *ie,* EP's 17 August Letter.[215] If so, this would mean that Panoil's 18 August Letter came to Panoil's attention much later than the day it was sent. Yet, Panoil purportedly sent Panoil's 18 August Letter the very next day after receiving EP's 17 August Letter.

204 Mr Yong also testified in chief that he had instructed Ms Chua to draft this letter.[216] In cross-examination, he retreated and said that this was a poor use of language. What he really meant by "this matter" was "this whole issue on how do…we manage it, how do we handle this".[217] The plain words of his 23 July 2018 email however do not bear this out. "This matter" reads as a reference to the inception of Eastern Pacific's request to deal directly with Panoil.

205 Similarly, in his email to Mr Yeo on 23 July 2018, Mr Yong sought to provide context to the cancellation of the invoices:[218]

> Dear Mr Yeo,
>
> Apologies for the late reply, as the staff that was handling the case is no longer working in Panoil. we have a difficult time trying to clarify the issues raised by you. However, the following are some of the facts that we have gathered.
>
> 1. Our facilities with the banks for invoice financing is on a non-notified basis, as such there is no requirement for us to inform you. Further to that, invoices was not assigned to anyone during that period.
>
> 2. *When our staff was informed of the cancellation, before they can react to do anything, the Judicial Managers*

[215] Notes of Evidence (30 July 2019), p165(15) to 166(8)

[216] Notes of Evidence (30 July 2019), p151(24) to 152(3)

[217] Notes of Evidence (30 July 2019), p167(8) to 167(16)

[218] Defendant's Bundle of Documents at p94

> *have already step in. It was an oversight on their part, as they do* not *know how to manage this.*
>
> …
>
> Best regards.
>
> [emphasis added]

206 When cross-examined on when Panoil's employee "was informed of the cancellation", Mr Yong prevaricated. He first said that this was when the employee received EP's 17 August Letter "informing" Panoil's staff of the cancellation. However, he backtracked when he conceded that EP's 17 August Letter contained no such request for cancellation. He then claimed instead that it was Mr Yeo who came to Panoil's office demanding the cancellation. He further suggested that there was another letter – separate from EP's 17 August Letter – informing Panoil of the cancellation.[219] Yet, this letter was not disclosed in these proceedings.

207 Another problem with Mr Yong's account of events in his email to Mr Yeo on 23 July 2018 is that the words "before they can react to do anything" suggests that Panoil never actually cancelled the invoices. This assertion is also hard to square with Mr Yong's evidence that he directed Ms Chua to tell Eastern Pacific that Panoil accepted the cancellation by Panoil's 18 August Letter.[220] He then sought to clarify that the phrase "before they can react to do anything" meant completing "all the proper paperwork" such that Panoil's 18 August Letter was a "stop-gap measure to pacify everyone" but that Panoil then failed to "follow up with all the relevant documentations".[221]

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[219] Notes of Evidence (30 July 2019), p143(1) to 143(24)

[220] Notes of Evidence (30 July 2019), p152(24) to 153(16)

[221] Notes of Evidence (30 July 2019), p153(10) to 153(16)

208 Moreover, Mr Yong's suggestion that Panoil's employee was unable to do anything upon receiving EP's 17 August Letter because judicial managers had, by then, been appointed is factually wrong.[222] Judicial managers were appointed only on 2 October 2017. No interim judicial managers were ever appointed. Mr Yong remained in control of Panoil until 2 October 2017. At trial, Mr Yong backtracked by claiming that he was not actually "familiar with the process" at the time.[223] Panoil filed the application for its own judicial management on 31 August 2017. He said that the nominated judicial managers had advised Panoil not to do anything after filing the application.[224] When confronted with this in cross-examination, Mr Yong sought to explain that what he "really [meant] in [his 23 July 2018 email] is 31 August". However, the plain words of this email do not support his re-characterisation of the email. This is especially so when considered alongside Mr Yong's email to the judicial manager sent on the same day, in which he says that the request by Eastern Pacific to deal directly with Panoil[225] "only came to [Panoil's] attention at a much later time, and we do not have time to act on it *until the JM steps in*" [emphasis added]. Moreover, as one of only two directors of Panoil, I find it hard to believe that Mr Yong would be unaware of Panoil's state of affairs, much less by August 2017 when Panoil was already on the brink of insolvency.

Panoil never issued replacement invoices to Eastern Pacific

209 Finally, Panoil never issued replacement invoices to Eastern Pacific. This is another indication that no cancellation ever took place. In considering this point, there is an issue which arises on the defendant's pleadings.

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[222] Notes of Evidence (30 July 2019), p145(9) to 146(5)

[223] Notes of Evidence (30 July 2019), p146(18) to 147(4)

[224] Notes of Evidence (30 July 2019), p148(12) to 149(8)

[225] Notes of Evidence (30 July 2019), p149(9) to 149(19)

210 On any reasonable reading, the defence contains a plea only that Panoil unilaterally cancelled the invoices. There is no plea as to what took the place of the cancelled invoices. However, defendant's counsel confirmed in his oral closing submissions that the thrust of the defendant's Cancellation Defence is that, on 18 August 2017, the parties agreed to novate the Contracts to Eastern Pacific.[226] According to the defendant, this resulted in the defendant dropping out of the picture and Eastern Pacific assuming the defendant's obligation to pay the Debt to Panoil, albeit under fresh contracts.

211 This alleged novation of the Contracts was nowhere pleaded. The defence pleads merely that Eastern Pacific sent Panoil a letter on 17 August 2017 "notifying Panoil to bill Eastern Pacific Tankers Sdn Bhd directly" and that Panoil proceeded to accept the "said request of … Eastern Pacific Tankers Sdn Bhd and on 18 August 2017 notify [*sic*] the latter accordingly by way of a letter dated the same".[227] That is simply a plea that two parties – the defendant and Panoil – agreed to cancel the invoices. It does not contain, even by implication, a plea that there was a tripartite novation let alone a plea of the consideration necessary to support it.

212 Defendant's counsel submits that consideration is not required for a novation. That submission is without merit. In a novation, "both the benefits and the burdens of the original contract are transferred to the new contracting parties, essentially because…the original contract is extinguished and a new contract is formed" (*Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 at [46]). It necessarily follows that consideration is required for this new contract to be formed. It is true that, for a

[226] Defendant's Closing Submissions at para 15(iii)

[227] Defence at para 5(b)(ii)

novation, "the consideration [is] usually…the discharge of the old contract" (*Koh Chong Chiah and others v Treasure Resort Pte Ltd and another* [2013] 1 SLR 1069 at [67], citing *Halsbury's Laws of England* vol 9(1) (Butterworths, 4th Ed Reissue, 1998) at para 1036). The requirement of consideration may be easily satisfied in a novation, but it remains a requirement.

213 The only pleaded defence is a bilateral cancellation. The allegation that there was a tripartite novation is nowhere pleaded. The defendant cannot advance a defence based on a novation.

214 Even if I were to leave aside the pleading point, the defendant failed to call any witness of fact from Eastern Pacific who had personal knowledge of this alleged novation. And if there were such a novation, one would have expected to see Panoil re-issue the cancelled invoices to Eastern Pacific. No such re-issued invoices were produced in evidence.

215 Further, it appears that no re-issued invoices exist. Mr Yong confirmed that Panoil did not re-issue any invoices to Eastern Pacific.[228] Panoil's judicial managers searched for re-issued invoices and were unable to find any.[229] This is surprising. No commercial entity would, in the ordinary course of its business, cancel an invoice without re-issuing a fresh invoice covering the same receivable. Doing so amounts to forgiving the receivable entirely. It is not the defendant's case that Panoil ever intended to forgive the Debt entirely.

216 In response, Mr Yong explains this away on the basis that Panoil was hard-pressed for time and thus could not react "to issue the invoice, to do

[228] Notes of Evidence (30 July 2019), p175(19) to 176(1)

[229] Lin Yueh Hung's AEIC at para 9

whatever necessary for the…change in the request by Eastern Pacific".[230] In support of this, he cites his 23 July 2018 e-mail to Mr Yeo (see [203] above). I am not persuaded, for the reasons given above at [208].

217 Even if I were to accept Mr Yong's characterisation that he meant to refer to the date as of 31 August 2017, having been advised that Panoil "should not be doing anything after we have filed for … judicial management", there still remains a 13-day window between Panoil's 18 August Letter and Panoil's judicial management application on 31 August 2017.[231] During these 13 days, Panoil did not re-issue *any* invoices to Eastern Pacific. Mr Yong simply offers no satisfactory explanation for why, if Panoil had the time to reply to EP's 17 August Letter, it did not have the time to re-issue the invoices.

218 Panoil's failure to re-issue invoices to Eastern Pacific is a strong indication that the Debt was never cancelled.

Conclusion on the Cancellation Defence

219 Given my findings, I am satisfied that the Debt was not cancelled in August 2017. The documents on which the defendant relies for the Cancellation Defence are fabrications. They were created for the purposes of defending a claim on the Contracts. Accordingly, I hold that Cancellation Defence fails.

220 Both of the defendant's substantive defences have failed. The plaintiff is therefore entitled to judgment in this action.

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[230] Notes of Evidence (30 July 2019), p150(8) to 150(23)

[231] Notes of Evidence (30 July 2019), p148(24) to 149(8)

Costs

221 The event in this action is entirely in the plaintiff's favour. As part of its judgment, the plaintiff is accordingly entitled to an order for its costs of and incidental to the action. Plaintiff's counsel submits that the defendant's conduct throughout the entirety of this action makes this an appropriate case for me to exercise my discretion under O 59 r 27 of the Rules of Court to award costs against the defendant on the indemnity basis.

222 While this discretion is unfettered, it must necessarily be exercised judicially. As the Court of Appeal in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2011] 1 SLR 582 observed, "[c]osts on an indemnity basis should only be ordered in a special case or where there are exceptional circumstances" (at [29]). Indeed, the "burden on a party who seeks an order for indemnity costs as a matter of discretion is…a high one" (*Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274 at [97]).

223 Order 59 r 5 of the Rules of Court sets out a list of several factors which a court should take into account in considering whether it is appropriate to award costs on the indemnity basis. These factors largely relate to the conduct of the paying party both before and during the litigation. This list is however, not exhaustive (*Wong Meng Cheong and another v Ling Ai Wah and another* [2012] 1 SLR 549 at [199]). The court thus should have regard to all the circumstances of the case, to ensure that there is "some conduct or circumstance which takes the case out of the norm".

224 In so far as the conduct of the unsuccessful party is the ground for seeking an order of costs on the indemnity basis, "the test is not conduct attracting moral condemnation, which is an *a fortiori* ground, but rather

unreasonableness" (*Three Rivers District Council v The Governor and Co of the Bank of England (No 6)* [2006] EWHC 816 (Comm) at [25]). Some relevant factors include "the extent of a party's dishonest and unscrupulous intentions and actions" (*Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [50]).

225 I find in all the circumstances that the defendant's conduct in this litigation rises to the level of unreasonableness which is necessary to make an award of indemnity costs against it appropriate. The defendant conducted its defence contumeliously, evincing a blatant disregard for the court and its processes. The defendant played fast and loose with the court in discovery, in calling witnesses and in its affidavits of evidence in chief. There were many shifts of position, often at the last minute, and some of which involved misleading the court. The defendant engaged in the archetypal unreasonable litigation conduct which ought to be mulcted in indemnity costs.

226 I highlight a few examples.

227 On 8 November 2018, already concerned about the completeness of the defendant's discovery, I directed that no party shall be permitted to file supplementary lists of documents beyond a final round of lists to be exchanged on 13 November 2018. I also barred both parties from relying at trial, without the leave of court, on any document not disclosed in pre-trial discovery. Despite this, without the leave of court, the defendant filed a supplementary list of documents on 15 July 2019.[232] Mr Yeo admitted that some of these documents were in his possession, custody and power even in November 2018, when I

[232] Notes of Evidence (24 July 2019), p2(11) to 26(24)

imposed the discovery guillotine.[233] This piecemeal approach to discovery and the fact that the discovery was given on the eve of trial aggravates the defendant's blatant disregard of my order. As an indulgence, I allowed the defendant to rely on these documents, but ordered the defendant to pay any and all costs thrown away as a result of the late discovery.

228 At a pre-trial conference on 15 February 2019, the defendant alleged that Mr Yeo had been asking Mr Yong and Mr Joe Lim since 2018 to give evidence for the defendant at trial and to affirm affidavits of evidence in chief but had been unsuccessful.[234] Despite this, on the first day of trial, the defendant produced affidavits of evidence in chief from both witnesses and applied to have the affidavits admitted. I ordered Mr Yong and Mr Joe Lim to give their evidence in chief orally, with the defendant to bear all costs thrown away.[235]

229 When Mr Yong and Mr Joe Lim took the stand, they each confirmed that they had been approached by Mr Yeo to give evidence for the defendant at trial *only* two to three weeks before trial *ie,* sometime in early July 2019. They also confirmed that they had never refused to provide affidavits of evidence in chief for the defendant. Mr Yeo's assertion that he had asked Mr Yong and Mr Joe Lim in 2018 to provide affidavits of evidence in chief for the purposes of the trial and that they had refused to provide affidavits of evidence in chief for trial was therefore false on two counts. Mr Yeo made this false assertion on at least four separate occasions: (a) in his affidavit dated 22 November 2018 as a basis to vacate the initial trial dates in November 2018 when he stated that he

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[233] Notes of Evidence (24 July 2019), p124(4) to 124(14)

[234] Notes of Evidence (24 July 2019), p129(24) to 130(13)

[235] Notes of Evidence (24 July 2019), p140(2) to 141(9)

had asked them to give evidence for the defendant,[236] (b) during the hearing of an interlocutory application on 27 November 2018 when Mr Yeo stated that he had approached Mr Yong and Mr Joe Lim;[237] (c) in his affidavit dated 2 February 2019 filed in the defendant's interlocutory application to dispense with Mr Yong and Mr Joe Lim's affidavits of evidence in chief, a key factual basis on which the learned Assistant Registrar granted the application; and (d) while giving oral evidence on the first day of trial.[238] Mr Yeo misled the court. His conduct is inexcusable.

230 Furthermore, on the evening of the penultimate day of trial, the defendant applied to call Mr Chan instead of Mr Saleem as its witness to give evidence from Eastern Pacific's perspective.[239] Mr Saleem was scheduled to give evidence the following day. The defendant must have known of Mr Saleem's inability to attend trial well before it made the application. Yet it made the application very late in the day. This is not only unreasonable litigation conduct but unacceptable and inexcusable litigation conduct.

231 To make matters worse, knowing that Mr Chan was to be a witness, the defendant permitted Mr Chan to sit in the gallery before taking the stand without informing me or plaintiff's counsel.

232 For all of these reasons, I order that the defendant pay the plaintiff the costs of this action assessed on an indemnity basis, such costs to be taxed if they cannot be agreed.

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[236] Parry Yeo's 22 November 2018 AEIC at para 5

[237] Notes of Evidence (27 November 2018), p40(16) to 40(19)

[238] Notes of Evidence (24 July 2019), p129(18) to 131(10)

[239] Notes of Evidence (31 July 2019), p1(16) to 4(5)s

Conclusion

233 For all of the foregoing reasons, I allow the plaintiff's claim with interest and costs. Judgment will be entered for the plaintiff against the defendant as follows:

(a) The defendant shall pay to the plaintiff the outstanding principal sum of US$2,431,220.87;

(b) The defendant shall pay to the plaintiff contractual interest on the sum due under each invoice from the due date of each invoice until 19 February 2018 at the rate of 2% per month pursuant to Clause 8.3 of Panoil's T&Cs, such interest amounting to US$268,572.43;

(c) The defendant shall pay to the plaintiff contractual interest on the said sum of US$2,431,220.87 at the rate of 2% per month from 20 February 2018 until payment is received, pursuant to Clause 8.3 of Panoil's T&Cs; and

(d) The defendant shall also pay to the plaintiff the costs of and incidental to this action, such costs to be taxed on the indemnity basis if not agreed.

Vinodh Coomaraswamy
Judge

Chan Kia Pheng, Tan Jia Hui and Samuel Lee (LVM Law Chambers LLC) for the plaintiff;
Lim Chee San (TanLim Partnership) for the defendant.