IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 02

Suit No 1328 of 2014

Between

Seraya Energy Pte Ltd

… Plaintiff

And

Denka Advantech Private Limited

… Defendant

And

Denka Advantech Private Limited

… Plaintiff in Counterclaim

And

Seraya Energy Pte Ltd

… Defendant in Counterclaim

And

YTL PowerSeraya Pte Limited

… Third Party

Suit No 1329 of 2014

Between

Seraya Energy Pte Ltd

… Plaintiff

And

Denka Singapore Private Limited

… Defendant

And

Denka Singapore Private Limited

… Plaintiff in Counterclaim

And

Seraya Energy Pte Ltd

… Defendant in Counterclaim

And

YTL PowerSeraya Pte Limited

… Third Party

(*Consolidated pursuant to Order of Court dated 17 June 2015*)

JUDGMENT

[Contract] — [Breach]
[Contract] — [Formation]
[Contract] —[Discharge] — [Breach]

[Contract] — [Remedies] — [Damages]
[Contract] — [Remedies] — [Liquidated damages]
[Contract] — [Remedies] — [Mitigation of damage]

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Seraya Energy Pte Ltd
v
Denka Advantech Pte Ltd and another suit
(YTL PowerSeraya Pte Ltd, third party)

[2019] SGHC 02

High Court — Suit Nos 1328 and 1329 of 2014
Woo Bih Li J
7–10, 14–16, 20–23 November 2017; 10 July 2018; 14 November 2018

2 January 2019 Judgment reserved.

Woo Bih Li J:

Introduction

1 The plaintiff, Seraya Energy Pte Ltd ("SE"), is a wholly owned subsidiary of the third party, YTL PowerSeraya Pte Limited ("YTL"). YTL is in the business of generating electricity, which it sells to the National Electricity Market of Singapore ("NEMS"). SE is a retailer which buys electricity from NEMS and sells it to contestable customers which excludes customers residing in residential properties.[1] I will elaborate later on the electricity market in Singapore.

2 The present consolidated suit is a consolidation of two actions, Suit Nos 1328 and 1329 of 2014 by SE against two of its customers, the defendants,

1 Lim Sam San's affidavit of evidence-in-chief ("AEIC") at para 14.

Denka Advantech Private Limited ("DAPL") and Denka Singapore Private Limited ("DSPL"). In late 2012, SE entered into three electricity retail agreements ("ERAs") – two were with DSPL and one was with DAPL. As nothing material turns on the distinction between DAPL and DSPL for present purposes, I will refer to DAPL and DSPL collectively as "Denka". I will also occasionally use "Denka" to refer to either DAPL or DSPL in respect of the individual ERAs where there is no good reason to draw a distinction between DAPL and DSPL for present purposes.

3 The consolidated suit arises from SE's termination of the three ERAs due allegedly to wrongful conduct of Denka. SE's claim was for liquidated damages ("LD") under the provisions of the three ERAs. Alternatively, SE claimed damages.

4 Denka denied liability primarily on the basis that the three ERAs were part of an un-severable bundle or package deal in which YTL had agreed to re-negotiate a steam supply agreement dated 16 January 2012 with DSPL ("SSA") to grant certain concessions to DSPL of its obligations under the SSA, and also to enter into an ancillary supplemental agreement ("ASA") containing the concessions, failing which the parties could part company under the three ERAs. As YTL and DSPL did not eventually enter into the ASA, Denka alleged that it was entitled to give notice that it would not continue with the three ERAs and that DSPL would revert to the SSA with effect from 1 September 2014.

5 Alternatively, Denka disputed the enforceability of the LD provisions in the three ERAs and put SE to strict proof of the damages it has otherwise suffered.

6 Denka also relied on an offer it had made to SE which Denka alleged SE should have accepted to mitigate its damages.

7 Denka's counterclaim against SE was for:

(a) declarations of the validity of various defences;

(b) damages in respect of extra electricity charges which Denka had to pay SE as a result of SE's alleged delay in transferring Denka's account to the Market Support Services Licensee ("MSSL") after Denka had given notice that it would not continue with the three ERAs; and

(c) damages for amounts which SE had received under three bank guarantees issued to cover Denka's obligations under the three ERAs.[2]

8 Denka also claimed against YTL, as the third party, a declaration of non-liability under the three ERAs, or for YTL to indemnify and/or pay damages to Denka for breach of contract and/or fraudulent or negligent misrepresentation in respect of the package deal. The indemnity or claim for damages sought against YTL was in respect of a collateral contract or misrepresentations pertaining to the package deal. Denka claimed a declaration of non-liability and an indemnity against YTL for whatever Denka might be ordered to pay SE and amounts already paid by Denka to SE due to the delay in transferring Denka's account to MSSL and amounts paid under the three bank guarantees to SE as mentioned above.

9 YTL's position was that YTL did in fact enter into a contract with DSPL to grant DSPL certain concessions with respect to the SSA even though the ASA

2 See Chia Miaw Ling's AEIC at para 57.

was not signed by YTL and DSPL. However, YTL counterclaimed that if there was no such contract on the concessions, then it was entitled to claim from DSPL payment for steam under the initial SSA from the date when YTL had in fact granted concessions to DSPL.

Background

10 I elaborate on the electricity market based on the undisputed background information from the closing submissions of SE and YTL dated 28 February 2018.

11 NEMS commenced operations in 2003 and is where electricity is bought and sold in Singapore. NEMS is operated by the Energy Market Company and regulated by the Energy Market Authority.

12 Electricity generators, such as YTL, can only sell electricity to NEMS. In the current market, electricity generators are not allowed to sell electricity that they generate directly to end-users, *ie*, consumers.

13 The price of the electricity that is sold to NEMS is the Uniform Singapore Energy Price ("USEP"). USEP is based on the weighted average of all the nodal prices of nodes at which electricity is deemed to be withdrawn.[3] It is determined every 30 minutes by a computer model, known as the "Market Clearing Engine" ("MCE").[4] Electricity generators may submit bids every 30 minutes in "price-quantity" pairs, meaning they will indicate:

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3 Lim Sam San's AEIC at para 19.

4 See Sharad Somani's AEIC pp 19–20 at paras 3.3.1–3.3.2.

(a) how much electricity they are willing and able to supply to NEMS; and

(b) the price they wish to charge for such quantity of electricity.[5]

14 MCE will then collate all the bids submitted by the generation companies and map them against the forecast of the expected electricity demand for that half-hour period. USEP at any one time is a fixed price (as opposed to a range of prices) determined by the intersection of the supply curve and the expected demand.[6] Once USEP is determined, bids by electricity generators that are equal to or below USEP are accepted, whereas bids above USEP are rejected.[7] Regardless of their actual bid prices (whether equal to or below USEP), all electricity generators that are called upon to generate in that half-hour will be paid for the electricity supplied to NEMS based on USEP. For example, if the price is $55/MWh (where "MWh" stands for "megawatt hour"), an electricity generator that submitted a bid at $30/MWh will still be paid $55/MWh for the electricity it supplies to NEMS in that half-hour.

15 The price of electricity paid by a retailer encompasses USEP, as well as the Hourly Energy Uplift Charge ("HEUC"). HEUC captures any differences between the total amounts received from retailers and the total amounts paid to electricity generators for energy, reserve and regulation products. The actual price paid for electricity from the wholesale market will typically be slightly higher than the aggregate sum of USEP and HEUC, as there are some additional charges such as the Energy Market Company administrative charges. However,

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5 See Sharad Somani's AEIC p 20 at para 3.3.4.

6 See Sharad Somani's AEIC p 20 at para 3.3.5.

7 Sharad Somani's AEIC p 21 at para 3.3.6.

these additional charges are relatively low, and therefore it is common for industry players to equate the aggregate sum of USEP and HEUC with the "Pool Price".[8]

16 In general, consumers of electricity fall into two categories:

(a) Contestable consumers: Consumers who have an average monthly electricity consumption of at least 2,000 kWh (where "kWh" stands for "kilowatt hour").

(b) Non-contestable consumers: Consumers who have less than an average monthly electricity consumption of 2,000 kWh. Non-contestable consumers are only entitled to buy electricity from MSSL, which is SP Services Ltd.

17 On the other hand, contestable consumers can choose between purchasing electricity from MSSL or from retailers, such as SE. If such consumers purchase electricity from MSSL, they will pay the Pool Price for the electricity they consume. If instead such consumers purchase electricity from retailers in the market, they may negotiate the price of electricity, as well as the duration of the contract with the retailers. Regardless of whether electricity is purchased from MSSL or from a retailer, electricity is supplied to the consumer from the pool. It was undisputed that a consumer can only purchase electricity for a specific location from one retailer or MSSL at any one point in time. A consumer cannot buy electricity concurrently from two sources for the same location.

8 Lim Sam San's AEIC at para 20.

18 YTL and SE taken together form what is known as a "gentailer". This essentially refers to a vertical integration of the generation and retail of electricity. This is the predominant structure in NEMS. In Singapore, eight of the 15 electricity generators and seven of the 22 retailers are related to each other.[9] In 2015, seven out of these eight electricity generators produced a total of 90.5% of the electricity generated in Singapore,[10] while the seven corresponding retailers (which have a related generation arm) accounted for more than approximately 96% of the contestable market.[11] The remaining seven electricity generators that do not have related retail entities are not in the primary business of generating electricity. They produce electricity as a by-product of their main business, or primarily generate electricity for their own consumption.[12]

19 While there are 22 retailers in Singapore, only 11 have managed to capture a market share. Of these 11 retailers, the market is dominated by the seven retailers which have a related generation arm. The remaining four retailers are also not big players in the market. From 2014 to 2016, these four retailers did not even capture 1.5% of the market share.[13]

20 According to SE and YTL, the reason for this structure is that it helps mitigate the gentailer's exposure to the Pool Price given that the price that the electricity generator receives from selling electricity into the pool is the price that the retailer pays for the electricity it purchases from the pool. With the

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9 Sharad Somani's AEIC p 22 at para 3.4.8.

10 Sharad Somani's AEIC p 22 at para 3.4.8.

11 Sharad Somani's AEIC pp 22–23 at para 3.4.9.

12 Lim Sam San's AEIC at para 25.

13 See Sharad Somani's Supplementary AEIC p 19 at para 4.4.3.

gentailer structure, the gentailer's retailing arm would then be paid by the consumer at the agreed contract price or pricing plan.

21 By an agreement dated 16 January 2012 between PowerSeraya Limited ("PowerSeraya") and DSPL, PowerSeraya agreed to supply steam to a site of DSPL designated in the agreement. At [4] above, I have defined this steam supply agreement as "SSA" for convenience. The SSA was subsequently novated by PowerSeraya to YTL with effect from 1 April 2012.

22 Under the SSA, DSPL was obliged to ensure that its steam consumption did not:

> (a) fall below the Minimum Acceptable Flow Level of 6 tonnes per hour; or
>
> (b) exceed the Committed Capacity of 10.5 tonnes per hour.

23 Under the SSA, DSPL was also obliged to "take or pay" ("TOP") for a certain quantity of steam each month. There were three main charges each month:

> (a) "Monthly Fixed Charge": this was the charge that DSPL had to pay each month, regardless of the quantity of steam that DSPL consumed, under DSPL's TOP obligation;
>
> (b) "Monthly Variable Charge": this component varied with the amount of steam DSPL consumed each month; and
>
> (c) "Monthly Connection Charge": this was also a fixed amount.

24 The SSA was to be for a term of 15 years commencing from the scheduled Commercial Operation Date which was originally supposed to be 1 February 2012. I mention first that eventually the Commercial Operation Date was 1 September 2012. Apparently DSPL was liable to pay LD under the SSA to PowerSeraya for the delay of seven months.[14]

25 In May or June 2012, DSPL had indicated to PowerSeraya that it wanted to reduce the Minimum Acceptable Flow Level and Committed Capacity under the SSA which would correspondingly reduce the TOP.

26 On 28 June 2012, DSPL wrote to PowerSeraya to put in writing its request which entailed amendments to the SSA.[15] PowerSeraya was requested to agree to the reductions "out of goodwill".

27 Various oral discussions and emails ensued. According to Denka, the discussions and emails involved Denka entering into ERAs with SE as a *quid pro quo* for PowerSeraya/YTL agreeing to the requested reductions under the SSA.

28 On 7 August 2012, YTL sent a letter to DSPL to offer DSPL a concession of the original terms under the SSA.[16] This was referred to in the letter as the "Concession Offer". Under the terms of the Concession Offer, the reductions stated therein were to commence on 1 September 2012 and apply until 31 January 2021. Hence the Commercial Operation Date under the SSA

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14 See Lim Sam San's AEIC at paras 46–47.

15 1Agreed Bundle ("AB") 295–296.

16 1AB 304–307.

would be 1 September 2012 (as mentioned at [24] above). The terms of the Concession Offer also provided for:

(a) the execution by DSPL and YTL of the ASA to record their agreement in respect of the terms under the Concession Offer; and

(b) DSPL to enter into ERAs with SE on SE's standard terms and conditions for the supply of electricity to all of Denka's premises in Singapore from 1 September 2012 to 31 January 2021.

29 The terms of the Concession Offer anticipated that the ASA and the ERAs would be signed before 1 September 2012.

30 On the same date, *ie*, 7 August 2012, SE also sent Denka its standard ERA for Denka's review.[17]

31 On 14 August 2012, DSPL signed the relevant portion of the Concession Offer to accept the terms of the Concession Offer and handed this acceptance to YTL at a meeting between the parties held that day.[18]

32 According to YTL, the key commercial terms in respect of the concessions had already been set out in the Concession Offer. However, revisions to technical specifications and the Metering Protocol had to be resolved and incorporated into the ASA. Furthermore, the ASA would also include consequential amendments to the SSA arising from the terms in the Concession Offer.

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17 2AB 717–749.

18 1AB 307.

33 On 24 August 2012, YTL sent DSPL a draft of the ASA for DSPL's comments.

34 According to YTL, by late August 2012, it was clear that the ASA would not be finalised and executed on or before 1 September 2012. In order to ensure that YTL would not be liable to DSPL for any failure to meet technical specifications and/or the Metering Protocol, YTL sent an email to DSPL dated 30 August 2012 stating terms additional to those in the Concession Offer. These additional terms were accepted by DSPL on 31 August 2012.

35 The SSA, as amended by the Concession Offer and the additional terms, was in fact implemented from 1 September 2012. This was the revised Commercial Operation Date under the SSA even though the ASA had not yet been signed.

36 In the meantime, DSPL exchanged comments with SE on SE's standard ERAs. The contract duration under the ERAs was also to be from 1 September 2012 to 31 January 2021. This was the same duration as that under the SSA, as amended by the Concession Offer and the additional terms.

37 Eventually, SE signed the three ERAs on or about 4 September 2012. Denka signed them on or about 9 November 2012. However, it was not disputed that SE had proceeded to supply electricity to Denka pursuant to the intended ERAs from 1 September 2012. The three ERAs provided for the supply of electricity to three plants of Denka at three locations in Singapore from 1 September 2012. I add that even before these three ERAs came into effect, Denka had entered into prior ERAs with SE for the supply of electricity to Denka's plants.

38 The details of the three ERAs were:

(a) ERA 2012/099 was entered into between SE and DSPL.[19] As mentioned, SE signed it on 4 September 2012 and DSPL signed it on 9 November 2012. However, it was dated retrospectively to 1 September 2012. This ERA was amended by a supplemental agreement signed on or about 21 February 2014 but dated retrospectively to 1 November 2013.[20] Both the first and supplemental agreements were to be construed together and I will refer to them collectively as "ERA 99".

(b) ERA 2012/100 had terms which were different from those of ERA 99.[21] This agreement was also entered into between SE and DSPL presumably on or about 9 November 2012 as well. This agreement was superseded by another which was apparently signed on or about 21 February 2014.[22] For the purpose of the present action, it is the later agreement ("ERA 100") which applied.

(c) ERA 2012/101 had similar terms to that for the first of the two agreements of ERA 99. It was signed on the same two dates as the first of the two agreements of ERA 99.[23] However, the parties to ERA 2012/101 were SE and DAPL (instead of DSPL). There was also a supplemental agreement signed on or about 21 February 2014 but dated retrospectively to 1 November 2013.[24] Both the first and

19 1AB 158–181.

20 1AB 215–220.

21 1AB 182–190.

22 1AB 221–230.

23 1AB 191–214.

supplemental agreements were to be construed together and I will refer to them collectively as "ERA 101".

39 I will also elaborate on the pricing plan under the three ERAs based on the closing submissions of SE and YTL. The pricing plan was known as an "Index Price Plan". It was so named because the price of the electricity sold to Denka was based on a formula that varied with the prices of two indices: High Sulphur Fuel Oil ("HSFO"), and Foreign Exchange ("FX"). Examples of other pricing plans include:

(a) Fixed Price Plan: price of electricity is fixed for the term of the contract; and

(b) Pool Price plus Mark-Up: price of electricity is based on the Pool Price but with a mark-up added.

40 In the present case, the ERAs were based on an Index Price Plan but Denka also had a right to request to fix the price of electricity, at any point during the duration of the ERAs, for a period of three years (the "Option to Fix"). If Denka had chosen to exercise the Option to Fix, SE was obliged to fix the price accordingly.

41 According to YTL, there were follow-up discussions on the scope of technical works that had to be done at Denka's new plant in order to modify the supply of steam to DSPL pursuant to the reduced Committed Capacity and TOP quantity under the Concession Offer. Pending agreement on the scope of the modification works, interim technical measures were taken to meet these reductions. In the meantime, the parties proceeded on the premise of the SSA

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[24] 1AB 231–236.

as amended by the Concession Offer and the additional terms in so far as the supply of steam was concerned.

42 For the supply of electricity, the parties proceeded on the premise of the three ERAs. Although there were some differences in the pricing formulae between the three ERAs, that is not material for the issue of liability.

43 According to YTL/SE, in or about July 2014, Denka asked if SE could lower the electricity prices under the three ERAs if DSPL increased its consumption of steam. By then, the Pool Price for electricity had dropped so that Denka could likely purchase electricity from other sources at a price lower than that provided for in each of the three ERAs. Oral discussions were held and written proposals were made.

44 However, on 20 August 2014, DSPL wrote to YTL to say that, "the supply of steam and electricity shall cease under the temporary measures of the Concession Offer dated 7 Aug 2012 and the [three ERAs] that were part of the Concession Offer with effect from 1 September 2014" [original emphasis omitted].[25]

45 On 25 August 2014, YTL replied:[26]

(a) YTL agreed to revert to the SSA, without amendment, from 1 September 2014 for the supply of steam.

(b) As ERA 101 was a contract with DAPL, YTL requested DAPL's written confirmation of its intention to cease that ERA.

[25] 1AB 360–361.

[26] 1AB 362–363.

(c) For ERA 99 and ERA 100, YTL considered the termination as set out in DSPL's letter of 20 August 2014 as a repudiatory breach of the ERAs.

(d) For ERA 99, YTL gave DSPL notice to perform its obligations under the ERA within ten calendar days.

(e) For ERA 100, YTL said it would transfer DSPL's obligations (meaning DSPL's account) to MSSL with effect from 2 September 2014 unless DSPL gave written instructions before close of business of 27 August 2014 to stop the transfer. YTL also claimed LD of $3,255,383.39 under ERA 100. The effective date of termination by SE of ERA 100 was 1 September 2014.

46 On 28 August 2014, DSPL replied YTL.[27] DSPL said:

(a) The three ERAs were part of the Concession Offer which was subject to contract. The ASA was to be signed but it had not been entered into. It denied that the SSA had been amended at all. The only contract in question was the SSA and, under the SSA, DSPL was only obliged to buy steam and not electricity. It disputed YTL's allegations of repudiation and breaches of the ERAs.

(b) DSPL's position (for ERA 101) also reflected DAPL's position as they were part of the same group.

47 Also on 28 August 2014, SE wrote to DSPL in respect of ERA 100. It said that it had received DSPL's termination for the retail of electricity for the

[27] 1AB 364–365.

relevant premises. The effective date of termination of DSPL's account was 1 September 2014 and the account would be transferred to MSSL with effect from 2 September 2014. SE also claimed LD.[28]

48 The exchange of correspondence continued till 13 November 2014. Eventually ERA 99 and ERA 101 were also terminated by SE on 15 October 2014[29] and 14 November 2014[30] respectively. SE also claimed LD under those contracts as well as payment for electricity supplied up to the dates of termination.

49 In the meantime, in a letter dated 3 September 2014 from DSPL to YTL,[31] Denka had offered to continue purchasing electricity under the three ERAs pending a determination by the court of the disputes without admission of SE's claim and to protect Denka's rights (the "Mitigation Offer"). The Mitigation Offer was repeated but it was not accepted by SE.

50 Denka did not draw any distinction between DSPL and DAPL or between YTL and SE in its correspondence on the ERAs. However, YTL and SE attempted to maintain the distinction between DSPL and DAPL for formal purposes. The distinction between DSPL and DAPL is not material for the arguments on liability and quantum of damages but it explains the reasons for some of the correspondence from SE.

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28 1AB 606.

29 1AB 646–648.

30 1AB 674–675.

31 1AB 368–369.

Issues

51 The two main issues were on liability and quantum of damages but each main issue gave rise to various arguments.

Liability

52 On the issue of liability, Denka's position focused on the package deal argument. However, one of its sub-arguments was that even if the ERAs were binding, Denka was not obliged to purchase electricity from SE under the three ERAs as each of the three ERAs did not require Denka to purchase any minimum quantity of electricity.

Obligation to purchase electricity

53 On this sub-argument, it was common ground that the three ERAs did not require Denka to purchase any minimum quantity of electricity from SE. However, it was also common ground that each of the three ERAs had a provision for exclusivity.

54 For example, cl 2.1.2 of ERA 99 provided that, "[DSPL] shall not purchase electricity from any person other than [SE] during the Contract Duration".

55 ERA 101 had the same provision, with respect to DAPL.

56 For ERA 100, there was a similar provision under cl 1.2.2 of "[SE] Low Tension Electricity Retail Conditions" ("SELTERC") which stated, "the Customer [*ie*, DSPL] shall not purchase electricity from any person other than

the Retailer [*ie*, SE] for use at the Premises unless the Retailer agrees otherwise".

57 SE submitted that under the exclusivity provisions, Denka was obliged to buy electricity from SE so long as its plant in each location was in operation even though each ERA did not stipulate that Denka had to purchase any minimum quantity of electricity. Thus, if for example, one of the plants was not in operation because of repairs, Denka had no obligation to buy electricity from SE. Otherwise, so long as each plant required electricity, Denka could not legally obtain the electricity from any source other than SE.

58 However, Denka vigorously disagreed. It argued that because it was not obliged to purchase any minimum quantity of electricity from SE under each of the three ERAs, this meant that it was not obliged to purchase electricity from SE at all. Since the exclusivity provisions were couched in negative terms, they did not impose any positive obligations on Denka to purchase electricity from SE.

59 Before I continue, I will address some pleading points.

60 Denka submitted that SE should not be allowed to rely on the exclusivity provisions to establish liability because the last set of amendments made by SE, pursuant to an order of court dated 9 November 2017, was to include, *inter alia*, paras 56 to 58 in the Statement of Claim (Amendment No 3) ("SOC Amendment 3"). Denka argued that the amendments were allowed by the court on SE's submission that these paragraphs were to be included to establish the quantum of damages and not liability.[32] I note that, for example, para 56

[32] See Denka's reply submissions at para 9.

mentioned that SE has lost the benefit of the ERAs by reason of Denka's repudiatory breaches.

61 While it is correct that SE had submitted that these amendments were to establish quantum and not liability, there were other paragraphs in SOC Amendment 3 which might allow SE to rely on the exclusivity provisions to establish liability.

62 Each of the exclusivity provisions was pleaded at paras 6, 13 and 15 of SOC Amendment 3. There were also paras 21 to 24 which mentioned, *inter alia*, Denka's repudiatory breaches by reason of DSPL's letter dated 20 August 2014 to cease the ERAs with effect from 1 September 2014. In addition, paras 55, 57 and 60 of SE's Reply and Defence to Counterclaim (Amendment No 2) also asserted that Denka was obliged to purchase electricity under the respective ERAs.

63 I am of the view that SOC Amendment 3 could have been better drafted. Firstly, it should have stated that the exclusivity provisions meant that Denka was obliged to purchase electricity from SE exclusively under the respective ERAs. This should have been stated in that pleading and not just in the Reply and Defence to Counterclaim (Amendment No 2).

64 Secondly, SE should have stated that in the light of the obligation to purchase electricity from SE exclusively, DSPL's letter dated 20 August 2014 to cease the ERAs constituted repudiatory breach.

65 Nevertheless, although SOC Amendment 3 could have been better drafted, I am of the view that it did allow SE to rely on the exclusivity provisions to establish repudiatory breach by Denka in so far as SE did rely on repudiatory

breach to terminate any of the ERAs. I will elaborate on SE's reasons for termination of each ERA later. After all, SE did plead these provisions and repudiatory breach.

66 Denka's own pleading was in turn lacking as I elaborate below.

67 Denka's Defence and Counterclaim (Amendment No 3) was verbose and repetitive. In so far as Denka alleged that it did not have to purchase electricity from SE even if there was a binding contract arising from Denka's acceptance of the 7 August 2012 letter from YTL, this allegation was based on cl 7 of the 7 August 2012 letter and not on the terms of each ERA. Clause 7 of the 7 August 2012 letter only provided that the existing SSA continued to apply if the parties were unable to agree on the amendments to the SSA and the terms of the ASA prior to 1 September 2012. There was no pleading that in any event under the terms of each ERA, Denka was not obliged to purchase electricity from SE exclusively.

68 Nevertheless, I will assume that Denka's general denial of liability was sufficient to allow it to take the point and I will proceed to address the evidence.

69 I am of the view that Denka had conflated the facts. It did not follow that because Denka was not obliged to buy any minimum quantity of electricity from SE that Denka was not obliged to buy electricity from SE at all. I agree with SE's submission on this point that the exclusivity provisions meant that Denka was still obliged to buy whatever electricity it needed from SE even though it was not obliged to buy any minimum quantity. The two were not incompatible. In effect, each exclusivity provision did impose a positive obligation on Denka to buy electricity from SE although it was couched in negative terms.

Package deal

70 I come now to the main argument regarding the package deal.

(1) *Whether each ERA was a binding contract*

71 It was undisputed that Denka had entered into each and every one of the three ERAs. While Denka submitted that the three ERAs were subject to the condition that DSPL and YTL were to enter into the ASA for the supply of steam, Denka did not clarify whether the entry into the ASA was a condition precedent to be met before a contract to purchase electricity was constituted under each of the three ERAs or whether it was a condition subsequent to be performed such that there was already a binding contract to purchase electricity under each of the three ERAs but that each contract could be terminated by Denka if the condition was not subsequently met.

72 Hence, there was much confusion in the mind of Denka's only factual witness Ms Chia Miaw Ling ("Ms Chia") as to whether its case was that there was no binding contract at all for the purchase of electricity under each of the three ERAs until the condition precedent was met or that each ERA was a binding contract which SE or Denka could terminate if the condition subsequent was not met.

73 It is clear to me from the terms of the three ERAs that each of the three ERAs constituted a binding contract on the part of Denka to buy electricity from SE. There was nothing in each of them to suggest that each was not a binding contract.

74 In addition, the existence of a binding contract under each of the three ERAs was also consistent with the factual matrix. Each side did plead estoppel

against the other. I gather that that pleading referred to estoppel by convention. In my view, both sides had in fact proceeded on the basis that each of the three ERAs was a binding contract under which Denka obtained and paid for electricity from SE. The formula for pricing was pursuant to each of the three ERAs and this was applied until disputes arose. Whether each contract was subject to a condition subsequent which had to be met was a separate issue.

(2) *Whether each ERA was subject to a condition subsequent which had to be met*

(A) CONCESSION OFFER AND THE ASA

75 As regards the ASA for the supply of steam, it will be re-called that there was already the SSA which was a binding contract between DSPL and YTL for steam supply. The Concession Offer which YTL made to DSPL on 7 August 2012 was accepted by DSPL on 14 August 2012.

76 This led SE to argue that the offer (under the Concession Offer) and the acceptance thereof constituted a contract to amend the SSA. The additional terms agreed to on 31 August 2012 were part of the contract to amend the SSA but I need not say any more about the additional terms as they are not material for present purposes.

77 On the other hand, Denka argued that its acceptance of the offer did not constitute a contract to amend the SSA because the parties had envisaged under the terms of the Concession Offer that another agreement was to be entered into to amend the SSA. This was the ASA and the parties eventually did not enter into the ASA. Hence, Denka's position was that because the ASA was not entered into, Denka was also excused from continuing with the ERAs even if the ERAs were binding contracts on the parties.

78 Denka relied on the decision of the Court of Appeal in *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* [2004] 3 SLR(R) 316 ("*Compaq Computer*"). I will refer to the appellant there as "Compaq" and the respondent there as "CIS". In that case, CIS was the plaintiff. Compaq had submitted the lowest bid to Reuters Singapore for the installation, servicing and maintenance of hardware and software ("field services"). Compaq also intended to enter into an agreement with CIS for the provision of the field services. A memorandum of understanding between Compaq and CIS was followed by a letter of award ("LOA") issued on 30 June 2000 by Compaq to CIS. This LOA was accepted by CIS. The LOA envisaged the entry into a written agreement between Compaq and CIS which was to be signed by 14 July 2000. That written agreement was not entered into. In the meantime, CIS provided services until about 28 December 2001 when Compaq terminated "the arrangement" between them. Subsequently, CIS commenced action against Compaq and the main question was whether the LOA constituted a binding contract between the parties even though the written agreement which was envisaged was not signed. The trial court found that there was a binding contract. The Court of Appeal found there was not. The material parts of the LOA there stated:

> **LETTER OF AWARD ('LOA')**
>
> It is our pleasure to hereby confirm that, *subject to final terms and conditions being agreed* between [Compaq] and [CIS], we have selected CIS to supply the installation, maintenance and related services for the Reuters Field Outsourcing project in Singapore.
>
> The attached schedules *will form part of the Agreement*. By accepting this LOA, CIS agrees to commence the project on the terms stated on the schedules. Both parties agree that they will take all reasonable steps to ensure that the Agreement is negotiated and signed on or before Friday 14th July 2000. If the Agreement has not been entered into by 17th July 2000, a new target date for the signing of the Agreement will then be mutually agreed between the parties.

> The agreement shall take effect on 1st July 2000 *and subject to any ability to terminate it under the Agreement* shall expire 3 years after such date.
>
> …
>
> [emphasis added]

79 Firstly, the Court of Appeal noted that CIS was chasing for an early conclusion to the entry into the written agreement. Secondly, it also noted that not all the essential terms had been set out in the LOA.

80 Thirdly, there was the phrase "subject to final terms and conditions being agreed" in the LOA. The question was whether that phrase should be construed in a similar manner as the phrase "subject to contract". The latter usually meant that there was no binding contract until a formal written agreement was executed.

81 The Court of Appeal was of the view that the words "subject to" and "final" meant there were other terms to be settled. It was also uncertain what the "final terms and conditions" would be. In order for there to be a binding contract, there had to be a "final and unqualified expression of assent" to contract (at [36]).

82 Also, the phrase in question, "subject to final terms and conditions being agreed", was placed right at the top of the LOA.

83 As for the second paragraph of the LOA, the Court of Appeal was of the view that the words "will form part of the Agreement" also indicated that there was no binding contract yet as the words "will form" indicated something in the future.

84 As for the sentence in the second paragraph where CIS agreed to commence the project on the terms stated in the schedules, this was a proposal for an interim arrangement pending the finalisation of the written agreement.

85 As for the third paragraph of the LOA which referred to the ability to terminate the intended written agreement, the Court of Appeal noted that the terms for which termination would be effected had not yet been agreed.

86 I come now to the terms of the Concession Offer before me. I set out the material clauses of YTL's letter containing the Concession Offer and the material terms of the Concession Offer below:

> 1. We refer to the [SSA] dated 16th January 2012, that was signed between [DSPL] and [PowerSeraya], and subsequently novated by [PowerSeraya] to [YTL] with effect from 1 April 2012 (the "SSA").
>
> 2. We are pleased to confirm that the parties have agreed that the Commercial Operation Date under the SSA shall be 1 September 2012.
>
> *[CL 3 OMITTED]*
>
> 4. [YTL] has carefully considered DSPL's request to reduce the Committed Capacity to 6.5 MT/hr and the TOP to 3.0 MT/hr. We have simulated various permutations of Committed Capacity and TOP in our review, in our attempt to meet DSPL's request. We are now prepared to offer DSPL a concession of the original terms of the SSA ("Concession Offer") on the terms and conditions set out in this letter ("Concession Terms").
>
> 5. DSPL acknowledges and agrees that:
>
> (A) DSPL shall have to pay all costs and expenses incurred or to be incurred by [YTL] in connection with the changes to the SSA, including but not limited to the following:
>
> a. the external lawyer's fees and expenses for the negotiation, preparation, execution, delivery, performance of and compliance with this letter

and any ancillary supplemental agreement(s); and

b. the technical modification(s) of the existing steam metering system, PRDS, and re-commissioning of the entire steam supply system.

…

[YTL] will do a joint technical assessment with DSPL on the technical modifications required and will inform DSPL on the scope of the technical works. DSPL shall provide all necessary assistance as may be reasonably required for [YTL] to carry out such technical assessment.

(B) the Commercial Operation Date shall be 1 September 2012;

(C) the Committed Capacity shall be amended to 6.5 MT/hr;

(D) the TOP shall be amended to 3.0MT/hr and shall be measured on an hourly basis;

(E) the steam pricing and electricity contract price calculations set out in Appendix 1 shall apply for purposes of the SSA and the electricity retail agreement referred to in paragraph (I) below, respectively;

(F) …

(G) the Technical Specifications and Metering Protocol shall be revised by [YTL] to reflect the changes in the system capability and DSPL's Steam off-take capacity;

(H) DSPL shall execute or procure the execution of any ancillary supplemental agreement(s) prepared by [YTL] to record the parties' agreement in respect of the Concession Terms as set out in this letter; and

(I) DSPL shall, prior to the Commercial Operation Date, execute an electricity retail agreement with [SE] on [SE]'s standard terms and conditions for the supply of electricity to all of DSPL's premises in Singapore, for the period commencing from 1 September 2012 to 31 January 2021, and

> provide [SE] with a security deposit as required in accordance with the terms of the electricity retail agreement.
>
> 6. Once you agree to and accept the Concession Offer herein, the Concession Terms shall apply from 1 September 2012 to 31 January 2021, or such earlier date as parties may mutually agree in writing (the "Concession Expiry Date"). Thereafter, either the original terms and conditions of the SSA shall apply or the Concession Terms shall continue to apply, at the sole discretion of [YTL]. [YTL] will inform DSPL of its decision in writing on or before the Concession Expiry Date.
>
> 7. The existing SSA terms shall, notwithstanding anything set out in this letter, continue to apply on and after the Commercial Operation Date of 1 September 2012 in the event that both parties are unable to agree on the amendments to the SSA and / or the terms of any ancillary supplemental agreement (referred to in paragraph 5(H) above) prior [to] 1 September 2012.
>
> 8. We look forward to your acceptance and agreement to the above Concession Terms by signing this letter and returning the signed copy to us no later than 14 August 2012, after which the Concession Offer shall automatically lapse.
>
> 9. The provisions of the SSA will, except as amended and / or supplemented by this letter or the Concession Terms, continue in full force and effect.
>
> *[CLL 10 TO 15 OMITTED]*

87 As can be seen, the factual matrix leading to and the terms in the Concession Offer were different from those in the case of *Compaq Computer*.

88 For example, there was already an existing contractual relationship between YTL and DSPL under the SSA before the Concession Offer was sent to DSPL.

89 As another example, there was no word in the Concession Offer suggesting that the acceptance of the Concession Offer was still "subject to

contract" as such, although the Concession Offer anticipated that the parties would enter into the ASA after the Concession Offer was accepted by DSPL. Furthermore, the terms of the Concession Offer suggested that the Concession Offer was indeed an offer in law capable of acceptance by DSPL which would result in a binding contract for the time being of the terms of concession in respect of the SSA. The ASA was a formal agreement to amend the SSA.

90 As mentioned at [32] above, the evidence for SE was that the Concession Offer had set out the material commercial terms but the technical aspects to achieve the reductions for the Committed Capacity and TOP quantity had yet to be worked out. Once this was done, the ASA would be signed. Although Denka did not accept such evidence, it had hardly any evidence to challenge it.

91 Furthermore, cl 6 of YTL's letter made it clear that upon acceptance of the Concession Offer, its terms would apply from 1 September 2012 to 31 January 2021.

92 In the circumstances, I am of the view that the acceptance by DSPL constituted an interim contract between YTL and DSPL to amend the SSA but this was subject to a condition subsequent, *ie*, the entry into of the ASA. In other words, the entry into of the ASA was not a condition precedent to be met before a contract on the concession terms could come into force.

93 It is also true that cl 7 of YTL's letter stipulated that the existing SSA would apply if the parties were not able to agree on the amendments to the SSA before 1 September 2012. This does not change the above analysis. Clause 7 merely meant that the condition subsequent was to be met before 1 September 2012.

94 It was common ground that the SSA was not executed before 1 September 2012 or at all. However, notwithstanding this, the parties proceeded on the basis of the commercial terms stipulated in the Concession Offer from 1 September 2012.

95 In addition, I accept the evidence for SE that the parties were still discussing the technical aspects of the reductions for the ASA after 31 August 2012 even though as time progressed, the frequency and intensity of the discussions decreased. Although Denka was not prepared to accept such evidence, it had hardly any evidence to challenge it.

96 It is clear to me that after 31 August 2012, YTL and DSPL had proceeded on the premise that the terms of the Concession Offer continued to apply until after DSPL said in 2014 that it wanted to revert to the initial SSA. There was estoppel by convention.

97 Nevertheless, notwithstanding my conclusion that the Concession Offer and the acceptance thereof constituted an interim contract, the interim contract still anticipated that the parties thereto would enter into the ASA.

98 SE did not plead or argue that it was an implied term that DSPL would use its best endeavours to enter into the ASA. Neither did it plead that DSPL could not take advantage of its own wrong as it was DSPL who no longer wanted to enter into the ASA.

99 Clause 7 of YTL's letter suggested that if the ASA was not signed prior to 1 September 2012, the parties would revert to the SSA. Although the parties no longer treated that deadline itself as a condition which had to be met, cl 7 suggested that the signing of the ASA was not a mere formality. It suggested

that if the ASA was not entered into, either party could decide to revert to the (original) terms under the SSA.

100 In the circumstances, I am of the view that since the ASA was not entered into, either party was free to terminate the interim contract which had been entered into in respect of the supply of steam. DSPL's subsequent letter of 20 August 2014 did make it clear that it no longer wished to continue with the Concession Offer and hence the question of entering into the ASA became academic. Consequently, YTL did agree to revert to the terms of the SSA. However, this does not necessarily assist Denka in its dispute with SE on the three ERAs.

(B) ERAS

101 SE's position was that although the three ERAs were entered into because of the concessions made by YTL under the SSA, the three ERAs were standalone contracts. In that sense, they were not tied to the SSA or to the execution of the intended ASA. That was why SE disputed that Denka could rely on the package deal argument.

102 Denka raised a myriad of defences to avoid its obligations under the three ERAs: estoppel arising from misrepresentation, implied term, collateral agreement or warranty, misrepresentation, rectification and mistake.[33]

103 Most, if not all, of these defences were based on the same premise, *ie*, that Denka had entered into the three ERAs on YTL's or SE's representation that the entry into the ERAs was inextricably connected to the signing of the ASA so that even though the parties had entered into the three ERAs, they could

33 Defence and Counterclaim (Amendment No 3) at paras 84–89.

nevertheless withdraw from the contracts constituted under the ERAs if the ASA was not entered into. However, it was not clear whether Denka was relying on some fault on the part of YTL or SE or not in respect of each defence.

104 In Denka's closing submissions, Denka elaborated, at para 466, that there were representations by YTL and SE that if Denka signed the ERAs, YTL and SE would sign or procure the signing of the ASA. This suggested that Denka could withdraw from the ERAs only if the ASA was not signed due to some fault on the part of YTL or SE. Thus, so long as YTL and SE were prepared to sign or procure the signing of the ASA, there would be no misrepresentation by YTL in any event.

105 At para 473 of Denka's closing submissions, the argument was put differently, *ie*, that there had to be an implied term that if the ASA was not signed, Denka could terminate the ERAs. This suggested that even if YTL was prepared to sign the ASA, it did not matter. The simple fact that the ASA had not yet been signed would then be sufficient to allow Denka to terminate the three ERAs.

106 In the illustration given at para 475 of Denka's closing submissions, the same suggestion was made, *ie*, the mere failure to perform a condition discharges the other party from his own obligation. No fault was necessary for the failure.

107 Paragraphs 476 and 477 of Denka's closing submissions continued with the idea that no fault was necessary on the part of YTL.

108 At para 478 of Denka's closing submissions, Denka referred to the failure of YTL and SE to procure YTL to enter into the ASA as a breach of a

collateral contract, thus suggesting that there was some fault on the part of YTL and SE.

109 At paras 479 to 481 of Denka's closing submissions, Denka referred simply to a mistake on its part if the ERAs were standalone contracts, thus suggesting that it was not necessary to impute any fault to YTL.

110 As can be seen, Denka was conflating its arguments. The question whether there must be some fault on the part of YTL or SE could be important. If the mere fact that the ASA was not signed was sufficient to entitle Denka to withdraw from the three ERAs, then Denka would succeed in its defence on liability regardless of any fault on the part of YTL or SE. On the other hand, if Denka had to establish fault on the part of YTL or SE in YTL not signing the ASA, then Denka's defence on liability must fail for the reasons which I state below.

111 The evidence for SE, which I accept, showed that after 1 September 2012, YTL and DSPL were discussing the technical aspects of the agreement to reduce the Committed Capacity and TOP quantity. Over time, the discussions appeared to decrease in intensity and frequency.

112 It was also clear that DSPL never protested to YTL about the delay in executing the ASA. Neither did it call upon YTL to expedite the resolution of the technical aspects or to finalise the ASA for execution. The evidence showed that eventually it was DSPL who decided for its own reasons not to pursue the question of signing the ASA and indeed to revert to the SSA for the supply of steam.

113 Although DSPL's letter of 20 August 2014 said that it had successfully linked its plants for the supply of steam and gave this as the reason for ceasing the Concession Offer for the supply of steam and the three ERAs for the supply of electricity, I find that this was a disguise to hide the real reason. The reality was that the prices of electricity had dropped and it was for this reason that Denka wanted to withdraw from the three ERAs. Since the three ERAs were entered into because of Denka's initial wish to reduce its commitments under the SSA, it decided to say that it no longer needed to reduce its commitment under the SSA, thus giving it an excuse to withdraw from the three ERAs.

114 Even if that were not the true reason, the fact remained that it was DSPL who no longer wanted to pursue the signing of the ASA. There was no evidence that it was YTL who was not prepared to sign the ASA.

115 I come back to the question whether Denka could withdraw from the three ERAs even though the ASA was not signed through no fault of YTL.

116 Firstly, SE's case relied on a provision in each of the three ERAs which was to the effect that each ERA constituted the entire agreement between the parties thereto. Some of the provisions went further to say that Denka had not relied on any representation, warranty or undertaking in entering into the ERA concerned other than as expressly set out in the ERA (see, for example, cl 9.2 of both ERA 99 and ERA 101).

117 Secondly, even if such provisions did not preclude Denka from raising its defences, the burden of proof was still on Denka to establish that it was entitled to withdraw from the three ERAs merely because the ASA was not signed.

118 I find that, on the evidence, Denka has failed to establish that YTL made any representation to the effect that Denka could pull out of the three ERAs so long as the ASA was not signed at all. Likewise, Denka has failed to establish that YTL had represented that Denka could pull out of the three ERAs if it was Denka who unilaterally pulled the plug on the plan to sign the ASA. There is no basis for the implied term which Denka was advocating, like an implied term that if the ASA was not signed, Denka could terminate the ERAs. Indeed, it failed to adequately elaborate on its arguments about an implied term. Furthermore, if the parties were asked, at the time the three ERAs were entered into, whether Denka could withdraw from the ERAs in the circumstances, YTL and SE would have said, "Of course not". There was no question of a collateral agreement or warranty, rectification or mistake. Indeed, the shoe is on the other foot. YTL and SE would have been surprised if it was postulated to them at the material time that Denka could withdraw from the three ERAs if DSPL unilaterally decided that it no longer wanted the concessions or to sign the ASA.

119 Thirdly, while the terms of the Concession Offer anticipated the signing of the ASA and suggested that the parties to the SSA could revert to the terms of the SSA if the ASA was not signed, it is significant that the terms of the Concession Offer did not say that the parties could withdraw from the three ERAs if the ASA was not signed.

120 Furthermore, this was not a case where, after the three ERAs were entered into, YTL sought to renege on its agreement to the concessions under the SSA. The commercial concessions were implemented and would have continued if Denka had not attempted to unwind them. Since Denka no longer

wanted the commercial concessions, that was its prerogative but it could not use this manoeuvre to withdraw from the three ERAs.

Termination of the three ERAs and the LD provisions

121 DSPL's letter of 20 August 2014 made it clear that Denka did not wish to continue purchasing electricity under the three ERAs. I agree with SE that this was repudiatory conduct. However, SE's reasons for terminating each of the ERAs were not all based on this repudiatory conduct of Denka, as I elaborate below.

122 As mentioned at [45] above, for ERA 100, YTL had replied to DSPL on 25 August 2014 stating that the termination by DSPL as set out in DSPL's letter of 20 August 2014 was a repudiatory breach.[34] YTL said that it would transfer DSPL's account to MSSL with effect from 2 September 2014 unless DSPL gave written instructions before close of business of 27 August 2014 otherwise. On 28 August 2014, SE followed up with a letter to DSPL in respect of ERA 100 to state that the termination of DSPL's account was on 1 September 2014 and the account would be transferred to MSSL with effect from 2 September 2014. SE claimed LD.

123 For ERA 99, YTL's letter to DSPL of 25 August 2014 also stated that the termination by DSPL as set out in DSPL's letter of 20 August 2014 was a repudiatory breach. YTL's letter then gave notice to DSPL to perform its obligations under ERA 99 within ten calendar days. Although cl 8.2.2 of ERA 99 was not specifically mentioned in YTL's letter, SE's position was that YTL (as well as SE) was acting under that provision which states:

[34] 1AB 362–363.

> 8.2 [SE] shall be entitled to terminate the Contract Duration and cease Retailing electricity to the Consumer immediately by written notice to the Consumer if:
>
> …
>
> 8.2.2. without prejudice to Clause 8.2.1, the Consumer is in breach of any of its obligations under this Agreement and fails to remedy the same within 10 calendar days after being served with a written notice giving particulars of the breach and requiring it to be remedied;
>
> …

124 SE sent a follow-up letter dated 4 September 2014 to DSPL.[35] Although the letter was wrongly addressed to DAPL, Denka did not make any issue of this. In any event, SE rectified the error on 10 September 2014.[36] In SE's letters dated 4 September 2014 and 10 September 2014, SE confirmed that its position was as set out in YTL's letter to DSPL dated 25 August 2014. SE asked DSPL to perform its obligations under ERA 99.

125 In the meantime, DSPL was disagreeing that it was obliged to continue with any of the ERAs. Subsequently, on 7 October 2014, DSPL wrote to YTL to complain about the delay in transferring the other two accounts to MSSL (under ERA 99 and ERA 101, since the account under ERA 100 had already been transferred to MSSL).[37] DSPL also said that it would pay for electricity supplied under ERA 99 and ERA 101 in the meantime based on MSSL's electricity rates from 1 September 2014 since DSPL had said, through its initial letter dated 20 August 2014, that it was not continuing with the purchase of electricity from SE with effect from 1 September 2014. This intention to pay

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35 1AB 609–610.

36 1AB 621–622.

37 1AB 380–381.

based on MSSL's rates was repeated by DSPL in its letter dated 13 October 2014 to YTL.[38]

126 Accordingly, on 13 October 2014, SE sent two letters to DSPL to terminate ERA 99 with effect from 15 October 2014 and to make the requisite transfer to MSSL on 16 October 2014.[39]

127 As mentioned above, SE was purporting to terminate ERA 99 pursuant to cl 8.2.2 of ERA 99. I have set out its terms at [123] above. Under that provision, SE was entitled to terminate the contract if Denka was in breach of any of its obligations under the contract and failed to remedy the same within ten calendar days after being served with a written notice giving particulars of the breach and requiring it to be remedied.

128 SE had assumed that this provision would apply when Denka repudiated the contract under ERA 99. It did not elaborate why cl 8.2.2 would apply. Denka disagreed with SE. Its submissions covered both ERA 99 and ERA 100.

129 Denka submitted that even if there was repudiation by Denka which was denied, the repudiation was not a basis for payment of LD under the relevant ERAs.[40] Clause 8.2.2 (of ERA 99) only applied if there was a breach of a contractual obligation by Denka and not if Denka repudiated the relevant contract. As there was no obligation on the part of Denka to purchase electricity from SE, there was no breach by Denka when DSPL sent its letter dated 20 August 2014 to cease purchasing electricity under the three ERAs.

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[38] 1AB 382.

[39] 1AB 646–648.

[40] See Denka's closing submissions at paras 284–288.

130 In my view, there were two sub-issues. The first was whether SE was entitled to terminate ERA 99 and ERA 100. The second was whether the relevant contractual provisions for LD were *prima facie* engaged.

131 I have already explained at [69] above that contrary to Denka's submission, it was obliged to purchase electricity from SE under the three ERAs even though it was not obliged to purchase any minimum quantity. DSPL's letter of 20 August 2014 constituted repudiatory conduct.

(1) ERA 100

132 For ERA 100, the provision on termination was cl 5.1.2 of SELTERC[41] which allowed SE to terminate for Denka's breach if Denka failed to remedy such breach within five days of a written notice requiring it to remedy the breach. However, SE was not purporting to act under cl 5.1.2. Rather, it relied on its common law right to terminate based on Denka's repudiation. I am of the view that SE was entitled to do so.

133 As for the next question whether the relevant contractual provision for LD was engaged, the relevant contractual provision in ERA 100 is cl 5.3 of SELTERC which states that, "If the Contract Period [meaning the contract] is *for any reason whatsoever* terminated before the Expiry Date, the Customer [*ie*, Denka] shall immediately pay the Retailer [*ie*, SE] …" [emphasis added].[42]

134 This is different from cl 8.4.2 of ERA 99 which states that, "if the Contract Duration [meaning the contract] is terminated *pursuant to Clause 8.2*, save for Clause 8.2.8 …" [emphasis added], LD is payable by Denka.[43] In other

41 1AB 228.

42 1AB 228.

words, for ERA 99, LD was payable if the contract was terminated pursuant to cl 8.2 but for ERA 100, LD was payable if the contract was terminated "for any reason whatsoever". So for ERA 100, the termination did not have to be done under any particular contractual provision to give rise to a claim for LD. Hence, in my view, the relevant contractual provision for LD in ERA 100 was *prima facie* engaged.

(2) ERA 99

135 Coming back to ERA 99, SE was purporting to terminate it under cl 8.2.2. SE had to rely on this provision in order to trigger its right to claim LD under cl 8.4.2, which provides for Denka to pay LD if the contract was terminated pursuant to cl 8.2, save for cl 8.2.8 (see [134] above).

136 Clause 8.2.2 does not refer explicitly to repudiation. Instead, it refers explicitly to a breach by Denka of "any of its obligations under this Agreement" (see [123] above). Does that phrase include repudiation? I am of the view that it does. The purpose of cl 8.2.2 was to allow SE to give Denka a warning of ten days to remedy any breach of contract failing which SE would be entitled to terminate the contract. *A fortiori*, if Denka was not only in breach of one provision of the contract but was effectively in breach of the entire contract by repudiating it, cl 8.2.2 would apply.

137 It was not disputed that the ten-day notice had been given (see [123]–[124] above). Accordingly, I am also of the view that SE did validly terminate ERA 99 under cl 8.2.2 and that the relevant contractual provision for LD in ERA 99 was *prima facie* engaged.

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[43] 1AB 166.

(3) ERA 101

138 I come now to ERA 101. Although its terms for termination and LD are the same as those for ERA 99, SE did not purport to terminate ERA 101 under cl 8.2.2 but under cl 8.2.1. Clause 8.2.1 allows SE to terminate the contract if Denka "fails to pay any amount due and payable to [SE] under this Agreement". No period of warning or notice was required under cl 8.2.1.

139 As SE had not yet terminated ERA 101 initially, SE continued to supply Denka with electricity under this contract from 1 September 2014. On 7 October 2014, Denka complained about the delay in transferring its account to MSSL (see [125] above). In the meantime, SE sent an invoice to Denka dated 10 October 2014 for the month of September 2014 based on the contractual rates ("October 2014 invoice"). A reminder for payment was sent on 7 November 2014 but Denka still did not pay. Accordingly, on 13 November 2014, SE wrote to Denka to terminate ERA 101 under cl 8.2.1 for Denka's failure to pay that invoice with effect from 14 November 2014. The account was to be transferred to MSSL on 15 November 2014.[44]

140 I have found that Denka was not entitled to cease purchasing electricity and that it had repudiated each of the three ERAs in attempting to cease its purchases. Accordingly, SE was entitled, but not obliged, to accept the repudiation and terminate each of the three ERAs or to terminate under any of the grounds applicable under the respective ERA. Until SE terminated ERA 101, SE was entitled to continue supplying electricity pursuant to ERA 101 and to charge accordingly for it. In other words, Denka was not entitled to take the position that it would pay only at MSSL's rate. It was not

[44] 1AB 674–675.

disputed that the October 2014 invoice contained the correct quantum based on the contractual rates.

141 Denka's submission (at para 290 of its closing submissions) that there was no debt due to SE as at 1 September 2014 missed the point. SE was not alleging that it had terminated ERA 101 on 1 September 2014. Instead, it was using the unpaid October 2014 invoice as the reason for termination.

142 Furthermore, the existence of a bank guarantee to cover Denka's liability under ERA 101 did not mean that no amount was due and payable to SE at the material time. In Denka's closing submissions, it submitted that electricity charges after 1 September 2014 were nonetheless paid in full as SE had called on the bank guarantee for payment.[45] However, Denka did not elaborate as to when the October 2014 invoice was paid. It appeared that Denka's argument was misleading. There was no evidence that the amount outstanding under the October 2014 invoice had in fact been paid through the bank guarantee before SE used the outstanding invoice as the ground to terminate the contract. SE's letter of 13 November 2014 to Denka had stated that it was terminating ERA 101 as it had still not received payment of the sum due under the October 2014 invoice or any part thereof. Denka did not say then or at trial that in fact SE had already received payment under the relevant bank guarantee before the date of the letter. Accordingly, I infer that any payment under that bank guarantee was received by SE after SE terminated ERA 101.

143 In the circumstances, I am of the view that SE was entitled to and did validly terminate ERA 101 under cl 8.2.1. Under cl 8.4.2, LD was payable by Denka if the Contract Duration (meaning the contract) was terminated pursuant

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45 See Denka's closing submissions at para 291.

to cl 8.2. This covered cll 8.2.1 and 8.2.2. Therefore, the contractual provision for LD in ERA 101 was also *prima facie* engaged.

144 In summary, Denka is liable to SE for breach of contract in respect of each of the three ERAs. *Prima facie*, the contractual provisions for LD in the three ERAs were engaged.

Damages

145 There were various sub-issues in respect of the LD or alternatively, the damages which SE was claiming:

(a) whether SE should have accepted the Mitigation Offer;

(b) whether each provision for LD was non-enforceable as a penalty;

(c) if each LD provision was not enforceable, whether SE was precluded from claiming common law damages under cl 7.2.1 of ERA 99 and ERA 101; and

(d) if SE was not so precluded, what were the common law damages that SE was entitled to for all three ERAs.

Whether SE should have accepted the Mitigation Offer

146 If a provision for LD was *prima facie* enforceable, the question arises whether the concept of mitigation also applies to reduce a claim for LD. SE argued that mitigation does not apply to reduce a claim for LD assuming that the LD provision was otherwise enforceable. It relied on the decision of Leggatt J in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) at [71] and SE submitted that the principle is also

supported by academic commentary. On the other hand, Denka argued that a plaintiff still has a duty to mitigate even if the LD provision was enforceable.

147 It seems to me that it is not necessarily inconsistent to say that a plaintiff need not prove his damages because of a valid LD provision and yet a defendant may show that the plaintiff failed to take reasonable steps to mitigate when the opportunity to mitigate arose. It is arguable that if a defendant were to be allowed to argue that the plaintiff failed to mitigate, this does not mean that the plaintiff has to prove his damages contrary to a valid LD provision. *Prima facie*, the valid LD provision will apply and it is for the defendant to establish the plaintiff's failure to mitigate which is a different point. For example, an owner of some land may claim LD against a building contractor for delay in completing the building of, say, a hotel. However, he may still have to mitigate in the sense that if the building contractor cannot carry on with the project, the owner would have to take steps to engage an alternative contractor promptly rather than let LD accrue indefinitely.

148 In any event, it is not necessary for me to reach a conclusion on this sub-issue for the reasons stated below.

149 It was undisputed that in principle, the Mitigation Offer must have been one that was reasonable for SE to accept. Although SE did not explicitly plead that the terms of the Mitigation Offer were unreasonable, it did deny that it had acted unreasonably in refusing to accept the Mitigation Offer (see para 64 of SE's Reply and Defence to Counterclaim (Amendment No 2)). Also, while the affidavit of evidence-in-chief ("AEIC") for SE which was that of Mr Lim Sam San ("Mr Lim"), Senior Vice-President, Special Projects for SE and YTL, did not elaborate as to why the Mitigation Offer was unreasonable, the burden was

still on Denka to prove that its terms were reasonable and that it was unreasonable of SE not to accept the Mitigation Offer. After all, the burden was on Denka to establish that SE failed to mitigate its damages if the principle of mitigation were applicable to a claim for LD.

150 Denka's Mitigation Offer meant that pending the outcome of a court decision, it would continue to purchase and pay for electricity under the three ERAs at the contractual rates. If the court were to decide that Denka was not entitled to withdraw from the three ERAs, then SE would retain what was paid and the parties would continue with the ERAs. However, SE would not be entitled to claim LD.

151 On the other hand, if the court were to decide that Denka was entitled to withdraw from the three ERAs, then SE would have to pay Denka the difference between the contractual rates and the market rates up till the date of the court's decision.

152 At first blush, the Mitigation Offer appeared reasonable. However, on closer examination, it was in reality a one-sided offer. Denka's worst case scenario was to continue purchasing and paying for electricity at the contractual rates. On the other hand, it would not have to do so if it won, *ie*, Denka would only have had to pay for electricity at the market rates up till the date of the court's decision and could thereafter withdraw from the ERAs. For SE, its best case scenario was to continue supplying electricity and be paid based on the contractual rates with the ERAs continuing. However, if it lost, it would have to refund Denka the difference between the contractual rates and the market rates, and be subject to the fact that Denka would withdraw from the ERAs.

153 In either scenario, Denka would not be liable for LD at all if the Mitigation Offer was accepted. Yet there was no additional advantage or benefit to SE for giving up its claim for LD. If the Mitigation Offer was not accepted and Denka was wrong in withdrawing from the three ERAs, SE would have been entitled to stop supplying electricity to Denka and claim LD (subject to the argument about non-enforceability of the LD provisions). Furthermore, there was no certainty whatsoever to SE as elaborated below.

154 This was not a case where Denka had offered to enter into new ERAs for the same three locations but at reduced prices. For example, Denka could have offered to enter into new ERAs based on, say, 80% of the existing contractual rates for the remaining period under the three ERAs. The terms of such an offer could be that if SE won its case, SE would only claim the difference between the original contractual rates and the new contractual rates. If SE lost its case, Denka would not be liable for the difference but, at least, Denka would have to continue buying electricity from SE under the new ERAs and at the new rates. In other words, SE would have the certainty of the new ERAs even if it lost its case although it would be paid based on the lower rates.

155 Such an offer as outlined in the preceding paragraph would be akin to the more familiar scenario where a defendant purchaser repudiates a long-term contract and the repudiation is accepted by the plaintiff vendor. The defendant purchaser then alleges that the plaintiff vendor should have entered into a long-term contract for the remainder of the term to sell his product to another purchaser, although at a lower price, in order to mitigate his damages and then claim only the difference between the prices. In that scenario, there would at least be a binding and certain long-term contract between the plaintiff vendor and the new purchaser after the repudiation is accepted.

156 Under the terms of the Mitigation Offer, SE had no such certainty. In reality, the Mitigation Offer was Denka's attempt to blow hot and cold and hedge its bets without paying any premium for the hedge. In the circumstances, I am of the view that the terms of the Mitigation Offer were not reasonable. SE did not act unreasonably in rejecting the Mitigation Offer.

Whether each provision for LD was non-enforceable as a penalty

157 The formula for calculating LD in ERA 99 and that in ERA 101 were the same. The formula was A x B x 40% where:

A: was the number of months (rounded down to the nearest month) between the date the Contract Duration (meaning the contract) was terminated and the Expiry Date; and

B: was the arithmetic average of the amount payable by Denka to SE in each of the three Billing Periods preceding the termination of the Contract Duration.

158 The formula for calculating LD in ERA 100 was substantially the same as that in ERA 99 and that in ERA 101 except that component B in ERA 100 referred to the arithmetic average in each of the two months, instead of three months, of the total amount payable by Denka preceding the termination. The provision in ERA 100 also specifically mentioned the exclusion of goods and services tax in calculating the average of the months. The accuracy of SE's calculation of the LD amounts in accordance with the applicable formula for each of the three ERAs was not disputed. The question on LD was whether each LD provision was enforceable. This question in turn raised various arguments.

159 The *locus classicus* on the principles applicable to distinguish between a provision for LD, which is enforceable, and one imposing a penalty, which is not enforceable, was for years the judgment of Lord Dunedin in *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 ("*Dunlop Pneumatic*"). The principles in that case were recently again applied by the Court of Appeal in 2015 in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia*"). However, subsequently in that same year, the UK Supreme Court issued its decision in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 ("*Cavendish*") which has been said to have reformulated the penalty rule.

160 SE submitted that this court should adopt the new approach propounded in *Cavendish* which has three key aspects:[46]

(a) The penalty test is only applicable to a secondary obligation. It does not place any restriction on the freedom of the parties to agree on the primary obligations under a contract.

(b) The concept of a "legitimate interest" of the innocent party, that is apart from the "interest" in being compensated for its loss, is introduced into the balancing exercise to determine whether a secondary obligation is a penalty.

(c) The test for a penalty is premised on whether the sum or remedy stipulated as a consequence of a breach of contract is "extravagant, exorbitant or unconscionable" with regard to the innocent party's legitimate interest in the performance of the contract. Implicit in this formulation of the test is the recognition of (i) the parties' freedom to

46 See SE and YTL's closing submissions at para 656.

contract on such terms as they may agree, and (ii) the shift away from a quantitative assessment (*ie*, the "genuine pre-estimate") of the loss that the innocent party may suffer. It is not every deviation from an estimate of the loss that will amount to a penalty. Instead, it must be so "extravagant, exorbitant or unconscionable" as to offend the bounds of fairness, in order to amount to a penalty.

161 On the other hand, Denka submitted that the court should still apply the principles in *Dunlop Pneumatic*.

162 I note that *Cavendish* did not do away completely with the principles enunciated in *Dunlop Pneumatic*. Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC (with whom Lord Carnwath JSC agreed) did say, at [22] of *Cavendish*, that Lord Dunedin had stated his four tests in *Dunlop Pneumatic* not as rules but only as considerations which might prove helpful or even conclusive "if applicable to the case under consideration". They also said, at [32], that in the case of a straightforward damages clause, the interest of the innocent party "will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine [the] validity [of the clause]".

163 The parties informed me that *Cavendish* has not yet been considered by the Singapore Court of Appeal but was considered in three Singapore High Court cases. I will refer to them in chronological order.

164 In *iTronic Holdings Pte Ltd v Tan Swee Leon and another suit* [2016] 3 SLR 663 ("*iTronic*"), George Wei J explained that primary obligations are the legal obligations imposed upon each party to a contract to do what he promised

would be done. A breach of the primary obligation leads to the secondary obligation to pay monetary compensation for the loss sustained by the innocent party. The importance of the distinction is that the penalty rule does not apply to a primary obligation to pay an agreed sum.

165 Wei J was of the view that the distinction appeared to have made its way into Singapore law and referred to three Singapore cases. However, I note that those three cases were not considering the distinction in the context of the application of the penalty rule. Wei J noted that this distinction was considered in the context of the application of the penalty rule in *Cavendish*. In the case before him, Wei J considered the provision in question to impose a conditional primary obligation and not a secondary obligation. In the event that he was wrong on this point, he was not persuaded that the additional sums payable upon the breach were so exorbitant or excessive that they ought to be struck down as penalties.

166 Wei J then noted that the Court of Appeal in *Xia* had affirmed the principles in *Dunlop Pneumatic* which were said in *Cavendish* to be adequate and applicable in cases involving straightforward damages clauses. Applying those principles in *Dunlop Pneumatic*, he reached the same conclusion, *ie*, that the provision in question was not a penalty.

167 Therefore, Wei J appeared to have applied the approach in *Cavendish* but he reached the same conclusion when he applied the principles in *Dunlop Pneumatic*.

168 The second Singapore High Court case is *Allplus Holdings Pte Ltd and others v Phoon Wui Nyen (Pan Weiyuan)* [2016] SGHC 144 ("*Allplus*"), a

decision by Foo Tuat Yien JC. At [15], Foo JC said that it was well established that the rule against penalty clauses regulates only the remedies for breach of a primary obligation, *ie*, the rule regulates a secondary obligation arising from a breach of a primary obligation. She was of the view that the provision in question before her indeed imposed a secondary obligation.

169 However, Foo JC said that at the time of her oral judgment (given on 29 March 2016), the law on when a provision amounts to a penalty remained that as stated in *Dunlop Pneumatic* which was applied in *Xia*. Applying *Dunlop Pneumatic*, she was of the view that the provision in question was a penalty because it required the defaulters to pay, upon default, a sum greater than the one which they were supposed to have paid.

170 With respect, that was a rather obvious case of a penalty because the defendants had agreed to pay $1m in two instalments and the provision in question stipulated that if that sum was not paid on or before the dates stated, the sum would be increased to $2.5m with interest at 12% per annum.

171 Foo JC also considered whether a different result would be reached if the approach in *Cavendish* was applied. In particular, she referred to the true test stated at [32] of *Cavendish*, "whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation." She concluded that the answer would be the same.

172 The third Singapore High Court case is *Hon Chin Kong v Yip Fook Mun and another* [2018] 3 SLR 534 ("*Hon*"). In that case, the question was whether an initial sum paid for the purchase of shares was paid as a deposit. If so,

whether the penalty rule applied to a deposit. Kannan Ramesh J decided that the sum was paid as a deposit and that the penalty rule did not apply to a deposit. He noted *Cavendish* but said, at [62], that it had yet to be accepted in Singapore and that he remained bound by various endorsements of *Dunlop Pneumatic* by the Court of Appeal.

173 It has come to my attention that there are three other Singapore High Court cases which considered *Dunlop Pneumatic* and *Cavendish*. I will refer to them as the fourth, fifth and sixth cases.

174 The fourth Singapore High Court case is *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties)* [2017] SGHC 22. There, the question was whether the default interest of 2% per month provided under a provision of the convertible bond subscription agreements was an unenforceable penalty. Audrey Lim JC said that the question was whether the sum stipulated for was extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach, citing *Dunlop Pneumatic* at 87. She also said that this test is qualified by the "strong initial presumption" that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach in a negotiated contract between properly advised parties of comparable bargaining power, citing *iTronic* at [177] which relied on *Cavendish*. She added that a clause will not become a penalty simply because it results in overpayment in particular circumstances and the parties are allowed a generous margin to determine the agreed damages payable upon a breach, citing *iTronic* at [176] and [177].

175 Applying these principles, the court concluded that the provision in question was not a penalty.

176 The fifth Singapore High Court case is *Leiman, Ricardo and another v Noble Resources Ltd and another* [2018] SGHC 166. There, the question was whether the relevant provision of a settlement agreement was a penalty. Wei J referred to *Dunlop Pneumatic* and *Cavendish*. He noted that *Cavendish* did not suggest that *Dunlop Pneumatic* was no longer good law in the UK. At [197], he expressed his view that the *Cavendish* inquiry as to whether the secondary obligation "imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation" offered the most appropriate guidance in the case before him. Applying that approach, he concluded that the provision in question was not a penalty. However, he added that if he were wrong to apply the *Cavendish* approach in Singapore, he was of the view that the provision was still not a penalty.

177 The sixth Singapore High Court case is *Nanyang Medical Investments Pte Ltd v Kuek Bak Kim Leslie and others* [2018] SGHC 263. There, the question was whether certain provisions in the call option agreements constituted unenforceable penalties. Mavis Chionh Sze Chyi JC noted firstly that it was rather odd for the plaintiff to argue that those provisions were penalties as the agreements were vetted and drafted by its own lawyers. She also noted that the parties were agreed that the *locus classicus* on the issue of penalties was *Cavendish*. She observed that *Cavendish* stated at [13], that the penalty rule regulates only the remedies available for breach of a party's primary obligations and not the primary obligations themselves. She was of the view that the analysis in *Cavendish* had been endorsed by the Singapore High

Court in *Allplus* and in *iTronic*. She concluded that the provisions in question created a conditional primary obligation and thus would not constitute a penalty. Accordingly, she did not find it necessary to deal with the defendants' submissions on the application of the test in *Dunlop Pneumatic*.

178 I agree with the views expressed in *Allplus* and in *Hon* that the High Court is bound to apply *Dunlop Pneumatic* and not *Cavendish*. Nevertheless, for completeness, I will consider the legitimate interest approach in *Cavendish* to see if it assists SE.

179 The parties appeared to agree that I should first consider whether the provisions in question were primary or secondary obligations. This was because SE was urging the court to apply *Cavendish* and it appeared that Denka did not dispute that this was a consideration even if the rest of *Cavendish* did not apply in Singapore.

180 As I mentioned above, ERA 99 and ERA 101 had the same provision for LD. ERA 100 had a different provision. For easy reference, I set out the material part of the terms again.

181 Under cl 8.4.2 of ERA 99 and of ERA 101, "if the Contract Duration is terminated pursuant to Clause 8.2, save for Clause 8.2.8 …", then LD is payable by Denka.

182 For ERA 100, under cl 5.3 of SELTERC, "[i]f the Contract Period is for any reason whatsoever terminated before the Expiry Date …", then LD is payable by Denka.

183 SE accepted that the provisions for LD in ERA 99 and ERA 101 imposed a secondary obligation on Denka to pay LD. However, it submitted that the provision for LD in ERA 100 was a conditional primary obligation that was triggered by the termination of the Contract Period before the expiry date. There could be many reasons for the early termination of ERA 100. Indeed, Denka could lawfully terminate ERA 100 by giving SE not less than 30 days' written notice (pursuant to cl 5.2 of SELTERC). In contrast, there was no provision in ERA 99 or ERA 101 allowing Denka to terminate either contract by notice.

184 SE also submitted that the provision in ERA 100 was similar to the provision in *iTronic* where Wei J concluded that the provision there was a conditional primary obligation. I can dispose of this argument quickly. The provision in that case was quite different and so *iTronic* does not assist SE.

185 Denka simply submitted that each of the provisions for LD in the three contracts (including the one in ERA 100) gave rise to a secondary obligation.

186 It seems to me that the LD provision in ERA 100 was a hybrid. If it was engaged because Denka had terminated ERA 100 by giving not less than 30 days' written notice, then it appeared to be a conditional primary obligation. On the other hand, if SE had terminated the contract for cause, as it did, then the LD provision was a secondary obligation.

187 SE's next argument was that SE had in any case a legitimate interest in enforcing the primary obligation. I repeat its submissions at para 719 of the closing submissions of SE and YTL:

> Based on the manner in which the electricity wholesale market operates and the vertical integration of the generation and retail

> businesses as part of the gentailer model adopted in the industry, it is clear that the retail arm of a gentailer would have a legitimate interest, both financially and strategically, in maintaining its electricity retail agreements as a hedge for the gentailer against the fluctuating Pool Price.

188 The problem for SE was that its pleadings did not mention any such legitimate interest as a reason for requiring Denka to pay LD.

189 Also, Mr Lim's AEIC barely explained the legitimate interest which the LD was meant to address. His explanation of a gentailer structure was an attempt to explain how the 40% figure in the LD formula was derived, *ie*, to show that the 40% figure was not particularly excessive, but not to explain that even if the 40% figure was excessive, it was justifiable because of some legitimate interest other than financial loss. The only mention of legitimate interest was a bare reference to "legitimate commercial interests" at para 287 of his AEIC.

190 Instead, the point about a legitimate interest was developed in argument to avoid a consideration of the principles set out in *Dunlop Pneumatic*. This was SE's attempt to avail itself of the concept of legitimate interest as expounded in *Cavendish* in the context of the penalty rule.

191 It seems to this court that it may be that it would be extremely inconvenient for electricity retailers to have to prove their damages each time a contract is terminated for default by the counter-party. However, that *per se* is not good enough to establish legitimate interest as every provision allegedly for LD is meant precisely to avoid such inconvenience which could involve massive efforts that are time-consuming and expensive.

192 I am afraid that SE is precluded by its pleadings from raising any legitimate interest to justify the imposition of LD. In any event, it has failed to establish such an interest on the facts. There was no legitimate interest of SE other than the financial loss it would suffer if Denka terminated any ERA. Therefore, the question whether the LD was extravagant, exorbitant or unconscionable in relation to SE's alleged legitimate interest does not arise.

193 Indeed, SE did not adequately explain on the facts or in submissions why Lord Dunedin's principles in *Dunlop Pneumatic* were not adequate to determine the validity of each LD provision in question. This then brings us back to those principles and the four tests mentioned therein (at 86–88):

> 1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found *passim* in nearly every case.
>
> 2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda* [[1905] AC 6 ("*Clydebank*")]).
>
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner v. Hills* [[1906] AC 368] and *Webster v. Bosanquet* [[1912] AC 394 ("*Webster*")]).
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> (*a*) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in [*Clydebank*.])

> (*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble v. Farren* [(1829) 6 Bing 141]). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable,—a subject which much exercised Jessel M.R. in *Wallis v. Smith* [(1879) 21 Ch D 243]—is probably more interesting than material.
>
> (*c*) There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage' (Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co.* [(1886) 11 App Cas 332]).
>
> On the other hand:
>
> (*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties ([*Clydebank*], Lord Halsbury [at 11]; [*Webster*], Lord Mersey [at 398]).

194 Denka submitted that SE did not genuinely address its mind to the quantum of its damages before including the formula for LD in each of the three ERAs. Hence, the formula was not a genuine pre-estimate of SE's damages. The formula was plucked from the air and simply included in the contracts used by SE without even distinguishing between the differences in each contract. For example, earlier contracts for electricity supply between SE and Denka had the same formula even though they were for shorter durations.

195 Mr Lim gave evidence that he had assessed SE's damages by either working out some figures on his computer or on a scrap piece of paper, which

he had not saved or had thrown away, before the formula was included in the ERAs.[47] However, as Denka submitted, Mr Lim could only come up with a range of figures and he could not specifically show how the 40% figure was derived. Mr Lim eventually said he used 40% as a gauge or estimate of the damages that SE would suffer if each contract was terminated.

196 In attempting to justify the use of the 40% figure, SE's expert, Mr Sharad Somani ("Mr Somani"), was of the view that the existence of a contract for difference ("CfD") between SE and YTL, the electricity generator, should be disregarded. This was because the loss of SE should be considered on a group basis and SE's loss should not be mitigated by the existence of the CfD. Denka's expert, Mr Michael Timothy Thomas ("Mr Thomas") disagreed.

197 In any event, it is clear to this court from the evidence that Mr Lim did not engage in the exercise that he claimed he did. Neither had he considered whether the CfD should be taken into account or not. He was trying to work backwards to explain how he derived the figure of 40% (in the LD formula) but, as submitted by Denka, he could only come up with a range of figures instead. I am of the view that the 40% figure was indeed plucked out from the air, whether or not it was copied from other contracts of SE and/or other parties. On the other hand, Denka's factual witness, Ms Chia was aware of the existence of the LD provision in each of the three ERAs. There was no suggestion that she was surprised by or had objected to its inclusion.

198 Denka did not adduce any authority to suggest that the absence of any prior assessment of the quantum of damages before including an LD provision was fatal to its enforcement. Hence it appeared that the absence of such prior

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[47] Lim Sam San's AEIC at para 217.

assessment was only one of the factors to be taken into account in determining the question whether the provisions were indeed penalties.

199 Was the 40% figure extravagant in that it was much higher when compared to the greatest loss that SE might suffer so that each LD provision should not be enforceable? This question was affected by the consideration of the CfD between SE and YTL. If the CfD was taken into account, SE's losses would be considerably mitigated such that the 40% figure would appear extravagant. If the CfD was disregarded, then SE's losses, as calculated by SE's expert Mr Somani, could be higher and could exceed 40%. Hence, the parties spent much time on the question whether the CfD should be disregarded for the purpose of computing the loss that SE might suffer if each contract was terminated.

200 It was not disputed that the purpose of the CfD between YTL and SE was to allocate the risk of fluctuating prices of oil and of electricity to YTL. Although the CfD was a binding contract as between the two, I agree with Mr Somani that it was not an arms' length transaction. YTL and SE were part of the same group and it seemed to this court that it was an internal decision of the group that YTL should bear the risk. In any event, even if the CfD might be disregarded for the purpose of determining whether each LD provision was a penalty, this only meant that SE's losses were not as low as submitted by Denka and could exceed 40%. Other factors would have to be considered.

201 One other factor was whether the LD provision was applicable in a variety of situations from the less serious to the more serious. If so, this could suggest that it was a penalty. Hence, the distinction between the termination and

LD provisions for ERA 100 on the one hand and for ERA 99 and ERA 101 on the other hand becomes more important.

202 Firstly, as will be re-called, for ERA 100, the LD provision would be engaged if the Contract Period was "for any reason whatsoever terminated before the Expiry Date". In ERA 100, there was a provision under which Denka was entitled to terminate the Contract Period by giving 30 days' written notice. This meant that if it did so under that provision, it would still be *prima facie* liable for LD. This cannot be right in law. It suggested that the LD provision was a penalty and was included indiscriminately in ERA 100.

203 Secondly, the fact that a similar LD provision was also included indiscriminately outside of ERA 99, ERA 100 and ERA 101 in other contracts which SE had entered into, regardless of the terms of each contract and the duration, also suggested that the LD provisions were penalties even in the context of ERA 99 and ERA 100.

204 Thirdly, in ERA 99 and ERA 101, the LD provisions would be engaged if the Contract Duration was terminated pursuant to cl 8.2, save for cl 8.2.8. This entailed a consideration of the sub-provisions of cl 8.2 from cll 8.2.1 to 8.2.7, which provided grounds for SE to terminate. The grounds were that:

> 8.2.1. the Consumer fails to pay any amount due and payable to [SE] under this Agreement;
>
> 8.2.2. without prejudice to Clause 8.2.1, the Consumer is in breach of any of its obligations under this Agreement and fails to remedy the same within 10 calendar days after being served with a written notice giving particulars of the breach and requiring it to be remedied;
>
> 8.2.3. the Consumer, in the reasonable belief of [SE], has committed theft of electricity;

> 8.2.4. an order of court is made to wind up the Consumer or to place it under judicial management or a resolution is passed by the members of the Consumer for its winding up or liquidation;
>
> 8.2.5. any mortgagee, chargee or encumbrancer takes possession or a receiver is appointed over any of the property or assets of the Consumer;
>
> 8.2.6. any distress or execution is levied or enforced in relation to any of the assets of the Consumer;
>
> 8.2.7. the Consumer makes any voluntary arrangement with its creditors or becomes subject to an administration order; or
>
> 8.2.8. …

205 The above provisions did cover a variety of situations. Although each appeared at first blush to be quite serious, they were quite different in severity. For example, cl 8.2.1 referred to Denka's failure to pay any amount due and payable to SE. The amount could be large or small. Clause 8.2.2 referred to any breach by Denka of its obligations under the ERA. The breach could be of an important or much less important obligation. Also, a breach by Denka need not be as serious as an order to wind up Denka under cl 8.2.4. Furthermore, an order to wind up Denka would not necessarily mean that Denka would cease payment for electricity supplied. It might still have been in Denka's interest to continue operations and, consequently, pay for electricity supplied.

206 Accordingly, the variety of grounds upon which SE could terminate the contract and claim LD also suggested that the each of the LD provisions in ERA 99 and ERA 101 was also a penalty.

207 Fourthly, under the LD formula, no credit is given for accelerated payment or acceleration. Electricity would have been supplied and paid for progressively over the duration of each ERA, if there was no termination. On

the other hand, the LD was payable immediately when the LD provision was engaged. This also suggested that the LD provision was intended primarily to deter a breach by the counter-party.

208 Looking at the evidence holistically, it seems to this court that each LD provision was included primarily to deter any breach by the counter-party. In ERA 100, the provisions for termination and LD were drafted too widely. While the provisions for ERA 99 and ERA 101 were not as widely drafted, they too were intended primarily to deter any breach by Denka. I am of the view that each provision for LD was a penalty and therefore not enforceable.

Whether SE was precluded from claiming common law damages under cl 7.2.1 of ERA 99 and ERA 101

209 This then brings this court to the question of common law damages. Denka submitted that, for ERA 99 and ERA 101, SE was precluded from claiming common law damages because of a provision therein. This was cl 7.2.1 which reads:

> 7.2 Save to the extent expressly provided otherwise in this Agreement, neither Party shall have any liability to the other Party for:
>
> 7.2.1 any indirect or consequential loss (including any loss of profits, business, goodwill or any economics loss), whether such liability arises in contract, tort, breach of statutory duty or otherwise; or
>
> …

210 On the other hand, SE relied on the decision of the Court of Appeal in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 ("*Airtrust*") to argue that cl 7.2.1 did not preclude SE from claiming for loss of profits.

211 In *Airtrust*, the Court of Appeal had to consider a similar provision within cl 25 of an agreement which read:

> …
>
> *Neither party shall be liable to the other for any consequential or indirect losses* (whether or not foreseeable by either Party at the date hereof) including but not limited to *loss of profits*, products, and business interruption or economic losses arising out of or as a result of the performance of the work and regardless of the cause or reason for the said loss or damage and regardless of whether the same may arise as a result of the negligence of the other.
>
> …
>
> [emphasis added]

212 The issue was whether this provision precluded the plaintiff from claiming certain losses. The Court of Appeal noted at [153]:

> Both parties accept that the phrase 'consequential and indirect losses' in Cl 25 refers to those claims falling under the second limb in *Hadley v Baxendale* (1854) 9 Exch 341, *ie*, damage which does not arise directly, naturally and in the ordinary course of events from a breach of contract (see [*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 ("*Robertson Quay*")] at [82]). Direct losses, on the other hand, are those which fall within the first limb of *Hadley v Baxendale*. Such direct losses ought to be well within the reasonable contemplation of all the contracting parties concerned such that it is neither unjust nor unfair to impute knowledge of such damage to them (*Robertson Quay* at [81]). Airtrust argues that its 'inability to earn *revenue* from renting out the [reel drive unit] is a direct loss, not an indirect or consequential one'. [emphasis in original]

213 In *Airtrust,* the plaintiff's claim for loss of profit which a reel drive unit would have made over a period of time was dismissed because the loss of profit was not, on the facts there, a direct loss which was within the reasonable contemplation of both sides. However, in the present case before me, it was not

disputed and it could not be disputed that SE's claim for loss of profit was a direct result within the reasonable contemplation of both sides.

214 In the circumstances, I conclude that cl 7.2.1 did not preclude SE from making a claim for loss of profits for ERA 99 and ERA 101.

Computation of common law damages

215 If the CfD was to be taken into account, Mr Thomas had calculated SE's loss of profit to be $596,413 only[48] before any discounting for acceleration. This was because under the CfD, YTL would bear the risk of fluctuations in the prices of oil and of electricity. Mr Somani agreed with this figure but he was of the view that the CfD should not be taken into account in computing common law damages as it was not an arms' length transaction between SE and YTL. It was merely an internal device to allocate the risk as between SE and YTL within the group.

216 One of Denka's arguments was that SE would not be in a better position than if Denka had continued with the three ERAs to the end date. Even if Denka had so continued, SE's profit would have been curtailed in the light of the CfD.

217 On the other hand, I consider what the position would be if under a CfD, the entire risk was allocated to SE instead. Presumably, in that scenario, Denka might be liable for SE's loss of profit subject to the qualification under common law that the loss would have to be reasonably foreseeable.

48 See Michael Timothy Thomas' 1st AEIC, dated 30 June 2017, at para 84 of the first report exhibited at p 19.

218 While I accept that the CfD was not an arms' length transaction, it seemed to me that a defendant is liable to a plaintiff as the defendant finds him. If the plaintiff's profit is circumscribed by a CfD, then that is the good fortune of the defendant. This would not be unjust to SE because it was open to SE to have included a contractual term that if the formula for LD was not applicable for whatever reason, then its customer would be liable for common law damages and, for that purpose, any CfD between SE and an electricity generator would be disregarded. It would then be for the court to assess what the common law damages would be.

219 In the circumstances, I am of the view that the CfD between SE and YTL is to be taken into account.

220 As I mentioned at [215] above, Mr Thomas had calculated SE's loss of profit to be $596,413 if the CfD was to be taken into account. Mr Somani agreed with that figure. However, after the evidence for the trial had been given, Denka sought to introduce additional evidence from Mr Thomas by way of an AEIC from him executed on 19 January 2018. This AEIC exhibited a supplementary expert report to make two points.

221 Firstly, Mr Thomas had not provided a discount for acceleration of payment. Using Mr Somani's discount factor, Mr Thomas was of the view that SE's loss of profit would be reduced to $414,468.

222 Secondly, Mr Thomas had assumed higher future monthly electricity consumption by Denka (if the ERAs had not been terminated) than the figures used by Mr Somani. Using Mr Somani's figures, SE's loss would be further reduced to $390,853.

223 Ordinarily, such an attempt to introduce additional evidence might well be rejected. However, I am also of the view that the parties should be given a chance to consider the question of acceleration especially since, apparently, SE has already received an aggregate sum of $1,850,000 under various bank guarantees. This allegation by Denka was not disputed by SE. So any calculation to take into account the benefit of acceleration should take into account the date or dates when SE received the money making up the aggregate sum.

224 Since the parties will be given that chance, I will also allow Denka to rely on Mr Somani's figures for Denka's future monthly electricity consumption subject to any views which Mr Somani may have.

225 Therefore, I direct the parties to attempt to agree on the quantum for SE's loss of profit which should be based on the following:

(a) the CfD is to be taken into account;

(b) the benefit of accelerated payment is to be taken into account and, for this purpose, the parties are to bear in mind the date or dates when SE received money from the bank guarantees; and

(c) Mr Somani's figures for Denka's future monthly electricity consumption (if the ERAs were not terminated) are to be used.

226 I will allow the parties 14 days from the date of this judgment to attempt to agree on the quantum of SE's loss of profit failing which they are to write in within another seven days to state their positions and submissions. The latter is confined to five pages.

227 As the scope of the dispute on the quantum of damages is now much more restricted, I hope the parties will be able to reach an agreement expeditiously without incurring too much time and costs.

228 The parties may also agree to extend any of the time frames given by the court, subject to any other direction from the court.

229 The parties are also to agree or submit within the same time frames on the unpaid amounts due and owing by Denka to SE on each ERA based on the contractual rates before SE terminated the ERA.

230 Once all the above figures are established, I will finalise the conclusion of my judgment and the consequential orders to be made, including directing SE to pay the balance back to Denka and dismissing various counterclaims and other claims.

231 If I were wrong in concluding that the CfD is to be taken into account and assuming it were to be disregarded, I would have accepted in principle the approach of Mr Somani on the loss of profit otherwise suffered by SE with the loss for the accrued period being calculated up to 31 October 2017 as the trial commenced on 7 November 2017. Although Mr Thomas disputed Mr Somani's approach, if the CfD was to be disregarded, he did not offer any alternative approach.

232 The forecast period would then commence correspondingly from 1 November 2017 to 31 January 2021 as the latter is the end of each contract period. I would also have allowed SE to use the historical figures ascertained by Mr Somani up to 31 October 2017 as the basis to calculate SE's loss for the forecast period.

233 In so far as Denka (and Mr Thomas) had argued that Mr Somani was not given any internal figures from SE itself but had used figures from outside sources to make his calculations, this was a red herring. Mr Somani was calculating the difference between the contract price, as determined by each formula in each of the three ERAs, and the Pool Price. I would have agreed that that was the correct approach. In so doing, Mr Somani was using available data from sources outside of SE, as he was entitled to do, to ascertain, for example, the cost of oil (as part of the contract price formula) and the Pool Price. SE's own internal figures would only be relevant to the question of the cost of producing electricity but such cost was not relevant to SE's loss of profit as the cost would be the same whether the electricity was sold to Denka or sold to the market. The facts before me are therefore not the same as those before the Court of Appeal in *Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd and another appeal* [2018] 2 SLR 199 which was a decision which Denka was relying on.

234 I refer to Mr Thomas' point that SE could and would have sold electricity to other parties after SE terminated the ERAs, and therefore those other contract prices should be taken into account and not the Pool Price. I would not have accepted such an argument. The scenario was one where electricity prices were dropping. Supply exceeded demand. In such a situation, any retail contract which SE would have entered into with another party would be in addition to the ERAs and not in substitution thereof. Hence, such contracts would not have mitigated SE's loss of profit.

Woo Bih Li
Judge

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