Aero-Gate Pte Ltd *v* Engen Marine Engineering Pte Ltd
[2013] SGHC 148

Case Number : Suit No 373 of 2012

Decision Date : 31 July 2013

Tribunal/Court : High Court

Coram : Vinodh Coomaraswamy JC (as he then was)

Counsel Name(s) : Navinder Singh (Navin & Co LLP) for the plaintiff; Palaniappan Sundararaj and Ramesh Bharani (Straits Law Practice LLC) for the defendant.

Parties : Aero-Gate Pte Ltd — Engen Marine Engineering Pte Ltd

Contract – Breach – Termination

Contract – Waiver

Personal Property – Ownership

31 July 2013

Vinodh Coomaraswamy J:

Introduction

1 The plaintiff engaged the defendant to fabricate and deliver ten containerised diesel generators to the plaintiff under two purchase orders. The defendant delivered these generators either late or not at all. The plaintiff therefore commenced this action seeking a number of heads of relief in respect of the defendant's breach of contract. The defendant in its counterclaims alleges that it was the plaintiff who breached the two purchase orders as well as a separate contract unrelated to these two purchase orders.

2 Having heard and considered the evidence and the parties' submissions, I found the defendant to have been in breach of contract. I therefore granted the plaintiff most of the heads of relief it claimed and dismissed the defendant's counterclaim. The defendant has appealed against my decision. I therefore set out now the grounds of my decision.

Factual background

Parties and personnel

3 The plaintiff is a Singapore company. Its principal business is to provide engineering services for rotating equipment in the oil and gas industry. Edward Law ("Mr Law") is its managing director. James Stephenson ("Mr Stephenson") is a director. Hener Oblenida Oracion ("Mr Oracion") and Edwin Sarsale Podador ("Mr Podador") are electrical engineers employed by the plaintiff. The plaintiff called all four men as witnesses at the trial.

4 The defendant is also a Singapore company. Its business is to design and fabricate containerised generators as well as to manufacture and repair marine engines and ship parts. Its general manager is Ramasamy Tanabalan ("Mr Tanabalan"). His wife Selvarajoo Mageswari is its sole

director. Selvakumar s/o Ramasamy ("Mr Selvakumar"), Mr Tanabalan's brother, is its project engineer. The defendant called all three of them as witnesses at the trial. The defendant called, in addition, two other witnesses to give what was said to be expert evidence at trial. I address the evidence of these two persons at [112] below.

The purchase orders

5 On 9 March 2011, the Iran Offshore Engineering and Construction Company ("IOEC") awarded the plaintiff a contract. Under this contract, the plaintiff was to supply four containerised diesel generators to IOEC. [note: 1] The plaintiff subcontracted the work to the defendant under purchase order AG65-20110065-REV00 ("PO 1"). Although PO 1 was dated 22 March 2011, the plaintiff and the defendant executed it in April 2011. [note: 2] Under PO 1, the defendant was to procure four "Caterpillar Diesel Generator package[s]" ("Caterpillar Generators"), incorporate them into containerised diesel generators to be fabricated to the plaintiff's requirements and thereafter deliver the completed containerised diesel generators ("Completed Generators") to the plaintiff. Delivery was to be no later than 1 October 2011. As consideration, the plaintiff agreed to pay the defendant US$315,000 per Completed Generator. For PO 1, therefore, the total consideration was US$1.26m in all.

6 On 3 May 2011, IOEC awarded the plaintiff another contract. Under this second contract, the plaintiff was to supply six additional containerised diesel generators to IOEC. [note: 3] The plaintiff again subcontracted the work to the defendant under purchase order AG65-20110068-REV00 ("PO 2"). PO 2 was dated 31 May 2011 and was signed by both parties on 2 June 2011. [note: 4] Under PO 2, the defendant was to procure six Caterpillar Generators, incorporate them into containerised diesel generators to be fabricated to the plaintiff's requirements and thereafter deliver the Completed Generators to the plaintiff. The defendant was to deliver four of the Completed Generators no later than 1 November 2011 and the remaining two Completed Generators no later than 1 January 2012. As consideration, the plaintiff again agreed to pay the defendant US$315,000 per Completed Generator. For PO 2, the total consideration was therefore US$1.89m.

7 PO 2 was attached to an e-mail dated 31 May 2011 from Mr Law to Mr Tanabalan. [note: 5] In this covering e-mail, Mr Law informed Mr Tanabalan of a change to the delivery deadline specified in PO 1. The four Completed Generators under PO 1 were to be delivered no later than "end January 2012" instead of 1 October 2011. PO 1 was amended accordingly. [note: 6] I should note that, a few paragraphs later in the same e-mail, Mr Law wrote of PO 1, "delivery date end January 2012 (final date to be advised but not before end January 2012)". I discuss later the effect of these words.

8 In summary, under PO 1 and PO 2 the defendant was to supply the plaintiff with a total of ten Completed Generators, which the plaintiff would then deliver to IOEC in performance of its own contract with IOEC. The deadline for delivery under PO 2 was *earlier* than the delivery deadline in PO 1, even though the parties entered into PO 2 *after* PO 1.

9 At this juncture, I make two points about the two purchase orders. First, under both PO 1 and PO 2, the plaintiff was to pay the defendant in stages in accordance with a schedule ("the Payment Schedule"). The Payment Schedule provided as follows:

> Payment shall be made on the next Banking Day after receipt of the payment from [the plaintiff's] Client (IOEC) following receipt of invoice and achievement of the following milestone(s):
>
> - 20% - On submission of applicable SUPPLIER Documentation / Data and certification

requirements as detailed hereinafter.

- 30% - On arrival of the Caterpillar Diesel Generator packages and submission of proof of ownership

- 40% - Upon completion and prior to shipment of the packages.

- 10% - On submission of all PURCHASER approved final documentation.

The second point is that the defendant's work involved removing the standard factory-installed alternators in Caterpillar Generators ("SR4 Alternators"), and replacing them with alternators manufactured by Leroy-Somer (South East Asia) Pte Ltd ("LS Alternators"). The LS Alternators met IOEC's specifications but the SR4 Alternators did not. I note that there is a dispute as to when the defendant learnt that its work would involve this task of replacing the alternators.

Initial downpayments

10 On 4 May 2011, the plaintiff paid the defendant a sum of US$252,000, being 20% of the contract price of US$1.26m under PO 1. On 2 June 2011, the plaintiff paid the defendant US$378,000, being 20% of the contract price of US$1.89m under PO 2. Each payment was expressly made pursuant to the first stage of the Payment Schedule in each of PO 1 and PO 2. The plaintiff alleged that it made the payments even though the defendant had not, at the time, done what it was obliged to do in order to trigger its entitlement to the payments, *ie*, to submit the required documentation (see [9]) above. Not surprisingly, the defendant argued that the plaintiff's payments indicated its acknowledgment that the defendant had fulfilled its obligations as to documentation.

Deferment of PO 1 until completion of PO 2

11 The plaintiff's pleaded case is that it "requested" that work under PO 1 be "deferred" until the completion of work under PO 2. [note: 7] The prioritisation of PO 2 over PO 1 was apparent from, at the latest, 31 May 2011, when Mr Law informed Mr Tanabalan by e-mail that the delivery deadline for PO 1 would be pushed back to end-January 2012 (see [7] above).

Arrival of six Caterpillar Generators under PO 2

12 The defendant says that it purchased six Caterpillar Generators from a supplier in China for US$106,870.50 per Caterpillar Generator on 16 June 2011. [note: 8] On or around 21 July 2011, the defendant received delivery of these six Caterpillar Generators. [note: 9]

13 On 27 July 2011, [note: 10] Mr Tanabalan sought the second staged payment under PO 2 on the basis that the defendant had received delivery of six Caterpillar Generators. This payment amounted to US$567,000, being 30% of the contract price of US$1.89m. Mr Law replied on 1 August 2011 [note: 11] and informed Mr Tanabalan that the second staged payment required a "transfer of ownership to IOEC" of the six Caterpillar Generators. Mr Tanabalan responded on the same day, [note: 12] querying how he could make such a transfer of ownership when the 20% of the contract price received by the defendant under the first stage of payment was insufficient to make full payment for the Caterpillar Generators. Mr Law then replied, also on the same day. This reply reiterated the need to transfer ownership of the Caterpillar Generators to IOEC and assured the defendant that such a transfer of ownership would not be a "big problem" [note: 13].

14 On 11 August 2011, [note: 14] Mr Law sent Mr Tanabalan by e-mail a draft "Transfer of Ownership" document. He asked Mr Tanabalan to review it and send it back with comments. Instead, Mr Tanabalan signed it [note: 15] and sent it back to Mr Law by e-mail on 14 August 2011. This document was in the form of a letter addressed to the plaintiff ("the Letter of Transfer"). It was dated 15 August 2011 and indicated that it had been signed on the same day. I will consider the Letter of Transfer more closely later in these grounds of decision.

15 The plaintiff then released the second staged payment to the defendant under PO 2 in two payments. It paid US$100,000 on 1 September 2011 and paid the remaining US$467,000 on 27 September 2011. [note: 16]

Progress on PO 2 and eventual termination of purchase orders

16 The defendant's progress under PO 2 was slower than originally envisaged. The defendant faults the plaintiff for the delay while the plaintiff blames the defendant. I deal with this dispute later; for present purposes it suffices to note that such a dispute exists.

17 On 15 September 2011, the plaintiff informed the defendant that IOEC had agreed to grant an extension of time under PO 2. As a result, the defendant was now to deliver two Completed Generators (which I will refer to as "the First and Second Units") to the plaintiff no later than 14 November 2011, and the remaining four Completed Generators no later than 1 January 2012. [note: 17]

18 On 27 October 2011, the plaintiff informed the defendant that IOEC had agreed to a further extension of time for the First and Second Units. These were now due to be delivered to the plaintiff on 21 November 2011. [note: 18] At a meeting on 31 October 2011, Mr Law informed Mr Tanabalan that IOEC expected delivery of the First and Second Units by 26 November 2011. [note: 19]

19 The defendant failed to meet the 21 November 2011 deadline to deliver the First and Second Units to the plaintiff. Despite that, the defendant continued work under PO 2. Eventually, the defendant delivered the First and Second Units to the plaintiff on 16 January 2012. [note: 20] Earlier, on 5 January 2012, the plaintiff had made payment of US$315,000 to the defendant to get the defendant to release the First and Second Units.

20 Following the delivery of the First and Second Units, the defendant continued work under PO 2. This work was exclusively in respect of what I shall refer to as the "Third and Fourth Units"; no work was done on the remaining two units, which I shall refer to as the "Fifth and Sixth Units". The progress of the work was unsatisfactory to the plaintiff. It therefore terminated both PO 1 and PO 2 by a letter from its solicitors dated 24 April 2012. [note: 21] In that letter, the plaintiff's solicitors said the plaintiff had made a decision to "repudiate" both purchase orders. It is clear that what the plaintiff's solicitors meant was that the plaintiff had made a decision to accept the defendant's repudiatory breach and to *terminate* its contracts with the defendants. At the time that the plaintiff terminated the two contracts, the defendant had delivered no Completed Generators other than the First and Second Units.

21 I should say that I have at this point provided no more than a broad sketch of the parties' dealings in respect of PO 2. This is because there exist a number of disputes of fact in connection with PO 2. It is not convenient now to resolve those disputes, and accordingly I leave them for later.

Summary of the parties' positions

22 In brief, the plaintiff's case is that the defendant committed breaches of contract in respect of PO 1 and PO 2 by failing to deliver the Completed Generators by the stipulated deadlines. The plaintiff says further that by reason of those breaches, the plaintiff was entitled to terminate both contracts. To remedy the defendant's alleged breaches, the plaintiff claims recovery of certain sums paid to the defendant, damages, and an indemnity against claims made against it by its own customer IOEC. The plaintiff further claims that it is entitled to take possession of the Caterpillar Generators, LS Alternators and SR4 Alternators still in the defendant's possession. It therefore seeks an order that the defendant deliver up to it these items. To facilitate a full consideration of every one of the plaintiff's claims, I reproduce here in full the heads of relief it claims ("Heads of Relief"):

1) An order for the delivery up of the two unit packages including engine CYG00565 and alternator 5NJ01277 and engine CYG00560 and alternator 5NJ01276 in the Defendants' possession, complete with Caterpillar engines, control panels and alternators;

2) An order for the delivery up of the remaining two Caterpillar engines with SR4 Alternators and the remaining four SR4 alternators in the Defendants' possession;

3) A declaration that Defendants hold on trust in favour of the Plaintiffs the sum of USD 252,000 being the deposit paid by the Plaintiffs for the remaining Units pursuant to Plaintiffs' PO 1;

4) The sum of USD 252,000 being the deposit paid by the Plaintiffs for the remaining Units pursuant to Plaintiffs' PO 1;

5) The sum of USD 15,000.00 + GST being the Plaintiffs' payment for each of the two Unit packages including engine CYG00551 and CYG00552 which was delivered late;

6) Return of the USD31,500.00 + GST paid for each of the two Unit packages including engine CYG00551 and CYG00552 delivered being the 10% final payment on completion of documentation approved by the Plaintiffs, which was not done; and

7) USD213,000 being the additional costs incurred by the plaintiff to address the shortfall in documentation and engineering including the provision of 2 electrical engineers;

8) A declaration that the Defendants are liable to indemnify the Plaintiffs and keep them fully indemnified against all IOEC's actions, claims, proceedings, costs and damages (including any damages or compensation paid by the Plaintiffs to IOEC to compromise or settle any claim) in relation to the generator sets;

9) Damages to be assessed, including those arising from the Plaintiffs' completion of the contracts on behalf of the Defendants[.]

For convenience, I shall refer to the Heads of Relief by the numbers which the plaintiff has assigned to them.

23 The defendant denies that it breached either PO 1 or PO 2. It further alleges that it was the plaintiff who breached them because it terminated the purchase orders when it was not entitled to and because its conduct in a number of instances did not conform to the agreed terms. The defendant claims damages by way of counterclaim as a remedy for these alleged breaches by the plaintiff. The defendant further denies that the plaintiff is entitled to delivery up of the Caterpillar Generators, LS Alternators and SR4 Alternators in the defendant's possession.

24 The defendant's counterclaim against the plaintiff also asserts a claim against the plaintiff in respect of a separate contract, one unrelated to either PO 1 or PO 2. I will deal with this aspect of the defendant's counterclaim after I have addressed the claims and counterclaims arising from PO 1 and PO 2.

Issues to be determined on the plaintiff's claim

25 The following issues arise in relation to PO 1:

(a) Did the defendant commit breach of contract?

(b) If so, was the defendant's breach of contract of such a nature as to entitle the plaintiff to terminate the contract?

(c) Is the plaintiff entitled to recover the US$252,000 which it paid to the defendant under the first stage of the Payment Schedule?

26 The following issues arise in relation to PO 2:

(a) Did the defendant commit breach of contract?

(b) If so, was the defendant's breach of contract of such a nature as to entitle the plaintiff to terminate the contract?

(c) If so, was the plaintiff precluded from terminating the contract by reason of waiver or estoppel?

(d) If the defendant was in breach of contract, what remedies are available to the plaintiff?

(e) Did the plaintiff commit breach of contract, and if so, what remedies are available to the defendant?

(f) Is the plaintiff entitled to delivery up of the Caterpillar Generators, LS Alternators and SR4 Alternators in the defendant's possession?

27 There is a final issue common to both PO 1 and PO 2: is the defendant liable to indemnify the plaintiff against all loss arising from IOEC's claims against the plaintiff?

Three preliminary points

28 Before I deal with the issues to be determined, I pause to address three preliminary points. First, I set out the established principles governing the question of when a party's breach of contract entitles the counterparty to terminate the contract. This is an issue common to the analysis for both PO 1 and PO 2. Second, I make some remarks on a number of concepts in the law of contract – namely variation, estoppel, waiver, election, and affirmation – in the hope of clarifying the content of and relationship between these concepts. The parties used these concepts on occasion somewhat loosely. That resulted in parts of their written closing submissions being at cross-purposes to some extent. Third, I briefly examine what is meant when it is said that time is (or is not) of the essence in a contract. It was not always clear what was meant by that phrase as it was used in the present case.

The right to terminate a contract for breach

29 There are four situations in which a breach of contract by a party entitles the counterparty to terminate the contract: see *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [113]; *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [155]–[157]; *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 ("*Sports Connection*") at [24]; *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [32].

30 The first situation is where a contractual term clearly and unambiguously states that a party is entitled to terminate the contract if certain events occur and those events in fact occur.

31 The second situation is where the contract-breaker clearly conveys to the counterparty that the contract-breaker will not perform its contractual obligations at all, thereby renouncing the contract: *RDC Concrete* at [93]. I shall refer to this type of breach as a "renunciation".

32 The third situation is where the contract-breaker breaches a term of the contract which is a condition of the contract. A term is a condition of the contract if the parties intended to designate that term as one so important to the parties that any breach would entitle the innocent party to terminate the contract. The focus here is on the nature of the *term* breached considered at the time of contracting rather than on the actual consequences of the breach: *RDC Concrete* at [97].

33 The fourth situation is when the breach is one that deprives the innocent party of substantially the whole benefit which it was intended the innocent party would obtain from the contract. Such a breach has variously been called a "fundamental breach" and a breach that "goes to the root of the contract": *RDC Concrete* at [99]. The focus here is on the nature and consequences of the *breach*. I shall refer to this type of breach as a "repudiatory breach". I do so to distinguish it from the now-discredited common law doctrine of "fundamental breach" as a rule of law which restricts the application of exclusion clauses. This doctrine was developed by the English Court of Appeal before statute intervened in the form of the Unfair Contract Terms Act 1977. An attenuated version of the doctrine survives to mitigate the effects of exclusion clauses, but only as a rule of construction rather than a rule of law: *Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd* [2007] 1 SLR(R) 411 at [18]–[19].

Clarification of some concepts in the law of contract

Distinctions between variation, estoppel and waiver

34 When a party is alleged to have committed a breach of contract, and in particular a breach that entitles the innocent party to terminate the contract, the party allegedly in breach may, as in the present case, plead – or appear to plead – variation, estoppel and waiver as alternative defences to the innocent party's claim. As has been pointed out by a leading text, the three concepts are similar in that they all operate to relieve a party from, or of, its pre-existing contractual obligations, or rights: see Sean Wilken QC & Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ("*Wilken & Ghaly*") at para 2.02. But there are differences of substance between the three. One of these is that variation effects a contractually-binding alteration of the terms of the contract whereas estoppel and waiver do not: see *Wilken & Ghaly* at para 2.03. And so, establishing a variation affords a defence if the act or omission would have been a breach of the original contract but is in conformity with the varied contract which has superseded the original contract.

35 Estoppel and waiver, by contrast, never give rise to new substantive obligations. Instead, they

operate to prevent the innocent party from exercising the full range of his rights and/or remedies that have arisen by reason of the other party's breach. A summary of the distinctions between estoppel and waiver may be found in *Wilken & Ghaly* at paras 3.11–3.12. These distinctions may, however, be more apparent than real (see the observations of V K Rajah JC, as he then was, in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 at [28]).

Variation

36 A variation of a contract, like the contract itself, requires offer, acceptance and consideration: *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR(R) 305 at [28]–[29]. A factual or practical benefit suffices to satisfy the requirement of consideration. This means that it is generally very easy to locate some element of consideration between contracting parties, especially in a transaction of a commercial nature: see the decisions of V K Rajah JC (as he then was) in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139], Andrew Phang Boon Leong J (as he then was) in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric (practising under the name and style of W P Architects)* [2007] 1 SLR(R) 853 at [28]–[30], and the Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [100]–[101].

Estoppel

37 Estoppel is a protean concept. It is a genus consisting of a number of species. On the facts of this case, the relevant estoppel is what is usually referred to as "promissory estoppel", although *Wilken & Ghaly* prefer the term "equitable forbearance" (at para 8.06). Promissory estoppel has three elements: first, a clear and unequivocal promise by the promisor, whether by words or conduct; second, reliance on the promise by the promisee; and third, detriment suffered by the promisee as a result of the reliance: see the decision of Philip Pillai J in *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182 ("*Catalla*") at [83]. Some cases describe the first element alternatively as a "representation" – see the decision of Woo Bih Li J in *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter and others* [2013] 2 SLR 193 ("*CCL*") at [134] and that of Steven Chong Horng Siong JC (as he then was) in *Lam Chi Kin David v Deutsche Bank AG* [2010] 2 SLR 896 ("*Lam Chi Kin*") at [50]. But what is meant by "representation" here is not a representation of present fact. What is meant is a representation as to future conduct: the party making the representation represents that he will hold in abeyance the enforcement of his strict legal rights. This distinguishes promissory estoppel from estoppel by representation: see *Wilken & Ghaly* at paras 8.03 and 8.05.

38 It is also said that a promisor is estopped by promissory estoppel only if it is "inequitable" for him to resile from his promise. The precise relationship between this requirement and the three elements just described is not altogether clear. On one view, this requirement is in addition to the three other elements. That appears to be the view of Pillai J in *Catalla* at [83]. On another view, this requirement is an alternative to the third element of detriment. That appears to be the view of Woo J in *CCL* at [134(c)]. Still another view sees the third element of detriment as a flexible one with the requirement that it be inequitable for the promisor to resile from his promise being an "overarching principle" which determines how broadly or narrowly detriment is defined in a given case. That appears to be the view of Chong JC in *Lam Chi Kin* at [57]. Perhaps a fourth view is that this requirement is merely a compendious way of summarising the necessary effect of all three subsidiary elements being satisfied. Fortunately, it is unnecessary for me to align myself with any one of these views in order to dispose of this case.

Waiver, election and affirmation

39 Waiver, broadly speaking, is a "voluntary or intentional relinquishment of a known right, claim or privilege"; it is an "informed choice manifested in unequivocal conduct": see *Wilken & Ghaly* at para 3.14. These authors classify waiver into four types. Adopting that classification for present purposes, the type of waiver relevant to this case is what they call "waiver by election".

40 This brings me to the concepts of "election" and "affirmation". Election is simply a choice between two inconsistent rights, the "element of choice being essential": see *Wilken & Ghaly* at para 6.04. There may be many circumstances in which an election in that sense is made. The circumstance relevant for present purposes is when there is a breach of contract entitling the innocent party to terminate the contract. It is in this particular context that "affirmation" is relevant. Affirmation of a contract means no more than treating the contract as alive rather than terminated.

41 So a repudiatory breach of contract gives the innocent party an election between terminating the contract and affirming it. Once the innocent party has elected to affirm the contract notwithstanding a particular breach of that contract by the counterparty, he abandons and thereby loses his right to terminate the contract on grounds of that breach: see the speech of Lord Goff of Chieveley, with which all the other members of the House of Lords agreed, in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391 ("*Kanchenjunga*") at 397–398. Thus, an innocent party who is faced with a breach of contract and elects to affirm it instead of to terminate it thereby waives his right to terminate the contract. To put it another way, following the election, he is precluded by the doctrine of "waiver by election" from later seeking to terminate that contract on grounds of the same breach.

42 When does waiver by election operate to preclude an innocent party from terminating a contract for repudiatory breach? There are three requirements. First, the innocent party must have acted in a manner consistent *only* with affirming the contract, *ie*, treating the contract as still alive: see the decision of Belinda Ang Saw Ean J in *The "Pacific Vigorous"* [2006] 3 SLR(R) 374 at [15]. Second, the innocent party must have communicated his election, *ie*, his choice to affirm the contract, to the party in breach in clear and unequivocal terms: see *Kanchenjunga* at 398. Third, because the element of choice is essential, there must be sufficient knowledge on the part of the innocent party. He must at least be aware of the facts giving rise to his right to terminate the contract before his subsequent conduct will be taken as amounting to an election. It is not altogether clear whether he must, in addition, be aware of the right to terminate itself. Ang J in *The "Pacific Vigorous"* did not say that this knowledge was required (at [15]), while the English Court of Appeal in *Tele2 International Card Company SA v Post Office Ltd* [2009] EWCA Civ 9; [2009] All ER (D) 144 (Jan) appeared to take the view that it was required (at [53], point (2)). It should be observed, however, that the English Court of Appeal there purported to be summarising Lord Goff's analysis in *Kanchenjunga*, whereas Lord Goff expressly left the question open on the basis that it was unnecessary for him to decide it (at 398). Our Court of Appeal also left the question open in *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 at [34]. I likewise leave it open: I do not need to decide it to determine the issues in the present case.

Meaning of "time is (or is not) of the essence"

43 The phrase "time is (or is not) of the essence" is not a term of art; it is simply a convenient shorthand that can be used to mean different things in different contexts. I confine my observations here to the negative usage of the phrase, *ie*, saying that "time is not of the essence". All I seek to demonstrate is that this phrase is capable of a wide variety of meanings. First, it might mean that a contractual term as to time is not so important that it is a condition of the contract. Second, if a contractual term as to time is a condition and it has been breached, then describing the innocent

party as one to whom "time was not of the essence" might mean that he waived his right to terminate which arose from the breach of condition. Third, it might mean that the innocent party has waived not just his right to terminate but also his right to claim damages for the breach. Fourth, it might mean that parties have agreed a variation of a contractual term as to time, whether that variation be an extension of definite length or of a more open-natured character, *eg*, the grant of reasonable time. There may be other possibilities, but it is not my concern to canvass them all.

44 Having dealt with these preliminary points, I turn now to consider the various issues to be determined.

Issues pertaining to PO 1

Whether the defendant committed breach of contract

45 It is not disputed that, when the plaintiff terminated both purchase orders on 24 April 2012, the defendant had not delivered to the plaintiff any of the four Completed Generators which it was obliged to deliver under PO 1. The original delivery deadline for these four Completed Generators was 1 October 2011 (see [5] above). I am satisfied, on the basis of the e-mail dated 31 May 2011 and the amendment to the text of PO 1 (see [7] above), that the parties agreed a variation of PO 1 on 31 May 2011. This variation superseded the originally-stipulated delivery deadline and established a new, later delivery deadline. From the plaintiff's perspective, the consideration for this variation was the practical benefit of putting the defendant in a position where it was more likely to fulfil its obligations under PO 2 on time.

46 The question is then, what was the new delivery deadline agreed by the parties? The plaintiff argues that it was end-January 2012, while the defendant argues that the delivery deadline was set at large, or at least was pushed back to a reasonable time after it delivered all six Completed Generators under PO 2. The answer to this question depends on what was the objectively ascertained consensus between the parties as at 31 May 2011, the date on which the variation was agreed. My starting premise is that great weight must be ascribed to the fact that PO 1, *ie*, the contractual document itself, was amended to reflect a delivery deadline of end-January 2012. [note: 22] Next, I have regard to the e-mail dated 31 May 2011, which I am satisfied reflects the intention of the parties on that date. I note that Mr Tanabalan did not object to it in response. The second paragraph of that e-mail contains an unequivocal statement by Mr Law that the delivery deadline would be changed to end-January 2012, as follows:

> Hi Mr Tanabalan,
>
> Please find attached [PO 2]. You will please note the delivery for these units will be; 4 units for 1st November 2011 and 2 units for 1st January 2012...
>
> Please note! We will issue you with an amendment to [PO 1] *changing the delivery dates* for the 4 units for [PO 1] to *end January 2012*.
>
> ...
>
> [emphasis added]

However, there is a part of the same e-mail just a few paragraphs down in which Mr Law tells Mr Tanabalan:

> This means that partial payment will have been made for all 10 units; 6 units for [PO 2] with delivery dates of 1st November 2011 (4) and 1st January 2012 (2) and 4 units for [PO 1] *with delivery date end January 2012* (*final date to be advised* but not before end January 2012) [emphasis added]

I acknowledge that the words "final date to be advised" are curious given the prior unequivocal statement that the delivery deadline would be changed to end-January 2012. They are doubly curious because they immediately follow, in the same sentence, a clear re-affirmation that PO 1 was "with delivery date end January 2012". But I am unable to accept the defendant's contention that the words "final date to be advised" thereby negate the otherwise-clear agreement between the parties as at 31 May 2011 that the deadline for delivery would be end-January 2012, *ie*, 31 January 2012. At most, these words were intended to reassure the defendant that it would not unilaterally bring the delivery date forward and to indicate to the defendant a possibility that the plaintiff might at some future time agree with the defendant a further delay in the delivery deadline. The plaintiff never reached any such agreement with the defendant.

47 The defendant then relies on para 13 of the plaintiff's Reply and Defence to Counterclaim, which reads:

> Save that the work on the marine generators in relation to PO 1 *was requested to be deferred until work on the marine generators under PO 2 was completed*, Paragraph 18 of the Defence is denied. This did not mean the Defendants were permitted to delay work as such. The generators were still to be delivered by their contractual delivery dates. *The Plaintiffs had instructed the Defendants to commence work for PO 1 after the completion of the work for PO 2*. However, the delivery date for PO 1 remained as agreed in end of January 2012. [emphasis added]

The defendant argues that it is inconsistent for the plaintiff to say, on one hand, that the delivery deadline was 31 January 2012, and on the other, that it had instructed the defendant to defer work on PO 1 until after the work on PO 2 was completed. [note: 23] As was then contemplated by the parties, the defendant was to have completed its work under PO 2 by 1 January 2012. A deadline of 31 January 2012 for PO 1 would, the defendant contends, give it an unreasonably short period of 30 days in which to complete the work on PO 1. This must mean that an extension of the deadline was implicit in the plaintiff's instruction to defer the work on PO 1.

48 I reject the defendant's argument. Just because 30 days might appear in retrospect to be an unreasonably short period in which to complete PO 1, it does not follow that it appeared that way to the parties on 31 May 2011. The fact is that the defendant did not object to the amendment of PO 1 to reflect a delivery deadline of 31 January 2012, nor did it object to Mr Law's unequivocal statements in the e-mail dated 31 May 2011 that the new delivery deadline *was* 31 January 2012. I am satisfied that, at the time, parties contemplated that the defendant would arrange its affairs between 31 May 2011 and 31 January 2012 so as to enable it to complete both PO 2 by 1 January 2012 and PO 1 by 31 January 2012. Any unreasonable tightness of deadline stems from the defendant's own failure to do as it could and should have done. The plaintiff's instruction to defer the work on PO 1 is therefore entirely consistent with the parties having agreed on 31 May 2011 that the delivery deadline for PO 1 would be 31 January 2012. For this reason, I find that the parties agreed by a contractually-binding variation on 31 May 2011 that the delivery deadline for PO 1 would be 31 January 2012.

49 In connection with the plaintiff's instruction to defer work on PO 1, there is perhaps another argument that the defendant could have raised in its favour, although I do not understand the defendant to have done so. This argument is that such an instruction amounted to a second,

subsequent variation of the delivery deadline so that it was pushed back beyond 31 January 2012. Hypothetically speaking, if, for example, just days before 31 January 2012, as work on PO 2 was ongoing, the plaintiff instructed the defendant, "Complete PO 2 first and commence work on PO 1 after", this might amount to replacing the deadline with an open-ended stipulation as to time of delivery. The context in which the instruction was given is all-important. But in the present case, the defendant has not shown me what that context was. All I have is language in the plaintiff's pleadings saying that, at some unspecified point in time, in certain unspecified circumstances, such an instruction was given. Given that this is the extent of the material before me, I am unable to find on a balance of probabilities that the instruction from the plaintiff to defer work on PO 1 amounted to a subsequent variation of the delivery deadline such that it extended beyond 31 January 2012.

50 There are two more arguments put forward by the defendant that I should address:

(a) The defendant points out that, in contrast to the volume of correspondence and amount of activity in relation to PO 2, there was no such correspondence and activity in relation to PO 1. [note: 24] For instance, the plaintiff did not take any steps towards delivering to the defendant the LS Alternators which the defendant required to fabricate the Completed Generators. [note: 25] If the delivery deadline was indeed 31 January 2012, the defendant argues, the plaintiff would at least have checked on the defendant's progress and delivered the LS Alternators which the defendant required to complete the work. The fact that it did neither, the defendant submits, demonstrates that the deadline was not 31 January 2012. In my view, this argument was without merit. The defendant, in effect, was arguing that the plaintiff's conduct after 31 May 2011 should be taken into account in ascertaining the parties' intentions as at that date. This argument presupposes that it was unclear as at 31 May 2011 what the delivery deadline was. I do not think it was at all unclear. As I have said, I think it was clear that the parties had agreed on a delivery deadline of 31 January 2012. That being the agreement as at 31 May 2011, no subsequent silence or inaction on the plaintiff's part could change the agreed delivery deadline, unless such silence or inaction itself amounted to a fresh variation of the delivery deadline, which cannot have been the case.

(b) The defendant points out that the plaintiff, in its opening statement, alleged that the defendant's breach of PO 1 was in the nature of an "anticipatory breach" [note: 26] rather than a completed breach. This, the defendant argued, demonstrated the plaintiff's recognition that it was untenable to maintain that the delivery deadline was 31 January 2012. [note: 27] I cannot accept this argument. The delivery deadline depends on the intention of the parties at the time they entered into PO 1. I glean that intention from an objective consideration of the circumstances and the parties' conduct at that time. That intention does not change with the position that the parties later choose to adopt at trial.

51 Having found that the deadline for delivery of the four Completed Generators under PO 1 was 31 January 2012, I therefore hold that the defendant committed a breach of contract by failing to deliver the Completed Generators to the plaintiff by this date.

Whether the breach entitled the plaintiff to terminate the contract

52 In the absence of an express clause giving the plaintiff the right to terminate PO 1 on grounds of the defendant's failure to deliver, the plaintiff has the right to terminate PO 1 only if the defendant's breach was one or more of the following: a renunciation, a breach of condition, or a repudiatory breach (see [29]–[33] above).

53 In my view, the defendant's breach was not a renunciation. There was simply no correspondence before me between the parties in relation to PO 1 after the e-mail dated 31 May 2011. On the facts of this case, that silence and inaction does not amount to the defendant conveying an intention not to perform its contractual obligations at all. I do not rule out the possibility that, on the facts of another case, silence and inaction may indeed convey intention not to perform. But in the present case, the mutual intention was that the defendant would work on PO 1 only after completing work on PO 2. Silence and inaction in relation to PO 1 while work was still ongoing under PO 2 would have been completely in keeping with that mutual intention. For this reason, that silence and inaction could not have been contemplated by the parties as evincing a new and distinct intention, *viz*, the defendant's intention not to perform its obligations under PO 1.

54 I am also satisfied that this was not a breach of a condition. I find that the varied delivery deadline was not a condition because of the words "final date to be advised" in the e-mail dated 31 May 2011. As I have said at [47] above, these words do not negate a finding that the delivery deadline was end-January 2012. But they do indicate that the parties at the time did not view the deadline as a term so important that exceeding it by even a day would entitle the plaintiff to terminate the contract. Those words suggest a mutual understanding at the time that there was a more than fanciful possibility of the parties agreeing to a further delay in delivery at some future time. To that extent, parties did envisage at the time a degree of flexibility in the deadline, such flexibility to be achieved by future agreement. For this reason, the stipulated delivery deadline could not have been of such importance to the parties at the time as to qualify as a condition of PO 1.

55 I am, however, satisfied that the defendant's breach was a repudiatory breach. When considering the question of whether a breach is a repudiatory breach, the analytical approach comprises two steps. First, identify what exactly constituted the benefit that the parties intended the innocent party to derive from the contract. Second, examine the actual consequences of the breach that occurred at the time that the innocent party terminated the contract: see *Sports Connection* at [62].

56 In this case, the benefit intended by the parties under PO 1 was that the plaintiff should receive delivery of four Completed Generators by 31 January 2012 in order that it might meet its own contractual obligations to its customer IOEC. The actual consequence of the defendant's breach was that, as at 24 April 2012, the date of termination, the plaintiff had received nothing useful at all under PO 1. The defendant did not even commence fabrication and installation works. None of the Caterpillar Generators that the defendant purchased were even committed towards the fulfilment of PO 1. The plaintiff was no better off on 31 January 2012 or 24 April 2012 than when it entered into PO 1 an entire year earlier. What the plaintiff expected to receive and what it had actually received by the time that it terminated the contract leads me to the conclusion that, as at 24 April 2012, the plaintiff was deprived of substantially the whole of the benefit which it was intended by the parties to have obtained under PO 1. Indeed, I might say that it was deprived of *all* of the benefit that it was expected to receive under PO 1. On that basis, I hold that the plaintiff was entitled to terminate the contract when it did so on 24 April 2012. It follows that the defendant's counterclaim for wrongful termination of PO 1 must fail.

Whether plaintiff entitled to recover US$252,000 paid to the defendant

57 Having held that the defendant was in breach of contract, I turn to the remedies the plaintiff seeks as compensation for the breach. The plaintiff seeks to recover the sum of US$252,000 which it paid to the defendant pursuant to the first stage of payment under the Payment Schedule (see [10] above). It claims this sum of money under Heads of Relief 3 and 4. While not expressly stated to be so, it must be that these two Heads of Relief are pleaded in the alternative. Head of Relief 3 claims

that this sum is held on trust for the plaintiff, while Head of Relief 4 claims that the sum is recoverable "being the deposit paid" under PO 1.

Whether money held on trust

58 I consider first Head of Relief 3. In its closing submissions, the plaintiff identifies the alleged trust as a "constructive/purpose" trust. [note: 28] It then relies on the House of Lords decision of *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 ("*Quistclose*"). From this it is clear that the plaintiff's contention is that the US$252,000 was the subject matter of what is now known as a *Quistclose* trust. The classification of the *Quistclose* trust within the taxonomy of trusts is not free from controversy. But the judicial consensus at the very least is that this type of trust arises because of the intention of the parties: see the speech of Lord Millett in the House of Lords decision of *Twinsectra Ltd v Yardley and others* [2002] 2 AC 164 ("*Twinsectra*") at [69] and the decision of Belinda Ang Saw Ean J in *Pacific Rim Palm Oil Ltd v PT Asiatic Persada and others* [2003] 4 SLR(R) 731 ("*Pacific Rim*") at [16], which was cited with approval by Lai Siu Chiu J in *Singapore Tourism Board v Children's Media Ltd and others* [2008] 3 SLR(R) 981 at [88]. It arises when one party advances a sum of money to another and the intention of the parties is that: (a) this money should be applied for a specific purpose only; and (b) the beneficial interest in the money should remain in the party that advanced the money unless and until the purpose is fulfilled: see Lord Millett's speech in *Twinsectra* at [100], which was cited with approval by Steven Chong Horng Siong J in *Tee Yok Kiat and another v Pang Min Seng and another* [2012] SGHC 85 at [28], and Ang J's decision in *Pacific Rim* at [18].

59 The plaintiff then argues that the sum of US$252,000 that it paid to the defendant is held on a *Quistclose* trust because it was paid for the specific purpose of placing a deposit for four Caterpillar Generators under PO 1. I reject the plaintiff's argument without hesitation. As Lord Millett said in *Twinsectra* at [73], payments in advance for goods or services might be paid for a particular purpose, but such payments are ordinarily intended to be at the free disposal of the party receiving them and treated as part of his cash flow; it is only in an extraordinary case that such payments will create a trust, for otherwise commercial life would be impossible. The plaintiff has not satisfied me in the least that the present case is such an extraordinary one. It has not attempted to show me any evidence at all that it impressed upon the defendant that the US$252,000 might be applied *only* towards placing a deposit for four Caterpillar Generators. In the result, I cannot find that there was a specific purpose for which the parties intended that this sum of money would be used, let alone that there was a mutual intention that the beneficial interest in that money should remain in the plaintiff until then. Therefore, the plaintiff's claim for the US$252,000 on the basis of a *Quistclose* trust is a non-starter.

60 Although the plaintiff labelled the alleged trust as a "constructive/ purpose" trust at one point in its closing submissions, it did not advance any substantive submissions in support of a constructive trust. But for the sake of completeness I record my opinion that a constructive trust argument would have been as much of a non-starter as the *Quistclose* trust argument. For the avoidance of doubt, I am speaking here of an institutional constructive trust and not a remedial constructive trust: see the Court of Appeal decision of *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2001] 1 SLR(R) 856 at [34]–[35] for an explanation of the difference. The definition and boundaries of the constructive trust are notoriously nebulous, perhaps deliberately so. But the broad concept of the constructive trust is clear – it is a trust arising in equity to satisfy the demands of justice and good conscience. A necessary – but not a sufficient – condition for such a trust to arise is that there be some "want of probity": see the Court of Appeal decision of *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others* [1998] 2 SLR(R) 434 at [107], which was cited with approval, and expanded upon, by Kan Ting Chiu J in *Comboni Vincenzo and another v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020 at [56]–[60] and Woo Bih Li J in *George Raymond Zage III*

and another v Rasif David and others [2009] 2 SLR(R) 479 at [19]–[21]. The plaintiff has not shown me anything on the evidence that even hints at a want of probity on the defendant's part.

61 I therefore hold that the plaintiff's claim under Head of Relief 3 fails because the US$252,000 is not held on a *Quistclose* trust, and there is no reason to impose a constructive trust over that sum of money.

Whether money recoverable in any other way

62 I turn now to the plaintiff's claim under Head of Relief 4. It is perhaps unfortunate that this claim was not drafted with greater precision. It simply asserts that the sum of US$252,000 was recoverable "being the deposit paid" without more. Be that as it may, in my view, the plaintiff was entitled to recover this sum of money as damages for the defendant's breach of contract. Specifically, it is entitled to recover this sum as reliance damages. These damages protect the innocent party's reliance interest or, to put it another way, compensate it for its reliance loss. By whatever name, this is the measure of damages which addresses the loss suffered by the innocent party due to his reliance on the counterparty's unfulfilled promise to perform his contractual obligations. It aims to restore the innocent party to the position he occupied before he entered the contract: see *Halsbury's Laws of Singapore* vol 7 (LexisNexis, 2012 Reissue) at para 80.545, and see also the decision of Belinda Ang Saw Ean J in *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2005] 2 SLR(R) 302 at [27].

63 Where the innocent party pays a sum of money to his counterparty pursuant to the contract, this sum of money is a form of wasted expenditure in reliance on the counterparty's promise. Reliance damages are therefore available to make good that wasted expenditure: see *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) at paras 26-022 and 26-025, and see also the decision of Philip Pillai JC (as he then was) in *PT Panosonic Gobel Indonesia v Stratech Systems Ltd* [2010] 3 SLR 1017 at [6], as well as a decision of Hutchison J in the English High Court which Pillai JC cited, *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] 1 QB 16 at 32A–D. Returning to this case, the US$252,000 which the plaintiff paid to the defendant was a form of wasted expenditure incurred in reliance on the defendant's promise to carry out its work under PO 1. I therefore hold that the plaintiff is entitled to recover that sum as reliance damages to remedy the defendant's breach of contract.

64 The plaintiff claimed damages for breach of contract over and above the sum of US$252,000. [note: 29] This could only be a claim for damages to vindicate the plaintiff's expectation interest, *ie*, to put it in the position it would have occupied had the contract been performed; such damages would compensate the plaintiff for loss of the profit expected under PO 1. In my view, the plaintiff's claim for expectation-based damages cannot succeed. Having recovered reliance damages, the plaintiff is now in the position it would have occupied had the contract not been made. Allowing it to go further and recover expectation-based damages on top of reliance-based damages would be to give it the expected profit without its having incurred any (notional) expenditure. To put it simply, this would be giving the plaintiff something for nothing, which cannot be right.

65 It was also arguable on the pleaded facts that the plaintiff had a restitutionary claim to recover the US$252,000 as money paid on a total failure of consideration. But the plaintiff did not put its claim to me in this way. And it is unnecessary for me to consider it because I have held that the plaintiff is entitled to recover this money as reliance damages under ordinary contractual principles. I note only that "consideration" in this context must not be confused with consideration in the context of the essential elements of a binding contract. The test for whether there has been total failure of consideration is not "whether the promisee has received a specific benefit", but rather "whether the

promisor has performed any part of the contractual duties in respect of which the payment is due": see the speech of Lord Goff in the House of Lords case of *Stocznia Gdanska SA v Latvian Shipping Co and others* [1998] 1 WLR 574 at 588D.

66 I accept that the defendant did do some work under PO 1. At the very least, it submitted some of the documentation required to trigger its entitlement to the first stage of payment, including the build and procurement programmes [note: 30] (whether or not the documentation was satisfactory is another matter). But at best, this work done would go towards resisting a claim of total failure of consideration. It does not furnish a basis on which to resist the plaintiff's claim for the sum of US$252,000 as reliance damages, because the defendant's work does not reduce or mitigate the plaintiff's loss in any way, and therefore does not affect the quantum of damages needed to restore the plaintiff to its pre-contractual position.

67 It may appear unjust that the defendant goes uncompensated for the work, minimal though it was, that it did under PO 1. But this is because its counterclaim claimed only damages for what it alleged to be the plaintiff's wrongful termination of the contract. [note: 31] That counterclaim fails. I have held that the defendant is not entitled to such damages because the plaintiff did not wrongfully terminate the contract. Curiously, the defendant's counterclaim did not include an alternative claim for a *quantum meruit*.

Conclusion on PO 1

68 In summary, I hold that the defendant breached PO 1 when it failed to deliver to the plaintiff four Completed Generators by 31 January 2012. I hold that the plaintiff was entitled to terminate the contract on 24 April 2012 because the defendant's breach deprived it of substantially the whole benefit which it was intended to receive under PO 1. I hold that the plaintiff is entitled to recover the US$252,000 paid to the defendant as reliance damages. I hold that the plaintiff is not entitled to any additional damages for breach of contract.

69 Even though I do not understand the defendant to have pleaded waiver or estoppel in relation to PO 1, I should record that I have considered whether the plaintiff may be said to have waived any of its rights or be estopped from exercising the same. I am satisfied that this question should be answered in the negative. I turn now to PO 2.

Issues pertaining to PO 2

Detailed narrative of the facts

70 In my narrative of the factual background above, I provided only a broad sketch of the parties' dealings in respect of PO 2. The analysis of the issues will be easier to follow if there is a firm factual foundation on which the analysis can proceed. Before I consider the various issues for determination, therefore, I pause here to flesh out that narrative on PO 2. In the course of doing so I raise and resolve the disputes of fact between the parties. The disputes of fact can be distilled to one central question: why did the work under PO 2 proceed so much slower than the parties had originally intended? Unsurprisingly, each party takes the position that the other is to blame for this slow progress.

71 I preface my findings with brief comments on the witnesses who gave evidence at trial. The principal witness for the defendant was Mr Tanabalan. His evidence spanned more than three days out of the six full days and two half-days of trial. I found Mr Tanabalan to be a thoroughly unreliable witness. He gave oral evidence on material facts which was inconsistent with or contradicted by

contemporaneous documentation, which was contrary to the inherent probabilities, and which could not be found in the defendant's pleadings or in his own affidavit of evidence-in-chief ("AEIC"). I will mention some of the unsatisfactory aspects of his evidence in the course of making my findings.

72 The principal witness for the plaintiff was Mr Stephenson. Although his evidence was not entirely without difficulty, on the material facts it was largely consistent with the contemporaneous documents and aligned with the inherent probabilities. In general, where the oral evidence of the plaintiff's witnesses conflicted with that of the defendant's witnesses and there was no contemporaneous documentation to test the conflicting evidence against, I preferred the evidence of the plaintiff's witnesses.

The parties' dealings in respect of PO 2

73 To recapitulate, the plaintiff and the defendant both signed PO 2 on 2 June 2011. According to the contract terms, the defendant was to submit nine documents within 14 days of signing the contract. These documents included technical plans and work schedules. The plaintiff would then forward these documents to IOEC, and IOEC would, in accordance with the terms of the contract between the plaintiff and IOEC, pay the plaintiff a proportion of the contract price in accordance with an agreed schedule. The plaintiff, in turn, would be obliged under PO 2 to make payment to the defendant one banking day after receiving payment from IOEC. This payment from plaintiff to defendant would be the first stage of payment under the Payment Schedule (see [9] above), in the amount of US$378,000 being 20% of the contract price of US$1.89m. As it was, the plaintiff paid this amount to the defendant on the same day that the parties signed PO 2.

74 Before I go further, I should elaborate on the nature and scope of the defendant's work under PO 2. Its ultimate obligation, of course, was to deliver to the plaintiff six Completed Generators by specified dates. In doing so, the defendant had to procure Caterpillar Generators and modify them. The modifications included replacing the factory-installed SR4 Alternators with heavier-duty LS Alternators. It had to fabricate containers to house these modified Caterpillar Generators. It had to procure or fabricate other component systems and parts. These included the electrical system, the heating, ventilation and air conditioning ("HVAC") system and the Fire & Gas system. It had the option of delegating to subcontractors the work on the component systems and parts. It then had to put everything together into a final product by installing the modified Caterpillar Generators and the component systems and parts into the containers. The final product, then, is what I have referred to as the Completed Generators.

75 In addition to procurement, fabrication and installation work, the work on PO 2 also involved designing the containers and the various component systems and parts. The understanding was that personnel from the plaintiff, namely Mr Oracion and Mr Podador, would assist the defendant in this aspect of the work. They would work together to prepare these technical designs and drawings for submission to IOEC for approval. These technical designs and drawings would consist of, *inter alia*, the General Arrangement drawing, which sets out the planned overall layout and dimensions for each Completed Generator, and drawings for the individual component systems and parts, for instance, the HVAC and Fire & Gas systems.

76 Having set out this background, I can now deal better with the various allegations that the parties levelled at each other for the purpose of demonstrating that the other party was to blame for the slow progress on PO 2.

Approvals granted by the plaintiff or obtained from IOEC

77 The defendant alleges that plaintiff was guilty of considerable delays in obtaining IOEC approval for the various technical designs and drawings. [note: 32] The defendant further alleges that the plaintiff approved the HVAC and Fire & Gas system specifications, as well as the installation of protection relays, late – at the end of September 2011 – when these specifications and plans had been submitted months earlier in June 2011. [note: 33] In October 2011, says the defendant, the plaintiff asked for even more changes to the HVAC and Fire & Gas systems. [note: 34] The defendant alleges that all this resulted in delays to its work.

78 I have difficulty believing the defendant's allegations. In its closing submissions, it did not cite a single piece of supporting evidence, whether in its witnesses' AEICs or in the contemporaneous documents. The defendant asserted these facts. The defendant therefore had the burden of proving these facts. It wholly failed to discharge its burden. Indeed, in making these allegations, the defendant's case was internally inconsistent on at least one point. In its closing submissions, it said that the plaintiff "approved the design and dimension" of the Fire & Gas system in July 2011. [note: 35] But the defendant also said that it "had in fact submitted to the [plaintiff] the specifications for the Fire & Gas system sometime in June 2011 and had to wait well over two months to obtain the approval". [note: 36] As for the allegation that the plaintiff was guilty of delay in obtaining approvals from IOEC, I am satisfied that, even if these approvals took longer to obtain than they should, the plaintiff is not to blame for the delays. I have regard, for instance, to e-mails in which the plaintiff, upon receiving plans and drawings from the defendant or the defendant's subcontractors, indicated that it would forward these plans and drawings to IOEC immediately. [note: 37] I am therefore satisfied that the plaintiff was generally prompt in seeking IOEC approval.

79 To be fair, the defendant has identified an e-mail which suggests that the plaintiff was at least on one occasion dilatory in its conduct. This is an e-mail dated 17 October 2011 from one Mohan Vijayanaman ("Mr Mohan") of Systemair (SEA) Pte Ltd ("Systemair") and addressed to Mr Oracion. [note: 38] Systemair was the company to which the defendant subcontracted work on the HVAC system. [note: 39] In the e-mail, Mr Mohan complained that he had received neither "advice nor confirmation" from the plaintiff since submitting amended drawings for the HVAC system. I accept that the plaintiff might have been slower than it should have been on this occasion, but I am not satisfied that it caused any delay, let alone significant or causative delay, to the defendant.

Alleged changes to technical specifications and scope of work

80 The defendant alleges that, as its work under PO 2 progressed, the plaintiff made a number of changes to the technical specifications and the scope of work which had been agreed upon when the parties entered into the contract. As a result, the defendant alleges, it had to amend and re-submit technical plans and drawings so as to bring them into conformity with the new specifications, and to procure new materials and incur the cost thereof in order to meet the new specifications.

81 What then are these changes to the specifications which the plaintiff is alleged to have made? There are a number of them, but the defendant places greatest emphasis on the change from SR4 Alternators to LS Alternators. I address this first. According to the defendant, LS Alternators are larger and heavier than SR4 Alternators. The change from the latter to the former necessitated an increase in the dimensions of the containers housing the generators as well as a strengthening of the skid tank which forms the base of the containers. This meant that the defendant had to re-submit technical drawings of the containers and purchase additional materials towards increasing the size of the containers. [note: 40] In his AEIC, Mr Tanabalan said that the dimensions of the container as

originally envisaged were 20 feet long and 8 feet wide and high. [note: 41] This had to be changed to 20 feet long and 10 feet wide and high.

82 I accept that LS Alternators are larger and heavier than SR4 Alternators and consequently require larger containers. And it is true that the purchase orders mention SR4 Alternators but not LS Alternators. But I am satisfied that, even before it signed PO 2 on 2 June 2011, the defendant knew that it would need to replace the factory-installed SR4 Alternators with LS Alternators. In an e-mail dated 29 Apr 2011, [note: 42] Mr Law asked Mr Tanabalan if the Caterpillar Generators could be supplied with LS Alternators in respect of PO 1 (the specifications for PO 1 were the same as those for PO 2, as Mr Tanabalan acknowledged [note: 43]). In e-mails dated 15, 16, 17 and 18 May 2011, [note: 44] Mr Tanabalan enquired about the dimensions of LS Alternators. He accepted under cross-examination that this was so that the defendant could prepare the General Arrangement drawing. [note: 45] Mr Tanabalan himself said in cross-examination that the plaintiff first informed him of the use of LS Alternators around the "end of May". [note: 46] And so I find that the change from SR4 Alternators to LS Alternators was one agreed upon prior to the parties' signing of PO 2 and that it was not an unexpected alteration sprung by the plaintiff in the course of the defendant's work.

83 It follows from this that when the parties entered into PO 2, the defendant already knew that the container dimensions would have to be such as to accommodate the larger and heavier LS Alternators. Indeed, an e-mail from Mr Tanabalan to Mr Oracion dated 24 May 2011 [note: 47] clearly shows that, as at that date, the defendant had in mind a container of 20 feet long, 10 feet wide and 9 feet high, as opposed to the smaller dimensions that the defendant says would have been right for the original SR4 Alternators. Under cross-examination, Mr Tanabalan acknowledged that the dimensions as at 24 May 2011 already took into account the fact that LS Alternators would be used in lieu of SR4 Alternators. [note: 48] I am satisfied that the container dimensions were then approved by IOEC on 7 June 2011, based on an e-mail of that date from Mr Law to Mr Tanabalan. [note: 49] I am also satisfied that there were no further changes to the dimensions. The defendant in its closing submissions accepted that the "new dimensions" had been approved on 7 June 2011, and for this reason I disbelieve entirely Mr Tanabalan's assertion in cross-examination that the container dimensions were finalised only in mid-August 2011. [note: 50] I therefore reject unreservedly the defendant's allegation that the plaintiff made changes to the alternators and container dimensions which had not been agreed upon when the parties entered into PO 2.

84 The defendant then alleges that the plaintiff made a number of other changes to the specifications and scope of work which likewise resulted in delays to the defendant's work. In his AEIC, Mr Tanabalan details these alleged changes [note: 51] :

(a) modification of the Fire & Gas system by providing an advanced scope of supply instead of a standard scope of supply;

(b) installation of a protection relay to the generator control panel in order to allow the generators to be operated from an unmanned platform;

(c) installation of a twin motor HVAC system instead of a single motor HVAC system; and

(d) installation of a three-cylinder six-start hydraulic system instead of a secondary single cylinder hydraulic start system in the engines.

I am wholly unconvinced that there is any substance in these allegations. By this I mean that, while I am willing to believe that these tasks described by Mr Tanabalan were part of the work that the defendant did, I do not accept that the tasks arose out of *unanticipated* changes to the specifications that had been agreed upon when parties entered into PO 2. Mr Tanabalan's AEIC makes reference to a number of e-mails which he claims supports his allegation that the specifications were changed. I fail to see how these e-mails on any reading provide any measure of support for his allegation. On the contrary, the sense I get from the e-mails is that the plaintiff was fairly fastidious about complying with the contractual specifications. In an e-mail dated 5 August 2011 [note: 52] from Mr Oracion to one Mr Nithin KB of Crystal Offshore Systems & Controls Pte Ltd, with whom Mr Oracion was liaising regarding the Fire & Gas system, Mr Oracion wrote, "This proposal is OK already as *this is what the specs calls for*" [emphasis added]. In an e-mail dated 11 August 2011 [note: 53] to Mr Mohan of Systemair, Mr Oracion asked, "how come a three winding motor *as per your submitted drawing* become single phase?" [emphasis added]. And in an e-mail dated 30 November 2011, [note: 54] Mr Oracion wrote that the differential pressure transmitters purchased by the defendant were not acceptable because they did not comply with specification "6.3 page 19 of 61", the text of which Mr Oracion reproduced.

85 Under cross-examination, Mr Tanabalan asserted that evidence of the alleged changes might be found in the purchase orders and in the various e-mail exchanges. [note: 55] But he was unable to point to specific examples of such evidence. That leads me to believe that the evidence does not exist. Mr Selvakumar, likewise, was unable to put forward evidence of changes to the specifications besides his bare assertions. Under cross-examination, he accepted that, if he wished to say that there were specifications that had subsequently been changed, he ought to show what the specifications are and what the changes were. [note: 56] But he did not do so. [note: 57] Mr Selvakumar eventually fell back on the allegation that the container dimensions were changed, [note: 58] an allegation which I have already given my reasons for rejecting. Given all this, I find that the plaintiff did not make changes to the specifications and scope of work which were outside the parties' contemplation when they entered into PO 2.

The defendant's obligation to submit documentation

86 I find that the plaintiff has made out its allegation that the defendant failed to meet its obligation to submit the nine documents required within 14 days of signing PO 2, as alluded to above at [73]. I further find that, even after the expiry of the 14-day period, the defendant was slow to submit those documents. Having regard to the contemporaneous e-mail correspondence, I find that two of the documents, *viz*, the procurement programme and build schedule (which the defendant appears to have amalgamated into a single document called the build schedule and procurement plan ("BSPP")), were submitted on 7 June 2011 but were rejected by the plaintiff on 21 June 2011 for being unrealistic and for lacking detail. [note: 59] The BSPP was later re-submitted on 14 September 2011. [note: 60] The e-mails show that, as at 27 July 2011, four of the nine documents had not yet been submitted; [note: 61] and as late as 22 October 2011, there were still documents that had not been submitted. [note: 62] The defendant's only argument in response is this: because its entitlement to the first stage of payment from the plaintiff depended on its submitting the nine documents required, the fact that the plaintiff made the first stage of payment is proof that it did submit those nine documents within 14 days of signing PO 2. I do not find this convincing in the slightest.

The defendant's progress on the work

87 I find also that the defendant's progress on its work was far slower than it should have been and did not even meet the timelines that the defendant had set for itself. The defendant's timelines are reflected in the BSPP which it prepared; according to this document, an unidentified number of Completed Generators would be ready for their Factory Acceptance Test ("FAT", alternatively referred to as the "Final Acceptance Test") by 31 October 2011. As it turned out, the defendant missed its own timelines by a significant margin.

88 A specific example of the defendant's dilatory conduct is its fabrication of two containers for the First and Second Units. In an e-mail dated 13 June 2011, Mr Tanabalan informed Mr Law that the materials required for fabrication of two containers would arrive by 16 June 2011. [note: 63] But the defendant did not commence fabrication of the containers until more than a month later – an e-mail from Mr Tanabalan dated 27 July 2011 reported that the defendant had "started fabrication" of the container. [note: 64] Mr Tanabalan explained under cross-examination that fabrication had in fact started in the third week of June, and that "started" was a typographical error that should have read "in process" [note: 65] . That explanation seems to me inherently improbable and I reject it without hesitation. Mr Tanabalan's explanation is also contradicted by the defendant's BSPP, which states that fabrication of the container started on 2 August 2011. [note: 66] Mr Selvakumar acknowledged that, according to the procurement plan which he prepared for PO 1 and which was sent to the plaintiff before 4 April 2011, it would take 37 days to fabricate four containers. [note: 67] Assuming that the computation of these 37 days starts from the time of arrival of the materials needed to fabricate the containers, and even allowing 37 days for two containers on the assumption that Mr Selvakumar's estimate was on the optimistic side, the containers would have been fabricated before the end of July 2011 had fabrication works started some days after the arrival of the materials on 16 June 2011.

89 Mr Podador's evidence was that he prepared bi-weekly progress on the basis of personal visits to the defendant's workshop, and his reports likewise show that the defendant's work proceeded slowly. For instance, the progress report for the fortnights ending 15 July, 31 July and 29 September 2011 [note: 68] reflected progress rates of 33, 35 and 37.5% respectively, indicating that, in the two months between 31 July and 29 September 2011, the progress rate had increased by just 2.5%. His evidence was not seriously challenged in cross-examination, and so I take his reports as fairly accurate accounts of the defendant's progress – that is, as accurate as it can be to measure quantitatively a complex, multi-faceted variable such as work progress. Faced with an e-mail dated 2 December 2011 [note: 69] in which Mr Law informed Mr Tanabalan that "Mr Stephenson and Mr Oracion had stated that there is a big improvement on activity in the workshop", Mr Podador acknowledged that there had indeed been a "big improvement in the activity" in the defendant's workshop in December 2011. [note: 70] But that is not saying much; given the slow rate of progress prior to that, an improvement, even a "big improvement", might not mean a lot.

90 When Mr Podador resumed his bi-weekly progress reports in January 2012, the progress rates for the fortnights ending 31 January and 10 February 2012 were 46% and 47% respectively. [note: 71] This suggests that work was once more proceeding slowly. An e-mail from Mr Stephenson to Mr Tanabalan dated 10 April 2012 [note: 72] conveys Mr Podador's and Mr Oracion's views that "no activity" was occurring on the Third and Fourth Units, and Mr Podador's final report dated 20 April 2012, days before the plaintiff terminated both PO 1 and PO 2, states that "only [a] few things [have] been done" in the approximately two months that elapsed since his last progress report. [note: 73] It should be noted that, from the inception of PO 2 to 20 April 2012, no work at all had been done on the Fifth and Sixth Units.

91 In light of all this evidence, I find that the causative factor for the slow progress of the work on PO 2 was simply that the defendant did not work as quickly as it could have, should have, or promised to do. I find that the defendant over-committed itself to projects the cumulative demands of which were too much for its limited manpower, its limited financial resources and its limited capacity to supervise.

The defendant's procurement of materials for the work

92 I am satisfied that, as the plaintiff alleges, the defendant was slow to procure the materials needed for its work. The minutes of a meeting between Mr Stephenson, Mr Law and Mr Tanabalan on 31 October 2011 [note: 74] show that, as at that date, the defendant had not yet furnished purchase orders in respect of many items – cable ducting, panel wiring and potentiometers, to name just a few. The three of them met again on 21 November 2011. [note: 75] The minutes of that meeting reveal that many items had not yet been delivered to the defendant, despite Mr Tanabalan having assured Mr Stephenson and Mr Law at the previous meeting that orders had already been placed over the phone for some of these items. And at least in respect of the battery chargers, the defendant even falsely represented to the plaintiff that it had purchased them when it had not in fact done so. In a work progress report expressed as being correct as at 27 June 2011, the defendant represented that the battery chargers would be arriving in the second week of August 2011. [note: 76] However, in the minutes of the meeting of 31 October 2011, Mr Tanabalan was recorded as promising that the battery chargers would be delivered by 5 November 2011. And even that promise was not kept. In the minutes of the meeting between the same three persons on 21 November 2011, Mr Tanabalan was recorded as saying that the "battery charger was expected today".

93 I am also satisfied that the defendant's lack of speed in procuring materials was exacerbated by its occasional procuring of materials that did not meet the specifications and which had to be purchased afresh. Mr Oracion gave evidence to that effect in his AEIC. I accept the veracity of his evidence, which went unchallenged in cross-examination. One particular example cited by Mr Oracion was that the defendant procured differential pressure transmitters which were for "clean room application" rather than for use in hazardous areas as required by the specifications. [note: 77]

The defendant's financial difficulties

94 I find that the defendant was facing financial difficulties as it worked on PO 2. This may be seen from Mr Tanabalan's acknowledgment that the defendant utilised the US$252,000 paid under PO 1 to purchase Caterpillar Generators for PO 2 instead. [note: 78] Moreover, in early April 2012, Mr Tanabalan indicated that the defendant required an advance payment of US$50,000. [note: 79] Later in the month he reiterated these requests and explained that this payment was "urgently" required "to complete the job". [note: 80] I find further that the defendant's financial difficulties led to delays in procuring materials needed for its work. Under cross-examination, Mr Tanabalan said that the slow progress of the work under PO 2 was caused by what he called a "cost effect". [note: 81] And in an e-mail dated 5 April 2012, Mr Tanabalan informed the plaintiff that the defendant's procurement of protection relays had been delayed because it had only managed to make full payment in March despite having placed an order in February. [note: 82]

95 Not surprisingly, the defendant's position is that the plaintiff was at fault for its financial difficulties for two reasons. I reject both reasons, as I explain below:

(a) First, the defendant argues that it had to incur additional costs because the plaintiff made unanticipated changes to the technical specifications and requirements. I am not satisfied that this was the case. As I have said at [80]–[85] above, I am not persuaded that the plaintiff did make such changes. I should mention that Mr Tanabalan's AEIC refers to an e-mail of 8 June 2011 [note: 83] to make his point that costs increased as a result of changed specifications. But I fail to see how that e-mail furnishes any support for his allegation. It is no more than an e-mail informing the plaintiff that the surveyor was charging $5,000 per container for inspection and certification, and does not show that it was an extra cost arising from changes made by the plaintiff. Mr Tanabalan's AEIC also attached a number of invoices [note: 84] intended to show that the defendant had to purchase additional materials for a container with increased dimensions. But these invoices merely show that materials were purchased. They do not show that such purchases were necessitated by the plaintiff's changes. And I do not accept that that was the case.

(b) Second, the defendant argues that the plaintiff was late in making payments to the defendant as they fell due under the Payment Schedule. For reasons which I give below at [136], it has not been established that the plaintiff did not make these payments any later than it was obliged to.

Therefore, I find that the plaintiff was not to blame for the defendant's financial difficulties. If any party is to be blamed for those difficulties, it is the defendant itself, for over-committing itself and stretching its resources too thin over its various projects.

The defendant's workmanship

96 Leaving aside the speed of the defendant's work under PO 2 and focussing instead on its quality, I find that the defendant's workmanship left much to be desired. In late-October 2011, IOEC rejected the defendant's unit control panels because they had "not been built within approved specifications" and because of their "poor build workmanship and poor painting quality". [note: 85] Furthermore, mechanical and electrical punch lists dated 14 January 2012 [note: 86] revealed that the work on the First and Second Units was incomplete or unsatisfactory in a number of respects. Mr Tanabalan said under cross-examination that the punch list was not an updated one, and that the defendant had in fact completed or rectified all the items on the punch list save for "minor things" [note: 87] and/or items "not related to the function test of the generator set". [note: 88] He said that there was a document that would demonstrate the truth of his assertions, [note: 89] but no such document has since been brought to my attention. That leads me to conclude that it does not exist. Left only with Mr Tanabalan's bare assertions, I am unable to accept them. I find that the punch lists of 14 January 2012 accurately reflect the deficiencies in the defendant's workmanship in respect of the First and Second Units.

Summary of my findings of fact

97 In summary, I find that the slow progress of the work under PO 2 was caused by the defendant. It was slow to meet its obligation to submit certain contractually-required documents. It did not procure materials and carry out fabrication and installation works in a timely manner, due in part to its financial difficulties. It has not made out its allegations against the plaintiff: that the plaintiff was guilty of undue delay in obtaining from IOEC the necessary approvals, and that the plaintiff made post-contractual changes to the technical specifications and scope of work. I find, for good measure, that the defendant's workmanship was less than satisfactory in many material

respects.

Whether the defendant committed breach of contract

98 The breach of contract which the defendant is alleged to have committed is simply that it did not meet the contractual deadlines for the delivery of all six Completed Generators under PO 2. At the inception of PO 2, the delivery deadlines agreed upon were I November 2012 for four Completed Generators and 1 January 2012 for the remaining two. Subsequently, there were three occasions on which the plaintiff represented to the defendant that the delivery deadlines were extended. The cumulative effect of these extensions was that the plaintiff represented that two of the Completed Generators could be delivered by 26 November 2011, while the remaining four could be delivered by 1 January 2012 (see [17] above). However, I find that these representations did not give rise to variations of PO 2.

99 For there to have been a variation, the defendant would have had to furnish consideration for the plaintiff's extension of the deadline. I cannot see what consideration the defendant furnished, however easy it might generally be in a commercial transaction to locate some practical benefit sufficient to constitute the essential element of consideration. The representations may well give rise to waiver or estoppel, but no more than that. In my view, therefore, the delivery deadlines remained as originally agreed, *viz*, four Completed Generators by 1 November 2011 and the remaining two by 1 January 2012. And so, simply by comparing these deadlines with the fact that the First and Second Units were delivered on 16 January 2012, as well as the fact that none of the other four Completed Generators had been delivered as at 24 April 2012, it would seem clear enough that the defendant had breached the terms of PO 2 as to time of delivery.

100 The defendant of course objects to this. Broadly speaking, the defendant advances three arguments as follows:

(a) First, the defendant argues that it was an implied term of PO 2 that delivery of the Completed Generators was possible only a reasonable time (two to three months, according to the defendant [note: 90]) after the plaintiff had delivered to the defendant the LS Alternators which the defendant required to fabricate the Completed Generators. [note: 91] Taking the times at which the plaintiff made delivery of the various LS Alternators as the starting point, the First and Second Units were completed within that reasonable time thereafter; reasonable time had not yet run out in respect of the Third and Fourth Units when the plaintiff terminated PO 2 on 24 April 2012; and reasonable time had not even begun in respect of the Fifth and Sixth Units because the plaintiff had yet to supply the defendant with LS Alternators when it terminated PO 2.

(b) Second, the defendant argues that there was an understanding between the parties that the original delivery deadlines would no longer apply because the plaintiff was at fault for the slow progress of the work under PO 2. The plaintiff was at fault, argues the defendant, because it made a number of changes to the technical specifications and the scope of work that had originally been agreed upon, and because it delayed payment that it ought to have made to the defendant in accordance with the Payment Schedule.

(c) Third, the defendant argues that the plaintiff's conduct after the expiry of the delivery deadline of 1 November 2011 meant that the delivery deadlines stipulated under PO 2 no longer applied. [note: 92] The plaintiff's conduct in this regard consisted of, *inter alia*, encouraging the defendant on 25 November 2011 to "push the extra mile" in its work on the First and Second

Units, [note: 93] and thereafter accepting delivery of the First and Second Units without protest. [note: 94]

101 I consider now the defendant's first argument. The plaintiff's position in its pleadings is that it agreed to supply the defendant with LS Alternators. [note: 95] To that extent, the time at which the defendant received the LS Alternators was beyond its control. For this reason, I can see some force in the contention that the defendant should be allowed a reasonable amount of time after receiving the LS Alternators in which to complete the fabrication and installation works. Hence I am willing to accept for purposes of argument that parties contemplated an implied term in PO 2 providing that the delivery deadline would be no earlier than a reasonable time after the plaintiff delivered the LS Alternators to the defendant. However, I am unable to accept the defendant's assertion that this reasonable time would be two to three months. It has shown me no evidence in support this assertion. At no point when the work on PO 2 was ongoing did the defendant take the position that it would need two to three months after receiving the LS Alternators to deliver the Completed Generators. On the contrary, in the defendant's BSPP (see [86] above), the expected date of arrival of two LS Alternators was stated to be 15 October 2011, while the expected date on which the Completed Generators would be ready for the FAT was stated to be 31 October 2011. This is contemporaneous evidence which shows that the defendant itself accepted that the Completed Generators would be ready for delivery in under three weeks from receipt of the LS Alternators.

102 Further, it appears that the defendant in fact completed installation works within two weeks of receiving the LS Alternators. In an e-mail dated 30 November 2011, [note: 96] Mr Tanabalan said that "all jobs pertaining to installation [in respect of the First and Second Units] were completed" on 12 November 2011. The defendant then argues that even after completion of installation works, much work remained to be done before the Completed Generators could be delivered to the plaintiff, [note: 97] including subjecting the Completed Generators to technical tests. I take it that this is what Mr Tanabalan meant when he testified under cross-examination that installation is "totally a different thing" from the FAT. [note: 98] Even accepting this, however, the fact remains that the defendant's own BSPP states that the Completed Generators would be ready for the FAT 16 days after the arrival of the LS Alternators.

103 Finally, the defendant argues that it would require time to carry out rectification works should the results of the FAT and other tests be unsatisfactory. [note: 99] But given that it was the defendant's obligation to ensure that the Completed Generators were of satisfactory quality by the time of the FAT, the defendant cannot rely on its own shortcomings in this regard to argue that it should be given more time. Ultimately, it is the defendant's burden to prove that a reasonable time between receipt of the LS Alternators and delivery of the Completed Generators would be two to three months. I find that it has wholly failed to do so. In my view, reasonable time would not be any more than a month, and even that would be fairly generous to the defendant.

104 It is true that the plaintiff delivered the LS Alternators for the First and Second Units on 31 October 2011. And I accept that the defendant could not realistically be expected to deliver the First and Second Units by the following day. But I am satisfied that, even if the plaintiff had delivered the LS Alternators much earlier, the defendant could not have met its contractual deadlines anyway. In other words, the plaintiff's delivering the LS Alternators on 31 October 2011 did not in any way cause the defendant's failure to meet the delivery deadlines. I am also satisfied that the reason the plaintiff did not deliver the LS Alternators earlier was that it saw no reason to do so earlier while the defendant's progress on the work was so very much behind schedule. And so, even accepting that there was an implied term granting the defendant reasonable time after receipt of the LS Alternators

in which to deliver the Completed Generators, the defendant would be in breach of the delivery deadlines all the same. The defendant's first argument therefore fails.

105 I move on to the defendant's second argument, which is that it was the plaintiff who caused slow progress on PO 2. As I have said at [80]–[85] above, the defendant has not satisfied me that the plaintiff made changes to the specifications and scope of work as agreed upon by the parties when they entered into PO 1. There is therefore no factual basis in this regard on which to find an understanding between the parties that the delivery deadlines would no longer apply. As for the defendant's allegation that the plaintiff was late in making payment according to the Payment Schedule, even if the allegation is true and the plaintiff is thereby in breach of contract, it does not necessarily follow that the defendant was not itself in breach of contract. After all, it is entirely possible for both plaintiff and defendant to be in breach of contract. The defendant must go further and show that the plaintiff's conduct was such that the delivery deadlines were changed or otherwise no longer applied, *ie*, it must satisfy me that the plaintiff's conduct was such as to give rise to an implied variation of the delivery deadline. If the defendant fails to do so, then howsoever egregious the plaintiff's conduct might have been, the defendant will be found to have been in breach of the delivery deadlines nonetheless, and its recourse against the plaintiff would be confined to counterclaims in respect of the plaintiff's own breaches of contract. And so, even assuming that the plaintiff did not make payment to the defendant in a timely manner, I do not see how that would amount to an implied variation of the delivery deadlines. The defendant's second argument therefore fails.

106 Finally, I come to the defendant's third argument. As far as I could tell, the argument was this: the plaintiff's conduct, as well as a number of other circumstances (which I need not specify), indicated that time was not of the essence in PO 2, and therefore the delivery deadlines agreed upon at the inception of PO 2 no longer applied. This is a *non sequitur*. As I have said above at [43], the phrase "time is not of the essence" is capable of many meanings. The only meaning which would assist the defendant in relation to the issue of whether it committed a breach of contract would be that a variation of the delivery deadlines had been agreed. The plaintiff's conduct and all the circumstances, in my view, did not give rise to any such variation, however much this might have indicated that "time was not of the essence" within some other meaning of that phrase. The defendant's third argument therefore fails.

107 For completeness, I should address the decision of Lee Seiu Kin JC (as he then was) in *National Skin Centre (Singapore) Pte Ltd v Eutech Cybernetics Pte Ltd* [2001] 3 SLR(R) 801 ("*Eutech*"). The defendant cited a passage from that case in support of its third argument. In *Eutech*, the defendant ("Eutech") contracted to provide the plaintiff ("NSC") with a computer system with customised software. The commissioning of the system was to be carried out by 31 August 1999. Eutech failed to do so by that date. Despite that, the parties continued to negotiate and work together with a view to commissioning the system at some later time. Eventually, NSC gave Eutech an ultimatum: commission the system by 11 May 2000. When Eutech repeatedly proposed schedules under all of which commissioning would take place by 28 July 2000, NSC terminated the contract. I need not set out the parties' arguments and the outcome in that case because it is not relevant for present purposes. Rather, I wish to deal with the passage from *Eutech* at [60] which the defendant in the present case quoted:

> Applying the law to the present case, when NSC elected not to terminate the contract after Eutech was in breach by its failure to commission the system on 31 August 1999, but chose to continue with it, time was set at large and was no longer a condition.

Relying on this passage, the defendant argues that "no time [was] fixed for delivery of the

[Completed] Generators", and the defendant's obligation was simply to deliver within a reasonable time. [note: 100] But I fail to see what support the defendant may possibly derive from that passage. One supposes that the defendant relies on the words "time was set at large". I do not express any view on what Lee JC meant by that, but I am certain that he did not mean that the deadline for commissioning the system in that case no longer applied. He could not have meant this, because it is clear from the passage itself that Lee JC thought that Eutech had committed a breach of contract notwithstanding NSC's subsequently choosing to continue the contract.

108 Since I consider that the defendant's objections have no merit, I hold that the defendant was in breach of PO 2 because of its failure to deliver the First and Second Units by 1 November 2011, not to mention its failure to deliver anything else at all.

Whether the breach entitled the plaintiff to terminate the contract

109 I find that the defendant did not renounce PO 2. Its progress on the work was doubtless slow and in breach of contract. In March and April 2012 it did not respond to the plaintiff's repeated requests that it choose a completion date and commit to it. The plaintiff places particular significance on an e-mail dated 4 April 2012 [note: 101] in which Mr Stephenson told Mr Tanabalan, " **We require a conclusive and final test date from Engen Pte Ltd** " [emphasis in original], and the defendant's failure to reply to it. But in my opinion this failure does not amount to the defendant renouncing its contractual obligations. The defendant might not have been willing to commit itself to deadlines, but I find that it remained ready to perform its contractual obligations and continued to do so, albeit at its own glacial pace.

110 In their submissions, the parties unsurprisingly advanced arguments on the question of whether the delivery deadlines were a condition of the contract. However, I do not intend to decide this question. I do not need to, because I am of the view, as I shall shortly explain, that the defendant's breach was a repudiatory breach and that the plaintiff was entitled to terminate PO 2 on that basis. And in any event, even if the deadlines were a condition of the contract, the plaintiff's conduct subsequent to the lapse of the deadlines probably amounted to a waiver by election of its right to terminate on the basis of breach of a condition.

111 And so I turn to the question of whether the defendant's breach was a repudiatory breach. I answer the question in the affirmative. The benefit which the parties intended the plaintiff to receive under PO 2 was delivery of four Completed Generators by 1 November 2011 and a further two by 1 January 2012, in order that it might meet its own contractual obligations to its customer IOEC. As at 24 April 2012, when the plaintiff terminated the contract, the actual consequence of the defendant's breach was this: the defendant delivered two and a half months late two Completed Generators, the quality of which was less than satisfactory in material respects; the defendant failed wholly to deliver two other Completed Generators, the Third and Fourth Units even though almost six months had elapsed since the deadline expired. This was a substantial amount of time considering that the defendant had agreed to deliver five months after the date on which PO 2 was signed; and the defendant *had not even begun* work on the Fifth and Sixth Units even though they had exceeded the deadline for *delivery* by almost four months. The gap between what the defendant promised and what the defendant delivered was immense. For that reason I would hold – looking at the facts alone – that the plaintiff was deprived of substantially the whole benefit which it expected to receive from PO 2.

112 I should mention that the defendant sought to persuade me that the Third and Fourth Units had in fact been completed and were ready for shipment when the plaintiff terminated the contract. To make good this submission, the defendant relied on what was said to be expert evidence given by K Ragupathy ("Mr Ragupathy") and E Naresh Kumar ("Mr Kumar"), both inspection engineers with M/s

Cutech Quality Solutions Pte Ltd since 2011. They each submitted their own inspection report in which they concluded that in their "expert" opinion, the Third and Fourth Units were "ready for shipment".

113 I reject their evidence as being wholly unsatisfactory. The inspections which they performed were perfunctory and their reports were not worth the weight of the paper they were written on. Mr Ragupathy acknowledged under cross-examination that he only looked at the contractual document PO 2 and did not even see the specifications. [note: 102] His inspection was no more than a "visual inspection" and "inventory check". [note: 103] He later conceded that "ready for shipment" required more than just a satisfactory visual inspection, and that he had not conducted any tests of the Third and Fourth Units. [note: 104] For example, when he said that the carbon dioxide equipment and the pressure relief damper were "in order", he meant only that the equipment was physically there and not that it was in working order. [note: 105] Mr Kumar likewise did not see the specifications [note: 106] and conducted only visual inspections on the Third and Fourth Units. [note: 107] He acknowledged that a judgment as to workmanship had to include the question of whether the generators were working or not and that this could only be ascertained by conducting tests, which he did not do. [note: 108] He admitted in effect that he could not accurately say that the overall workmanship was satisfactory and that it met the plaintiff's and IOEC's requirements. [note: 109] Hence I found that the Third and Fourth Units were not at all "ready for shipment" as at 24 April 2012. And given this finding, I was not moved from my view that the plaintiff had been deprived of substantially the whole benefit which it was intended to have received under PO 2.

114 But the defendant cites three English cases in support of its contention that its breach was not a repudiatory breach. I must deal with two of these cases, namely the decision of Judge Richard Seymour QC, sitting in the English Technology and Construction Court, in *Astea (UK) Ltd v Time Group Ltd* [2007] Lloyd's Rep PN 21 ("*Astea*") and the decision of the English Court of Appeal in *Shawton Engineering Ltd v DGP International Ltd and another* [2006] Build LR 1 ("*Shawton*"). I need not deal with the third case, the decision of the English Court of Appeal in *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239, because it merely approves of a portion of *Astea* which the defendant does not rely on. What the defendant does rely on in *Astea* is the following passage at [151]:

> The application of the test of repudiation formulated by Diplock LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* is most straightforward in a case in which no performance at all of the obligations of one of the contracting parties has taken place and there is a straightforward refusal of performance. In any case in which there has been any degree of performance before the alleged repudiation the application of the test requires a qualitative judgment of whether failure to perform the remainder of the obligations of the relevant party will deprive the other party of substantially the whole benefit of the contract judged against the commercial purpose of the contract. It is likely to be necessary to consider not only what has been done, but also the value of that to the other party if nothing else is done. However, a flat refusal to continue performance will probably amount to a repudiation however much work has been done. *On the other hand, if considerable work has been done in performance of a party's contractual obligations and what is alleged to amount to a repudiation is not a flat refusal to perform, but an indication of an intention to continue to perform at a speed considered by the other party to be unreasonably slow, it may be very difficult to conclude that in those circumstances what is being offered will deprive the other party of substantially the whole benefit of the contract.* On the contrary, it may appear that the innocent party will eventually gain exactly the benefit contemplated. The question will be whether, by reason of the time which will need to elapse

before that happens, in commercial terms the party entitled to performance will be deprived of substantially the whole of the benefit which it was intended he should derive from the contract. [emphasis added]

As for *Shawton*, the defendant relies on the following passage therein at [32]:

> ... In the present case, there were originally fixed dates for completion, but it is correctly agreed that variations had rendered those dates inoperable. Instead, the obligation was to complete within a reasonable time. That obligation did not depend on Shawton giving any notice. But such an obligation was not a condition such that breach of it would automatically entitle Shawton to determine the contracts. Shawton could only in law legitimately determine the contracts for delay if either
>
> (a) they gave reasonable notice making time of the essence; or
>
> (b) DGP's failure to complete within a reasonable time was a fundamental breach such that the gravity of the breach had the effect of depriving Shawton of substantially the whole benefit which it was the intention of the parties that they should obtain from the contracts.
>
> *Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense.* So here, I think, where on any view DGP were performing at least in part.
>
> [emphasis added]

I have highlighted in italics the statements of general principle in these passages which do tend to support the defendant's case. I should clarify that, in my understanding, the defendant merely seeks to rely on these statements of *general principle*, and does not seek to draw analogies between the present case and *the facts* of *Astea* and *Shawton*.

115 I begin with *Astea*. Perhaps, as Judge Seymour QC said, it "may be very difficult" to establish a repudiatory breach where the party alleged to be in breach is performing his contractual obligations, albeit at a pace which the other party considers to be unreasonably slow. But the question ultimately to be asked is: whether, by reason of the time which will need to elapse before the benefit is delivered, in *commercial terms* the party entitled to performance will be deprived of substantially the whole of the benefit which it was intended he should derive from the contract. I have no hesitation in answering that question affirmatively on the facts of the present case, based on a comparison between, on one hand, the length of time which the defendant agreed it would have to deliver six Completed Generators, and on the other, the length of time which it took to produce only two of them, the poor quality of the two produced, and the length of time it was taking to produce just two more.

116 I move on to *Shawton*. The statement of general principle there goes only so far as to say that it is intrinsically difficult to establish a repudiatory breach where "time is not of the essence". Conversely, where it cannot be said that "time is not of the essence", it cannot be said that it would be intrinsically difficult to establish a repudiatory breach. What then does "time is not of the essence" mean in this context? Here, regard must be had to the facts of *Shawton* itself. A company, KAT Nuclear, was to construct a processing plant for handling nuclear waste. It placed subcontract orders with the plaintiff, Shawton, for the design and manufacture of a number of packages. Shawton further subcontracted the design work of five of these packages to the defendant, DGP. The critical

fact in *Shawton*, for present purposes, is that although there were completion dates fixed at the outset, there were subsequently significant variations to DGP's work. In the absence of a contractual mechanism for awarding extensions of time in respect of those variations, DGP's obligation became to complete within a reasonable time: at [20]. So, when the Court of Appeal spoke of giving reasonable notice "making time of the essence", that is a reference to replacing the open-ended obligation to "complete within reasonable time" with an obligation to complete within a specified time. It follows that the words "time is not of the essence" in the statement of general principle in *Shawton* simply covers a situation where there are no fixed deadlines and the obligation is to complete within reasonable time.

117 Therefore, the portion of the judgment in *Shawton* on which the defendant relies goes only so far as to say this: where there is no fixed contractual deadline for completion, and the obligation is to complete within reasonable time, and where the party said to be in breach by delay is making an effort to perform the contract, it will be intrinsically difficult to establish a repudiatory breach. Conversely, where there is a fixed contractual deadline, it cannot be said that it would be intrinsically difficult to establish a repudiatory breach. Returning to our case, as I have found, the deadlines agreed at the inception of PO 2 still applied, *viz*, four Completed Generators by 1 November 2011 and two by 1 January 2012. Even accepting the full width of the statement of general principle in *Shawton*, it cannot be said that it would be intrinsically difficult in our case to establish a repudiatory breach on the defendant's part.

118 I therefore hold that the defendant's failure to meet the delivery deadlines in PO 2 constituted a repudiatory breach of PO 2. The plaintiff was entitled to terminate PO 2 when it did. The issue then is whether the plaintiff's conduct was such that it waived its right to terminate the contract (or was estopped from doing so).

Waiver or estoppel

119 There are cases which suggest that a waiver of a contractual deadline has the effect – to put it perhaps inexactly – that the deadline ceases to exist. In *Charles Rickards Ld v Oppenhaim* [1950] 1 KB 616 ("*Rickards*"), the defendant ordered a car from the plaintiff. The agreement was that the body of the car would be completed "within six, or, at the most, seven months". The plaintiff did not deliver within that time but the defendant did not cancel the contract. Instead, the defendant continued to press the plaintiff for delivery of the finished car. Denning LJ (as he then was) said (at 622–623):

> ... I agree that that initial time was waived by reason of the requests that the defendant made after March, 1948, for delivery; and that, if delivery had been tendered in compliance with those requests, the defendant could not have refused to accept the coach-body. ... If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, *he could not afterwards set up the stipulation as to the time against them*. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. [emphasis added]

And in *Astea*, Judge Seymour QC added at [158] that, the deadline having ceased to exist, it had been replaced by an obligation to perform within reasonable time:

> ... I find that the Contract was a single agreement and that it was, following the waiver on the part of Time of any insistence that the Services should be completed by 1 August 2000, *a term of that agreement by implication of law that Astea should perform the totality of its obligations under that agreement within a time which was reasonable* in all the circumstances as they in

fact transpired for performance of those obligations in aggregate. [emphasis added]

It will be noted that Denning LJ in *Rickards* did not distinguish between the concepts of variation, estoppel and waiver. In *Shawton*, however, the Court of Appeal viewed *Rickards* as a case in which "the purchaser had waived the original completion date" (at [32]). I thus proceed on the basis that *Rickards* was a case of waiver and not of variation of the contractual deadline.

120 The point to be made here is this. When one party waives a contractual deadline, and it is said that he is thereafter prevented from setting up the deadline against the other party, or that the other party's obligation then becomes one of completion within reasonable time, it should *not* be taken to mean that there was no breach of contract. In my view, the proper analysis is that there *was* a breach of contract, except that the innocent party has waived *all* his rights arising from that breach. Take for example a breach of a condition. The innocent party has at least two rights arising from such a breach, *viz*, the right to damages to make good any loss suffered as a result of the breach, and the right to terminate the contract. It is perfectly possible to waive the latter right but not the former: indeed, that is the default result if the innocent party elects not to terminate the contract. It is also possible to waive *both* rights. When both rights are waived, in practical terms, the result is the same as if there was no breach of contract at all. But I think it is useful to keep the concepts clear: a breach with a waiver of all rights is still a breach.

121 Returning to this case, the defendant alleges that even if the plaintiff had a valid right to terminate PO 2 for breach of contract (which the defendant does not accept), the plaintiff waived that right by its conduct. What is not clear is whether the defendant alleges that the plaintiff waived *all* its rights in relation to the defendant's breach of contract. Having held that the defendant did commit a breach of contract by failing to deliver the Completed Generators by the delivery deadlines, I find no evidence whatsoever that the plaintiff waived all its rights arising from that breach. The plaintiff's conduct was most certainly not such that it could be described as treating the delivery deadlines as never having existed. On the contrary, there was an express reservation of the plaintiff's rights in a letter from its solicitors to the defendant dated 30 November 2011. [note: 110] And from January 2012, the plaintiff constantly reminded the defendant that it had exceeded the deadlines and impressed upon it the urgency of completion. [note: 111] Therefore, I need only consider whether the plaintiff waived its right to terminate the contract and not whether it waived any other right, such as a right to claim damages.

122 The evidence clearly supports the defendant's submission that the plaintiff treated the contract as alive after the delivery deadlines had lapsed on 1 November 2011. In my view, the plaintiff continued to treat PO 2 as alive as late as April 2012. I do not think I need to go into the evidence in great detail. It suffices to say, in general terms, that the plaintiff persistently pressured the defendant to carry out its work on the Third and Fourth Units and to fix dates for testing them.

123 What then is the legal effect of the plaintiff's conduct in this regard? A right to terminate a contract may arise because there has been a breach of a condition, or it may arise because there has been a repudiatory breach. In other words, on a given set of facts, there can be a right to terminate for breach of condition (regardless of the consequences of this breach) *as well as* a right to terminate for repudiatory breach (because of the consequences of this breach). On our facts, there is a strong case for saying that the plaintiff by its conduct precluded itself from taking the position that the defendant's breach of PO 2 was a breach of condition entitling the plaintiff to terminate PO 2 immediately upon that breach and regardless of its consequences. To be precise, this is a waiver by election. I need not and do not decide this point, because as I have said I need not and do not decide if the delivery deadlines were in fact a condition of the contract in the first place.

124 But I do not think it can be said that the plaintiff irrevocably waived its right for all time to terminate PO 2 for *repudiatory breach*. Since determining whether a breach is a repudiatory breach necessitates an assessment of the actual consequences of the breach, parties must be entitled to wait and see what these consequences actually are: see *RDC Concrete* at [100]. Hence, it is not at all inconsistent for the innocent party to treat the contract as alive post-breach and then to terminate it *subsequently* when it transpires that the consequences of that breach operate to deprive him of substantially the whole benefit of the contract. In this case, the plaintiff's conduct in treating PO 2 as alive can at best be an election to affirm the contract *for the time being*. It cannot be an election to affirm the contract *for all time, regardless of the consequences of the breach as they became apparent over time*. Therefore I hold that, however much the plaintiff's conduct might amount to a waiver by election of its right to terminate PO 2 for breach of condition, assuming the term breached was indeed a condition, it did not amount to a waiver by election – or any other waiver – of its right to terminate PO 2 for repudiatory breach.

125 As for estoppel, the defendant's pleadings suggested that it relied on that as a defence. The plaintiff accordingly advanced arguments relating to estoppel in its closing submissions. But the defendant then seemed to say in its reply submissions that it was not relying on promissory estoppel. [note: 112] I should say that this appeared to me a reason for making clear the distinctions between variation, waiver and estoppel as I have done. Nevertheless, I have considered the question of whether it may be said the plaintiff was, by its conduct, estopped from terminating the contract on the basis of a repudiatory breach on the defendant's part. I am satisfied that it should be answered in the negative.

126 As a result of the foregoing analysis, I am unmoved from my holding that the plaintiff was entitled to terminate PO 2 on 24 April 2012. It follows that the defendant's counterclaim for wrongful termination must fail.

Plaintiff's remedies

Damages

127 The plaintiff claimed, under Head of Relief 9, damages to be assessed. Having found that the defendant is in breach of contract, I order that there be an assessment of all of the plaintiff's damage arising out of the defendant's breach of PO 2.

Specific sums of money

128 In addition to damages to be assessed, the plaintiff claims specific sums of money from the defendant. Under Head of Relief 5, the plaintiff claims a total of US$30,000 (excluding GST) arising from late delivery of the First and Second Units. Under Head of Relief 6, the plaintiff claims a total of US$63,000 (excluding GST) on the basis that it paid this sum to the defendant in respect of the First and Second Units despite the defendant not being entitled to this sum pursuant to the Payment Schedule under PO 2. Under Head of Relief 7, the plaintiff claims US$213,000 as additional costs which it incurred to address the deficiencies in documentation and engineering. I deal with each of these claims in turn.

129 I first consider Head of Relief 7 because it can be disposed of most easily. This Head of Relief sounds in damages. The short answer, therefore, is that the plaintiff will have to prove at the assessment of damages that it incurred those additional costs which it says it did, and that US$213,000 is the sum which it ought to recover. It is not my place at this stage to grant this specific sum sought. Accordingly I decline now to grant the plaintiff's claim under Head of Relief 7. I

leave it to the plaintiff to satisfy the court at the assessment stage that this sum is recoverable both as to principle and as to quantum.

130 The claim under Head of Relief 5 appears to be a claim under the liquidated damages clause in PO 2, which provides as follows: [note: 113]

> Should the [defendant] fail to deliver the equipment at the required delivery date, liquidated damages shall be paid by the [defendant] to [the plaintiff] as follows:
>
> - 5% of the maximum value of each unit is applicable on each unit (i.e. US$15,000 per unit). All 4 units must be delivered at the same time prior to 1st November 2011 and 2 units delivered prior to 1st January 2012 and in the event that 1 or more of the units of each delivery are delivered late then the full Liquidated Damages for that shipment value of US$60,000 for shipment one of 4 units and US$30,000 for shipment two of 2 units shall apply.

It is well-settled that when a contractual term provides for liquidated damages payable in the event of a breach, this term is enforceable only to the extent that the liquidated damages are a genuine pre-estimate of the loss flowing from that breach of contract: see the Court of Appeal decision of *CLAAS Medical Centre v Ng Boon Ching* [2010] 2 SLR 386 at [63]; the decision of Andrew Ang J in *Max Media FZ LLC v Nimbus Media Pte Ltd* [2010] 2 SLR 677 at [25]; and the decision of Belinda Ang Saw Ean J in *Pun Serge v Joy Head Investments Ltd* [2010] 4 SLR 478 at [40]. It should be noted that this last-mentioned case considered but did not accept a different test of "commercial justification" (at [42]).

131 I have already ordered that there be an assessment of the plaintiff's damages arising out of the defendant's breach of PO 2. By that order, the plaintiff will be compensated for the actual, provable pecuniary loss occasioned to it by the defendant's late delivery of the First and Second Units. To the extent that the liquidated damages claimed represent a genuine pre-estimate of the plaintiff's loss flowing from late delivery of the First and Second Units, allowing such a claim would appear *prima facie* to permit double recovery in respect of the same loss. To the extent that the liquidated damages claimed do not represent a genuine pre-estimate of loss, the liquidated damages clause would not be enforceable. Accordingly, I decline now to grant the plaintiff's claim for US$30,000 now under Head of Relief 5. The plaintiff can ventilate in the assessment of damages all issues related to the plaintiff's right to claim damages under the liquidated damages clause, including whether the clause is enforceable and whether liquidated damages are recoverable instead of or in addition to damages for its actual pecuniary loss.

132 The plaintiff's claim under Head of Relief 6 proceeds thus. The plaintiff paid the defendant US$378,000 and US$567,000, being the first and second stages under the Payment Schedule. This amounted to 50% of the contract price. The plaintiff subsequently paid the defendant US$315,000 (see [19] above), being the remaining 50% of the contract price in respect of both the First and Second Units. In effect, the First and Second Units were fully paid for. However, the plaintiff argues, the defendant is not entitled to the fourth and final stage of payment under the Payment Schedule (being 10% of the contract price) in respect of the First and Second Units because it did not submit the required "final documentation". The plaintiff therefore seeks a return of that fourth and final stage paid in respect of the First and Second Units, amounting to a total of US$63,000 (US$31,500 per Completed Generator).

133 In my view, the plaintiff is not entitled to recover that sum. It did not make the payment under

duress, nor did it do so under any mistake of fact or law. And I do not think that there was total failure of consideration, since the plaintiff did receive delivery of the First and Second Units. Perhaps, in relation to total failure of consideration, the plaintiff might argue that each stage of payment under the Payment Schedule must be assessed separately, in accordance with the principle of severability or apportionment of consideration: see the speech of Morritt LJ in the English Court of Appeal decision of *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 at 227E–F and the decision of the Privy Council in *Murray Stanley Goss and another v Laurence George Chilcott* [1996] AC 788 at 797G–798F. The plaintiff might then argue that the consideration in respect of the fourth and final stage of payment had failed totally notwithstanding that the consideration in respect of the previous three stages had not failed totally. But I reject this argument as well. The sum of US$315,000 must be characterised as indivisible consideration for one Completed Generator, even though this sum was to be paid in stages. Otherwise, the absurd conclusion would be reached that 30% of this sum (the first and fourth stages), *ie*, US$94,500, was consideration for nothing more than documentation. This claim fails in law and is not one which need be deferred to the assessment of damages stage.

134 For these reasons, I decline to grant the plaintiff's claims under Heads of Relief 5, 6 and 7.

Whether the plaintiff committed breach of contract

The plaintiff's obligation to make payment

135 The defendant alleges that the plaintiff committed a breach of PO 2 because it failed to make the second stage of payment in accordance with the Payment Schedule. The defendant alleges that, having received delivery of the Caterpillar Generators on or about 21 July 2011, the plaintiff was obliged to make the second stage of payment in the amount of US$567,000 by the following banking day, *viz*, on or about 22 July 2011. But the plaintiff paid the defendant US$100,000 on 1 September 2011 and US$467,000 on 27 September 2011 (see [15] above).

136 In my view, the plaintiff was not in breach of contract. Going by the terms of PO 2, the Payment Schedule (set out at [9] above) provides that the second stage was due, not the banking day after arrival of the Caterpillar Generators, but the banking day *after the plaintiff received payment from IOEC*, such payment from IOEC being conditional on arrival of the Caterpillar Generators and "submission of proof of ownership". The defendant has not shown that the plaintiff made payment to it more than one banking day after receiving the corresponding payment from IOEC.

ABS certification

137 In its pleadings, the defendant alleges that the plaintiff was in breach of contract "when it required the [defendant] not to use ABS certificates though it was part of the original agreement". [note: 114] However, it has not elaborated on this allegation anywhere in its submissions. It has not shown me what the original agreement as to ABS certification was; it has not shown me that the plaintiff required the defendant not to use the same; and it has not shown me what loss it has suffered as a result. In the circumstances, I am unable to hold that the plaintiff was in breach of contract in this regard.

The plaintiff is entitled to delivery up of the items sought

138 Under Heads of Relief 1 and 2, the plaintiff seeks delivery up of the following:

(a) the Third and Fourth Units (including the LS Alternators installed in them) and the two

original SR4 Alternators removed from them;

(b) two Caterpillar Generators (which were intended to be used in the Fifth and Sixth Units) together with their two SR4 Alternators; and

(c) the two SR4 Alternators removed from the Caterpillar Generators which were used in the First and Second Units.

139 The plaintiff relies on the Letter of Transfer (alluded to at [14] above) to establish its entitlement to delivery up of these items. The Letter of Transfer reads as follows:

Dear Sirs,

Please note that [the defendant] do hereby transfer ownership of the below listed Caterpillar C18 Diesel marine engine packages including Caterpillar engine, SR4 alternator, skid and systems to [the plaintiff].

Said transfer is part of the stage payment process forming the second payment to [the defendant] by [the plaintiff] of the sum of US$567,500 being 30% of the total Contract price of US$1,890,000 and forms part of the terms and conditions of above purchase order. ...

Said payment to be made following the submission of this Letter of Transfer and upon receipt of monies from the client IOEC. It is understood by both parties that payment to [the defendant] shall be made within one working day of receipt of payment from client into [the plaintiff's] bank account.

...

The Letter of Transfer goes on to list the serial numbers of the six Caterpillar Generators as well as those of the six SR4 Alternators.

140 The plaintiff takes the position that, according to the Payment Schedule, the defendant would be entitled to the second stage of payment only after it had transferred ownership in the Caterpillar Generators to the plaintiff. According to the Payment Schedule, the second stage of payment would be made following the "arrival of the [Caterpillar Generators] and submission of proof of ownership". The plaintiff argues that "proof of ownership" here refers to proof of the plaintiff's ownership. It points to the third of three "additional conditions" in PO 2, [note: 115] which provides: "Documentary evidence of purchase of 6 [Caterpillar Generators] to be provided within 10 working days from payment of initial down payment". The plaintiff argues that this "additional condition" already obliged the defendant to produce proof of *the defendant's* ownership in the Caterpillar Generators, and that it cannot be that "proof of ownership" referred to in the Payment Schedule likewise means proof of the defendant's ownership, as this would entail producing the same proof twice and so give rise to a redundancy, which parties cannot have intended. Hence, "proof of ownership" must refer to proof of *the plaintiff's* ownership in the same. The Letter of Transfer was then the proof of the plaintiff's ownership in the Caterpillar Generators, argues the plaintiff; and ownership having been transferred to it as required by the terms of PO 2, it is entitled to delivery up of the items as claimed.

141 I do not find the plaintiff's arguments convincing. On a plain reading of the Payment Schedule, "arrival of the [Caterpillar Generators]" can only mean arrival at the defendant's workshop. In the absence of any reference to specific parties in the conjunctive clause "arrival of the [Caterpillar Generators] and submission of proof of ownership", I find it difficult to believe that it was intended

that each part of the clause should refer to different parties, *ie*, arrival at the defendant's workshop but proof of the plaintiff's ownership. Further, I think that the plaintiff's reliance on the "additional conditions" is misplaced. Requiring the defendant to furnish documentary proof of purchase of the Caterpillar Generators, as the "additional conditions" does, is quite different from requiring the defendant to furnish proof of its ownership of them. I do not think that the "additional conditions" required the defendant to furnish this latter proof, and hence no redundancy, in my judgment, is created by interpreting "proof of ownership" to mean proof of the defendant's ownership in the Caterpillar Generators.

142 However, the plaintiff's claims for delivery up of the items does not therefore fail. The Letter of Transfer reflects the defendant's acceptance of the plaintiff's offer to "transfer ownership" in the Caterpillar Generators from the defendant to the plaintiff. With the Letter of Transfer, IOEC would release payment to the plaintiff, and the plaintiff would then make the second stage of payment to the defendant, resulting in the defendant gaining the practical benefit of receiving that payment. In this way, consideration flowed from the plaintiff to the defendant. All the ingredients of a binding contract were therefore present. Even though the defendant might not have been *obliged* under the terms of PO 2 to transfer ownership in the Caterpillar Generators to the plaintiff, I see no reason why there cannot have been an enforceable *contract* which effected precisely that transfer.

143 The defendant, in turn, relies on an e-mail from Mr Law to Mr Tanabalan dated 1 August 2011, which was in the following terms:

> Balan,
>
> As far as I can tell there is no way around it other than to assign ownership to [the plaintiff] and then [the plaintiff] to IOEC, this is their way of retaining some control over their monies paid out. At the end of the day the units are not leaving the workshop until 90% of the monies are paid. It is understandable that they are a little nervous because they have no legal standing outside of their own country.
>
> I think we just need to submit a joint declaration that ownership of the 6 units is transferred to IOEC upon receipt of the second stage payment (30%) this will enable them to release the 30% and for us to continue with the fabrication.
>
> On completion and inspection the 6 units will not be received until the next stage payment of 40% is reached.
>
> This way we keep the units until the 90% monies are paid.
>
> I really don't think giving them ownership is a big problem, it isn't as though they could come and take them away, that is not possible.
>
> Eddie
>
> [emphasis added]

The defendant argues that the intention of the parties was not to transfer ownership to the plaintiff, but rather to transfer ownership to IOEC. It argues that the plaintiff therefore cannot contend that it is the "true owner" of the Caterpillar Generators [note: 116] and therefore has no right to demand or secure delivery up. The defendant says that it would not have agreed to sign the Letter of Transfer had it known that the plaintiff would make use of it to claim ownership of the Caterpillar Generators.

[note: 117]

144 I should first touch on the possible arguments which I understand the defendant *not* to have made. The defendant does not appear to argue that it signed the Letter of Transfer under duress. In any event, having regard to the principles outlined by Quentin Loh Sze-On J in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 at [42]–[52], which I accept as correct having heard no argument on the point, I am satisfied that there was no duress. The defendant does not appear to argue that Mr Law's 1 August 2011 e-mail contained any misrepresentation or gave rise to any estoppel. In any event, I am satisfied that this e-mail contained neither a false representation nor a representation giving rise to an estoppel. When Mr Law assured Mr Tanabalan that IOEC would not be able to take the Caterpillar Generators away any time it liked, this was on the assumption that the defendant would keep within the contractual timelines. The defendant not having done so, Mr Law's assurances to Mr Tanabalan cannot operate to negate any entitlement of the plaintiff arising out of the parties' agreement as contained in the Letter of Transfer.

145 And so I turn to the defendant's argument that the plaintiff is not entitled to delivery up of the items as claimed because it is not the true owner of those items. In my judgment, this argument is without merit. It overlooks the concept of relativity of title in the law of personal property. This concept was briefly adverted to by Steven Chong Horng Siong J in *Wong Seng Kwan v Public Prosecutor* [2012] 3 SLR 12 at [29] when he quoted a passage from an academic treatise, which states as follows:

> If you make a ring from your own hair, there is no doubt whatever that it is yours and that you have a better right to it than anyone else. If you lose it, you can claim it from the finder. But in the absence of any claim by you, the finder is treated as having a title good against everyone. You have a better right to possess the thing than does the finder, but the finder has a better right to possess it than anyone else.

The point to be made here is that it may not only be the true owner of an item who is entitled to delivery up of it. A party who is not the true owner may be entitled to delivery up *as against another party with a weaker right to possess that item*. And so what must be considered here is the strength of the plaintiff's right to possess the items *relative to* the defendant's right to the same.

146 At the outset of the analysis, a distinction should be drawn between the concepts of "interest" and "title". *Goode on Commercial Law* (Ewan McKendrick ed) (LexisNexis, 4th Ed, 2009) ("*Goode*") explains the concepts as follows (at p 34):

> ... A person's interest in an asset denotes the quantum of rights over it which he enjoys against other persons, though not necessarily against *all* other persons. His title measures the strength of the interest he enjoys in relation to others. [emphasis in original]

What then is "ownership", that which the parties expressed themselves as having transferred? According to *Goode*, it is (also at p 34):

> ... conventionally defined as the residue of legal rights in an asset remaining in a person ... after specific rights over the asset have been granted to others. A person in whom such residue of rights is vested is said to have an *absolute interest* in the asset. By contrast, one who enjoys merely specific rights, eg possession under a pledge, lien or other bailment, has only a limited interest. [emphasis added]

147 In the present case, then, what the defendant agreed to transfer to the plaintiff was the absolute interest in the Caterpillar Generators. On the assumption – which I have no reason to doubt – that no specific rights over the Caterpillar Generators had been granted to third parties, the absolute interest would consist of the full range of legal rights in those items, including the right to possess. Of course, the defendant could transfer to the plaintiff only what it had. On the supposition – which I have no reason to believe is true – that the defendant had second-best title to the absolute interest, it could only transfer to the plaintiff that second-best title, which by definition can be defeated by the party with the best title. But the point is that the defendant transferred to the plaintiff *the full extent of its title to the absolute interest, whatever the strength of that title might be*. Having done so, the defendant's title to the absolute interest would necessarily be weaker than that of the plaintiff. For this reason alone, the plaintiff's right to possess the items is stronger than that of the defendant. The plaintiff might then have transferred to IOEC its title to the absolute interest, which would mean that IOEC would have a better right to possess the items than the plaintiff; but as I have said, the concept of relativity of title means that, in a dispute between the plaintiff and the defendant, the relative strength of a third party's title to the absolute interest is irrelevant.

148 The defendant advances a further argument, which is that, by seeking delivery up, the plaintiff is seeking specific enforcement of the contract. It then argues that the plaintiff cannot claim specific performance of a contract which it has terminated. I reject this argument without hesitation. The plaintiff is not seeking specific performance; it is seeking enforcement of its superior right as against the defendant to possess the items. This right derives not from PO 2 but from a collateral agreement between the parties to transfer ownership. The termination of PO 2 does not affect the right. I should say, though, that the converse is not necessarily true – while the contract was still alive (or perhaps only before the defendant breached the delivery deadlines), the plaintiff's superior title to the absolute interest would not necessarily mean that it had a better right to possess the items than the defendant. This is because, while the contract was alive (or perhaps only prior to breach), it might be said that the defendant was granted the specific right to possess the items for the purposes of completing its work under PO 2. This would mean that the absolute interest to which the plaintiff had the best title would consist of all legal rights over the items *except* that specific right to possess which had been granted to the defendant.

149 But PO 2 has in fact been terminated. And so in my view the plaintiff's superior title to the absolute interest gives it a better right to possess the Caterpillar Generators than the defendant. On that basis, I hold that the plaintiff is entitled to delivery up of two Caterpillar Generators (which were to be used in the Fifth and Sixth Units) and the SR4 Alternators therein, as well as all the remaining SR4 Alternators in the defendant's possession. I understand that the defendant sold one of these SR4 Alternators. I order that the defendant pay to the plaintiff the proceeds of that sale in lieu of delivery up of that SR4 alternator. I note that Belinda Ang Saw Ean J in *Antariksa Logistics Pte Ltd and others v McTrans Cargo (S) Pte Ltd* [2012] 4 SLR 250 declined to order delivery up to plaintiffs who succeeded in an action for conversion on the basis that delivery up was available only in an action for detinue: at [156]–[159]. But I do not think that this decision is authority for an argument – which the defendant did not advance – that I should not or cannot make an order for delivery up. I say this having regard to the decision of Chan Sek Keong J (as he then was) in *Hilti Far East Pte Ltd v Tan Hup Guan* [1991] 1 SLR(R) 711, in which an order for delivery up was granted in favour of a party which was entitled to possession of a car: at [3] and [23].

150 There is, however, a potential complication in the plaintiff's claim for delivery up of the Third and Fourth Units. This is that the Third and Fourth Units, in their present state of completion, comprise not just the Caterpillar Generators (which the plaintiff is entitled to possess by virtue of the transfer of ownership) and the LS Alternators (which the plaintiff is entitled to possess by virtue of its

never having relinquished title to any interest therein to the defendant), but also other components which do not appear to have been the subject matter of any similar transfer of ownership. In Mr Podador's bi-weekly reports, these components were recorded as having been installed into the works-in-progress that the Third and Fourth Units then were. [note: 118] Examples of the components include exhaust silencers and electrical equipment on the unit control panel. Despite this, my view is that the plaintiff is entitled to delivery up of the Third and Fourth Units. This is because it has acquired the right to possess those components by the doctrine or principle of accession, which has been described by A G Guest, "Accession and Confusion in the Law of Hire-Purchase" (1964) 27 MLR 505 ("Guest") at 507 in the following terms:

> ... if the chattel of one person is united to the chattel of another by labour, forming a joint product, the owner of the principal chattel will acquire the right of property in the whole by right of accession.

In other words, where the doctrine of accession applies, the owner of what has been called the "principal chattel" will acquire ownership rights over what have been called "minor chattels" which have been annexed to his principal chattel. Guest proceeds to consider the question of "what degree of annexation is necessary to constitute an accession", and puts forward four possible tests (at 507–510):

> (a) the test of "injurious removal", under which accession applies when the minor chattel is added or attached to the principal chattel so that the former cannot be separated without the destruction of or serious injury to the whole so formed;
>
> (b) the test of "separate existence", under which accession applies when the minor chattel which has been added or attached to the principal chattel has ceased to exist as a separate chattel;
>
> (c) the test of "destruction of utility", under which accession applies when removal of the minor chattel would destroy the utility of the principal chattel; and
>
> (d) the test of "the degree and purpose of annexation", which is a highly fact-specific test which takes into account factors such as the nature of the chattels, the degree of annexation, the ownership of the minor chattel and the intention of the parties. *Prima facie*, minor chattels attached to the principal chattel would be treated as accessions thereto, unless it was shown that the minor chattels were intended only to be temporary attachments and not integral or permanent parts of the principal chattel.

151 Before I go further, I should address the decision of L P Thean J (as he then was) in *The "Safe Neptunia"* [1988] 1 SLR(R) 314. Citing a number of cases from the Australian states – specifically, two from New South Wales and one from Victoria – Thean J agreed that the general rule was that property rights over minor chattels would not pass to the owner of the principal chattel if the owner of the minor chattels did not intend those rights to pass. He further said that the doctrine of accession should apply only when it would be "impracticable" to apply the intention-based general rule, and that it was for the owner of the principal chattel to show that the "necessity of the case" required the application of the doctrine: at [14]–[17]. I do not doubt the correctness of these principles approved of by Thean J. Primacy should be accorded to the intentions of the parties – or perhaps just the intention of the owner of the minor chattel – but this is provided that such intention or intentions is or are clear and unequivocal. Where, on the other hand, the intention is not apparent, then the default rule – or perhaps it is more of a presumption – is that the rights of the owner of the minor chattel do not pass to the owner of the principal chattel, unless it would be impracticable to

apply this default rule and so necessary to apply the doctrine of accession.

152 In this case, there is no indication that either the plaintiff or the defendant ever formed any intention as to whether the defendant's rights over the components incorporated into the Third and Fourth Units would pass to the plaintiff. Hence the default rule would be that the plaintiff has no better title to those components than the defendant, unless it would be impracticable to apply the default rule and so necessary to apply the doctrine of accession. And in my view, the question of when it would be impracticable to apply the default rule and so necessary to apply the doctrine of accession depends on the question of what degree of annexation (of the minor to the principal chattel) is required to constitute accession. For instance, if the "injurious removal" test were to be adopted, then it would be said that it would be impracticable to apply the default rule and so necessary to apply accession whenever the minor chattel is so attached to the principal chattel that the former cannot be separated without serious injury to the whole so formed. And so I must decide which test to apply.

153 Having examined the authorities, I take the view that a flexible, fact-specific test is called for. This might not be identical to the fourth test which Guest describes, but the broad idea is the same, *ie*, keep the test flexible so as to do practical justice based on the particular circumstances of each individual case. The characteristics of the owners of the respective chattels will probably be very relevant: for instance, what they know, and whether either of them can be said to be a "wrongdoer" (and it may matter whether the wrongdoer was "innocently" or wilfully so). The owner of the principal chattel might have had it wrongfully appropriated from him by another, or he might have wrongfully appropriated the minor chattels. The owner of the minor chattels might be a contractor attaching those minor chattels to a principal chattel which he knows full well belongs to another, or he might be a consumer who attaches minor chattels to a principal chattel which he believes to be his but to which a third party (of whom he has no knowledge) has better title. The first three tests described by Guest are more rigid in the sense that they invariably tend to favour either one of the owners – the one most favourable to the owner of the principal chattel is that of "destruction of utility" while the one most favourable to the owner of the minor chattel is that of "separate existence"; and "injurious removal" lies in the middle. However, while it may in some instances be right to favour one owner, there will be other instances in which it is right to favour the other. Everything in reality depends on the facts of each case.

154 In my opinion, adopting a flexible and fact-specific test in the doctrine of accession would be consistent with the approach taken in cases which have had to determine the relative title of two or more owners whose goods have been mixed together. In the House of Lords decision of *Frank Stewart Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680 ("*Sandeman*"), the goods mixed together were bales of jute; while oil belonging to different parties was mixed together in two English cases, namely *Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* [1988] 1 QB 345 ("*Indian Oil*"), a decision of Staughton J (as he then was), and *Glencore International AG and others v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284 ("*Glencore*"), a decision of Moore-Bick J (as he then was). While Staughton J opened his judgment in *Indian Oil* by explaining the Roman law concepts of *confusio* and *commixtio*, the approach underlying all these three English cases appears to be one of doing practical justice rather than rigid adherence to fixed rules: see *Sandeman* at 695, *Indian Oil* at 370H and *Glencore* at [184]. It should be noted that these were cases involving *physical* goods. I say nothing about cases involving the mixture of intangibles such as the debts represented by money notionally "in" a bank account.

155 I now elaborate on the authorities on the doctrine of accession to which I had regard. In *Jones v De Marchant* (1916) 28 DLR 561, a decision of the Manitoba Court of Appeal in Canada, a wife bought 18 beaver skins with her money. Her husband took those skins from her and, together with

four additional skins provided by him, had a coat made which he then gave to his mistress. The court held that doctrine of accession applied. That meant that the wife had better title to the coat than the mistress because it would be "most unjust" if the wife had no remedy for the loss of her beaver skins (at 565). In *Thomas v Robinson* [1977] 1 NZLR 385, a decision of Speight J in the Supreme Court of New Zealand, a consumer bought a car unaware that it was the subject matter of a hire-purchase agreement, *ie*, that the seller was merely a hirer and not the owner. The consumer made improvements to the car, including the replacement of certain components therein. The owner subsequently repossessed the car. Speight J held that the doctrine of accession did not apply, and that the consumer had better title to the minor chattels which had been used to replace the original components in the car. In *McKeown v Cavalier Yachts Pty Ltd and another* (1988) 13 NSWLR 303 ("*McKeown*"), a decision of Young J (as he then was) in the Supreme Court of New South Wales, the plaintiff was the owner of a laminated hull. It was agreed that the second defendant would build a yacht from this hull and the second defendant laboured to that end, attaching, *inter alia*, the deck, deckliner and engine to the hull. When the work had progressed to a point where the yacht was almost ready to be sailed, a dispute arose as to ownership of the yacht. Young J held that the doctrine of accession applied and that the plaintiff owned the yacht.

156 The present case is most like *McKeown*. I am of the view that the Caterpillar Generators used in the Third and Fourth Units were the principal chattels, and the components installed or attached thereto were the minor chattels. Like the second defendant in *McKeown*, the defendant in this case installed the minor chattels knowing that the principal chattels belonged to the plaintiff (or at least to someone other than the defendant) and that the final product, the Completed Generators, would be delivered to the plaintiff and thereon to IOEC. This case is not one in which the owner of the minor chattels did not know that a third party had a better title to the principal chattel. And in this case, to remove the installed components would be to destroy what would, with more work, become working Completed Generators. Accordingly, I follow the result in *McKeown* and say that, by the doctrine of accession, the plaintiff's title to the Caterpillar Generators gives it title to all the components installed in the Third and Fourth Units. I express no view on whether I should, in the present case, follow the test which Young J thought to be applicable in *McKeown*, *viz*, the "injurious removal" test (at 311E). I content myself with saying that the present case appears to me sufficiently similar to *McKeown* in the material facts to warrant reaching the same result without more.

157 For the foregoing reasons, I hold that the plaintiff is entitled to delivery up of all the items that it claims under Heads of Relief 1 and 2.

Whether the plaintiff is entitled to an indemnity against claims by IOEC

158 I consider now the plaintiff's claim under Head of Relief 8 for a declaration that the defendant is liable to indemnify it against claims by IOEC. In my view, the declaration sought is premature and too wide. I have ordered that the plaintiff's damages be assessed. It is not appropriate for me at this stage to make an award holding the defendant liable for unliquidated and unquantified damages that may or may not be sustained. In other words, it is not appropriate now to make a decision as to whether the plaintiff's damages to be assessed will or will not include a component to compensate the plaintiff for its monetary liability to IOEC. If the plaintiff wishes to recover damages for loss arising out of claims made against it by IOEC, it will have to prove in the assessment that such loss has been suffered and that such damages are recoverable on the usual contractual principles.

The defendant's counterclaim arising outside of PO 1 and PO 2

159 As mentioned above, one of the defendant's counterclaims concerns a contract between the plaintiff and the defendant that has nothing to do with PO 1 and PO 2. This was a contract for the

defendant to fabricate and deliver to the plaintiff by 3 December 2010 one containerised generator for the Single Buoy Mooring Deep Panuke project, in consideration of which the plaintiff would pay the defendant US$900,000. The contract was executed by way of purchase order AG65-20100032-REV00 dated 7 September 2010 [note: 119] ("PO SBM"). The payment due from the plaintiff to the defendant under PO SBM was to be made in stages according to the following schedule:

> Payment shall be made on the next Banking Day after receipt of the payment from [the plaintiff's] Client (SBM) following receipt of invoice and achievement of the following milestone(s):
>
> - 30% upon receipt of Supplier's unconditional Purchase Order acknowledgement
> - 10% upon Lloyd's Register approval of container design
> - 10% upon 50% schedule completion
> - 15% upon completion of container ready for packaging
> - 15% upon receipt of alternator
> - 15% upon successful FAT & Issue of Lloyd's Register Release Certificate
> - 5% upon issue of Vendor Data Books & Lloyd's Register acceptance

The plaintiff has since paid the defendant 90% of the contract price.

160 In brief, the defendant claims:

> (a) the sum of US$96,300 being the remaining 10% of the contract price, and
>
> (b) the sum of S$323,348.56 (*viz*, S$290,588.46 + US$12,700 + US$12,500) being expenses for work carried out at the plaintiff's request which was not agreed to in PO SBM.

161 The plaintiff, in its Reply and Defence to Counterclaim, purported to institute a counterclaim of its own in relation to PO SBM. By this counterclaim, the plaintiff alleged that it had suffered loss as a result of the defendant's unsatisfactory workmanship under PO SBM, and sought damages to compensate it for that loss. I have no hesitation in dismissing this counterclaim of the plaintiff's. It appears to me to have been included as an afterthought by way of defence against the defendant's PO SBM counterclaim. And so I turn now to consider the defendant's claims.

Remaining 10% of the contract price

162 The defendant argues that it is entitled to this sum because it has fulfilled all its obligations under PO SBM. [note: 120] It argues that the plaintiff's "main concern" was that the containerised generator should be able to supply power to a rig to facilitate a sea voyage from Abu Dhabi to Canada, the corollary of this being that the plaintiff was not seriously concerned about anything else, *eg*, the HVAC and Fire & Gas systems. [note: 121] The defendant then argues that the containerised generator which it delivered to the plaintiff successfully performed that function of facilitating the rig's voyage. [note: 122]

163 I cannot accept the defendant's argument. I cannot accept that the plaintiff's concerns were so narrow. Instead I am satisfied that the defendant failed to complete all its work under PO SBM in

that numerous technical problems plagued the containerised generator even after it had been delivered to the plaintiff and thereon to the plaintiff's own client. The fact that the generator is able to function at a certain level is not an indication that the defendant has fulfilled its entire scope of work under the contract. Further, I accept the plaintiff's argument that the defendant is not entitled to the remaining 10% because it has not achieved the milestone which it was obliged to achieve in order to trigger payment of this stage under the contractual schedule. Quite simply, the defendant has failed to provide all of the concluding documentation, in particular the Lloyd's Register Release Certificate. I reject the defendant's contention that it was the plaintiff's responsibility to obtain this document. Accordingly, I hold that the defendant is not entitled to the remaining 10% of the contract price.

Expenses incurred by the defendant

164 The defendant argues that the plaintiff asked that it carry out work which was outside the scope of PO SBM. [note: 123] It argues that it thereby incurred expenses amounting to S$290,588.46. [note: 124] The work alleged to have been requested by the plaintiff was as follows:

(a) install a hydraulic starter in the generator package;

(b) install bigger dampers in the HVAC system;

(c) fabricate a skid frame;

(d) install Canadian-certified parts and equipment; and

(e) install additional safety equipment such as beacon, loudspeaker and current transformer coil.

I reject the defendant's allegations. It did put forward evidence that it did the work which it said it did, but it failed entirely to establish that this work was not within the scope of PO SBM. The defendant's witnesses, of course, gave evidence that the work was outside the scope of the contract, but I did not find their evidence to be credible and the defendant was unable to point to any contemporaneous documentation to support their bare assertions.

165 In addition, the defendant argues that the plaintiff is liable to compensate it for the following:

(a) expenses incurred by the defendant in replacing cables which the plaintiff had instructed the defendant to install but which the plaintiff's client later rejected as unsuitable, such expenses amounting to US$12,500; and

(b) expenses incurred by the defendant in commissioning the containerised generator in Canada, such expenses amounting to US$12,700.

I likewise reject these claims put forward by the defendant. The only evidence before me that the unsuitable cables were installed on the plaintiff's instructions is Mr Selvakumar's testimony to that effect. I did not find him a reliable witness. I am unable to find that the defendant's allegation as to the cables is made out. And I do not see any basis upon which the plaintiff might be liable for expenses incurred in respect of the commissioning of the generator.

166 I therefore dismiss the whole of the defendant's counterclaim in respect of PO SBM. That is, I dismiss its claim that it is entitled to the remaining 10% of the contract price, as well as its claim that

the plaintiff is liable to make good expenses which it incurred in carrying out its work.

Conclusion

167 I summarise my decision as follows:

(a) In relation to PO 1, I hold that the defendant was in breach of contract and that the plaintiff was entitled to terminate the contract because the defendant's breach was a repudiatory breach. I allow the plaintiff's claim to recover US$252,000 by way of reliance damages, and I hold that the plaintiff is not entitled to any additional sums of money in respect of PO 1.

(b) In relation to PO 2, I hold that the defendant was in breach of contract and that the plaintiff was entitled to terminate the contract because the defendant's breach was a repudiatory breach. I hold that the plaintiff did not waive its right to terminate. I allow the plaintiff's claim for damages to be assessed, but decline to award it the specific sums of money claimed under Heads of Relief 5, 6 and 7. It may pursue Heads of Relief 5 and 6 in the assessment of damages, but not Head of Relief 7.

(c) I hold that the plaintiff is entitled to delivery up of the items claimed under Heads of Relief 1 and 2.

(d) I dismiss entirely the defendant's counterclaim under PO SBM.

168 I also award the costs of the action to the plaintiff.

169 Finally, I should point out that on 7 August 2012, the plaintiff secured a freezing injunction against the defendant. The injunction restrained the defendant from disposing of its assets in Singapore up to the value of S$1.5m. The defendant applied on 31 August 2012 to set aside that injunction. [note: 125] That application was fixed for hearing before me. I declined to set aside the injunction. In my view, that injunction had been correctly granted *pre*-judgment. It ought to continue *post*-judgment. The injunction will therefore continue until further order or until the defendant has discharged its liability in damages to the plaintiff.

[note: 1] AEIC of James Stephenson at 51-54.

[note: 2] 9DB at 1-10.

[note: 3] AEIC of James Stephenson at 55-58.

[note: 4] 9DB at 22-32.

[note: 5] 2DB at 101.

[note: 6] 9DB at 11.

[note: 7] Plaintiff's Reply and Defence to Counterclaim at para 13.

[note: 8] Defendant's closing submissions at para 43.

[note: 9] Defendant’s closing submissions at para 46; 3DB at 88, 92.

[note: 10] 3DB at 113.

[note: 11] 3DB at 139.

[note: 12] 3DB at 140.

[note: 13] 3DB at 141.

[note: 14] 3DB at 171.

[note: 15] AEIC of Edward Law at 92-93.

[note: 16] AEIC of Edward Law at para 8; AEIC of Ramasamy Tanabalan at para 68.

[note: 17] 4DB at 27-28.

[note: 18] 4DB at 213.

[note: 19] PCB at 28.

[note: 20] AEIC of James Stephenson at para 32; AEIC of Ramasamy Tanabalan at para 108.

[note: 21] AEIC of James Stephenson at 282-285.

[note: 22] 9DB at 11.

[note: 23] Defendant’s closing submissions at para 132.

[note: 24] Defendant’s closing submissions at para 140.

[note: 25] Defendant’s closing submissions at para 139.

[note: 26] At paras 52–56.

[note: 27] Defendant’s closing submissions at para 127.

[note: 28] Plaintiff’s closing submissions, section header between paras 245 and 246.

[note: 29] Statement of Claim (Amendment No 1) at para 33.

[note: 30] 1DB at 198-200.

[note: 31] Defence and Counterclaim at paras 62-63.

[note: 32] Defendant’s closing submissions at para 69.

[note: 33] Defendant’s closing submissions at paras 70-73.

[note: 34] Defendant’s closing submissions at paras 74.

[note: 35] At para 45.

[note: 36] At para 71.

[note: 37] 2DB at 158, 162.

[note: 38] 4DB at 192.

[note: 39] Transcript, Day 5 p 66 lines 9 to 23.

[note: 40] Defendant’s closing submissions at paras 32-36.

[note: 41] AEIC of Ramasamy Tanabalan at para 33.

[note: 42] 1 DB at 244.

[note: 43] Transcript, Day 5 p 27 lines 6 to 20.

[note: 44] 2DB at 32, 35-36, 39.

[note: 45] Transcript, Day 5 p 12 lines 4 to 7.

[note: 46] Transcript, Day 6 p 25 lines 13 to 17.

[note: 47] 2 DB at 76.

[note: 48] Transcript, Day 5 p 27 line 21 to p 28 line 6.

[note: 49] 2DB at 120.

[note: 50] Transcript, Day 6 p 28 lines 14 to 20.

[note: 51] At para 41.

[note: 52] AEIC of Ramasamy Tanabalan at p 140.

[note: 53] AEIC of Ramasamy Tanabalan at p 142.

[note: 54] AEIC of Mr Oracion at p 89.

[note: 55] Transcript, Day 6 p 45 lines 18 to 31.

[note: 56] Transcript, Day 7 p 109 lines 5 to 14, p 111 lines 1 to 7.

[note: 57] Plaintiff's closing submissions at paras 80-81.

[note: 58] Transcript, Day 7 p 112 lines 2 to 7.

[note: 59] AEIC of Mr Oracion at pp 54-56.

[note: 60] PB at 154-155E.

[note: 61] 3DB at 118.

[note: 62] 4DB at 186-187; AEIC of Mr Podador at 33-35.

[note: 63] 2DB at 147.

[note: 64] 3DB at 114.

[note: 65] Transcript, Day 5 pp 34-35.

[note: 66] PCB at 3.

[note: 67] Transcript, Day 7 p 115 lines 11 to 13.

[note: 68] AEIC of Mr Podador at 46, 50, 54.

[note: 69] 5DB at 195.

[note: 70] Transcript, Day 3 p 12 lines 29 to 31.

[note: 71] AEIC of Mr Podador at 92, 99.

[note: 72] 7DB at 124.

[note: 73] AEIC of Mr Podador at 111.

[note: 74] PCB at 27-28.

[note: 75] PCB at 29.

[note: 76] AEIC of James Stephenson at p 149.

[note: 77] AEIC of Mr Oracion at para 16, p 89.

[note: 78] Transcript, Day 5 p 104 line 24 to p 105 line 26.

[note: 79] 7DB at 109.

[note: 80] 7DB at 141-142.

[note: 81] Transcript, Day 5 p 78 lines 3 to 13.

[note: 82] 7DB at 108.

[note: 83] At 130-131.

[note: 84] At 110-128.

[note: 85] AEIC of Mr Oracion at 83-84; 4DB at 234-235.

[note: 86] AEIC of Mr Podador at 69-75.

[note: 87] Transcript, Day 7 p 24 line 19.

[note: 88] Transcript, Day 7 p 20 lines 22 to 24.

[note: 89] Transcript, Day 7 p 22 line 27 to p 24 line 2.

[note: 90] Defendant's closing submissions at para 301.

[note: 91] Defence and Counterclaim at para 12.

[note: 92] Defendant's closing submissions at paras 237, 289, 298.

[note: 93] 5DB at 156.

[note: 94] Defendant's closing submissions at para 310.

[note: 95] Reply and Defence to Counterclaim at para 7.

[note: 96] 5DB at 192.

[note: 97] Defendant's closing submissions at para 246.

[note: 98] Transcript, Day 7 p 18 lines 8 to 10.

[note: 99] Defendant's closing submissions at para 303.

[note: 100] Defendant's closing submissions at para 295.

[note: 101] 7DB at 100.

[note: 102] Transcript, Day 8 p 34 lines 20 to 27.

[note: 103] Transcript, Day 8 p 35 lines 22 to 30.

[note: 104] Transcript, Day 8 p 43 lines 19 to 29.

[note: 105] Transcript, Day 8 p 45 lines 3 to 26.

[note: 106] Transcript, Day 8 p 55 lines 2 to 11.

[note: 107] 2DBAEIC at pp 810-811.

[note: 108] Transcript, Day 8 p 52 lines 7 to 19.

[note: 109] Transcript, Day 8 p 59 lines 17-28.

[note: 110] PB at 246-249.

[note: 111] See, for instance, 6DB at 35, 79; 7DB at 20, 21, 23, 26, 28, 61, 80, 84, 93.

[note: 112] Defendant's reply submissions at para 36.

[note: 113] 9DB at 27.

[note: 114] Defence and Counterclaim at para 61.

[note: 115] 9DB at 25.

[note: 116] Defendant's closing submissions at para 215.

[note: 117] Defendant's closing submissions at para 213.

[note: 118] AEIC of Mr Podador at 92, 99.

[note: 119] AEIC of Ramasamy Tanabalan at 572-583.

[note: 120] Defendant's closing submissions at para 378.

[note: 121] Defendant's closing submissions at para 382.

[note: 122] Defendant's closing submissions at para 384.

[note: 123] Defendant's closing submissions at para 398.

[note: 124] Defendant’s closing submissions at para 396.

[note: 125] SUM 4439/2012.