IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 28

Civil Appeal No 155 of 2017

Between

BIOFUEL INDUSTRIES PTE LTD

… *Appellant*

And

V8 ENVIRONMENTAL PTE LTD

… *Respondent*

Civil Appeal No 157 of 2017

Between

V8 ENVIRONMENTAL PTE LTD

… *Appellant*

And

BIOFUEL INDUSTRIES PTE LTD

… *Respondent*

In the matter of Suit No 468 of 2015

Between

BIOFUEL INDUSTRIES PTE LTD

… Plaintiff

And

V8 ENVIRONMENTAL PTE LTD

… Defendant

JUDGMENT

[Contract] — [Breach]
[Contract] — [Remedies] — [Damages]

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Biofuel Industries Pte Ltd
v
V8 Environmental Pte Ltd and another appeal

[2018] SGCA 28

Court of Appeal — Civil Appeals Nos 155 and 157 of 2017
Andrew Phang Boon Leong JA, Steven Chong JA and Quentin Loh J
15 May 2018

25 June 2018 Judgment reserved.

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

Introduction

1 These are two appeals against the decision of the trial judge ("the Judge") in *Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd* [2017] SGHC 184 ("the Judgment").

2 The plaintiff in the court below was Biofuel Industries Pte Ltd ("BFI"). BFI is in the business of wood disposal and of processing waste wood into wood chips. It accepts waste wood or wood chips from suppliers in exchange for a disposal fee. Waste wood received by BFI is shredded into wood chips, and together with the rest of the wood chips received by BFI, is then sold by BFI to third parties.

3 The defendant in the court below was V8 Environmental Pte Ltd ("V8"). V8 is a waste management service provider. It collects waste wood from construction sites for a fee and eventually disposes such waste wood at facilities such as the one owned by BFI.

4 BFI is the appellant in Civil Appeal No 155 of 2017 ("CA 155/2017") and the respondent in Civil Appeal No 157 of 2017 ("CA 157/2017"). V8 is the respondent in CA 155/2017 and the appellant in CA 157/2017. To avoid confusion, we refer to the two parties as BFI and V8, respectively.

Background

5 V8 has been disposing of waste wood with BFI since 2007. Initially, V8 agreed to dispose of its waste wood at $40 per metric ton ("pmt"), but there was no written agreement between the parties. Sometime in late 2010, Eugene Lee Shung Guan ("Eugene"), the Chief Executive Officer of BFI, informed Yu Jia Ru Derrick ("Derrick"), the Sales and Operations Director of V8, that he was distributing wood shredders through a separate company called Hammel (S) Pte Ltd ("Hammel"). Eugene suggested that V8 purchase a shredder from Hammel to shred the waste wood that V8 collects from its customers into wood chips. This would make it easier for V8 to transport the wood chips and V8 could enjoy the lower price for disposal that applied to wood chips. Derrick agreed and purchased a shredder from Hammel through Eugene. The parties then agreed that V8 could continue to dispose of waste wood at the price of $40pmt, or dispose of wood chips at the price of $15pmt.

6 Sometime in July 2013, the parties entered into negotiations for the appointment of BFI as V8's exclusive disposal service provider. The parties eventually entered into the Biomass Supply Agreement ("BSA"). Under the

BSA, it was agreed that BFI would be V8's exclusive disposal service provider and that, in exchange, V8 would enjoy lower disposal fees, at $30pmt for waste wood and $13.50pmt for wood chips. It is unclear from the text of the BSA when the BSA was entered into. The Judge found the commencement date of the BSA to be 1 August 2013 (see the Judgment at [4]). This is not disputed on appeal.

7 On 10 April 2015, V8 terminated the BSA alleging that BFI had repudiated the agreement through its conduct. On 14 May 2015, BFI commenced this suit against V8 for wrongful termination of the BSA and for non-payment of invoices. V8 maintained that it was entitled to terminate the BSA because BFI had renounced it. In its Defence, V8 pleaded that BFI had (a) wrongfully rejected V8's deliveries of waste wood and wood chips, and/or (b) wrongfully and unilaterally raised the prices for its services under the BSA. In particular, V8 relied on four occasions when BFI had attempted to unilaterally increase prices and eight occasions when BFI had allegedly rejected delivery of waste wood and wood chips either because its premises were full, or because the wood chips were oversized in that they were more than 100mm in length ("the 100mm requirement").

8 We do not propose to outline the 12 occasions of the alleged rejections and the attempts by BFI to increase prices. These were set out in chronological order by the Judge: see the Judgment at [35]–[64]. We will only highlight two facts which are, in our view, germane to the two appeals before us: first, it is undisputed that after each alleged rejection of delivery, the deliveries would always resume thereafter; and second, it is undisputed that BFI issued credit notes to negate any price difference between the amounts charged to V8 and the amounts payable pursuant to the BSA, after V8 had protested the unilateral increase in prices by BFI. As a result, V8 never paid the higher prices that BFI

attempted to impose.

The decision below

9 In summary, the Judge held that BFI did not repudiate the BSA and that V8's termination of the BSA was therefore wrongful. The Judge awarded BFI damages in the sum of $1,074,615.26 resulting from the shortfall in delivery for the months of February 2015, April 2015, as well as the remaining 39 months of the BSA postdating V8's wrongful termination on 10 April 2015 (*ie*, May 2015 to July 2018). The Judge also allowed BFI's claim for payment for the outstanding invoices, which amounted to $186,326.92.

10 In determining whether BFI repudiated the contract, the Judge applied the objective test set out by this Court in *San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 ("*San International*") (at [20]) and considered whether BFI's conduct was such as to lead a reasonable person to conclude that BFI no longer intended to be bound by the BSA. Considering BFI's unilateral attempts at raising the price for the disposal of waste wood and wood chips, the Judge found that BFI had deliberately increased prices despite not being permitted to do so under the BSA in the hope that V8 would inadvertently pay (see the Judgment at [77]). While this was said to be poor behaviour on the part of BFI, the Judge nonetheless found that these attempts did not constitute repudiatory conduct because BFI later issued credit notes to negate the price difference, and consequently V8 did not in fact pay the higher prices but was charged according to the rates set out in the BSA (see the Judgment at [77] and [78]).

11 Proceeding next to consider the various alleged rejections of delivery, the Judge rejected at the outset BFI's distinction between the turning back of a

truck and the calling of V8 in advance to inform V8 that no deliveries would be accepted. The Judge treated both instances as rejections (see the Judgment at [34]). Although it was found that BFI did reject deliveries from V8 and that BFI had not discharged its burden to establish a valid reason for each rejection, the Judge ultimately held that these rejections did not constitute a repudiation of the BSA (see the Judgment at [127]). The Judge considered that, on each of the occasions where delivery had been rejected, delivery would resume sometime after the rejection (see the Judgment at [96]–[106]). The Judge also rejected V8's allegation that BFI had informed V8 on 12 December 2014 that it would not accept future deliveries because of their oversized wood chips ("the 12 December 2014 incident") (see the Judgment at [120]).

12 For the reasons set out above, the Judge held that V8 had failed to establish that a reasonable person would consider Biofuel's overall conduct as amounting to a repudiation of the BSA. Consequently, the Judge found that V8 wrongfully terminated the BSA on 10 April 2015 as it was not entitled to do so (see the Judgment at [127]).

13 As for the reliefs sought, the Judge allowed BFI's claim for damages for the shortfall in deliveries. Under the BSA, V8 had to deliver 2000 metric tons of waste wood and/or wood chips each month. The Judge accepted that there was a shortfall of 285.56 metric tons in the month of February 2015 and a shortfall of 1,315.57 metric tons in the month of April 2015 (see the Judgment at [130]). As V8 had terminated the BSA in April 2015, there was also a shortfall of 2000 metric tons each month from May 2015 to July 2018, which was the end date of the BSA, amounting to a total of 78,000 metric tons.

14 The Judge then considered the price that should apply to the shortfall. Based on the evidence before him, the Judge found it reasonable to assume that

V8 would have delivered only waste wood from December 2014 onwards (see the Judgment at [135]). This would mean that the starting point for quantifying damages for the shortfall would be the price for disposing waste wood, *ie*, $30pmt. V8, however, argued that the costs savings enjoyed by BFI as a result of not having to perform its obligations under the BSA ought to be deducted from the contract price. The Judge held that "[a]lthough the burden of proof is on [BFI] to prove the quantum of its damages, it seems to be unjust to award [BFI] nominal damages only because it omitted to include its costs in respect of the waste wood" (see the Judgment at [141]). The Judge eventually opted to use the lower rate of $13.50pmt for the delivery of *wood chips* as the profit which BFI would have earned from the delivery of *waste wood* (see the Judgment at [142]). This assumed that the difference in the disposal fee for waste wood and that of wood chips would constitute BFI's costs of performing its obligations under the BSA. Using $13.50pmt as the quantum of profit, the Judge awarded BFI damages for the shortfall as follows:

(a)	February 2015	285.56mt x $13.50	$ 3,855.06
(b)	April 2015	1,315.57mt x $13.50	$ 17,760.20
(c)	May 2015 to July 2018	78,000.00mt x $13.50	$1,053,000.00
		Total:	**$1,074,615.26**

15 The Judge also ordered that V8 pay $186,326.92 for outstanding invoices issued by BFI for the deliveries of waste wood made by V8 for the months of January to April 2015 (see the Judgment at [128]).

16 The Judge dismissed BFI's claim for loss of profits in respect of its onward sale of wood chips to a third party, SCG Trading Co Ltd ("SCG"), because the contract with SCG was to end on 31 December 2016 whereas the

BSA would end on 31 July 2018 and the contract with SCG could have been fulfilled by BFI's own production as well as by wood chips from other suppliers (see the Judgment at [147] and [148]).

17 The Judge also ordered that each party bear its own costs and disbursements in view of BFI's conduct before and during litigation.

Issues on appeal

18 As mentioned at the beginning of this judgment, there are two appeals before us. There is some degree of overlap in terms of the issues in the two appeals. In our view, the issues before us are as follows:

(a) First, whether the Judge erred in finding that BFI's conduct did not amount to repudiation of the BSA and therefore erred in concluding that V8 had wrongfully terminated the contract;

(b) Second, if the answer to (a) is in the negative:

(i) whether the Judge erred in ordering V8 to pay the outstanding invoices at the price for the disposal of waste wood (*ie*, $30pmt) as opposed to wood chips (*ie*, $13.50pmt);

(ii) whether the Judge erred in declining to award damages to BFI for its loss of profits under the onward sale contract with SCG;

(iii) whether the Judge erred in awarding substantial damages to BFI for the shortfall in delivery; and if he did not, whether he erred in awarding damages at the price of $13.50pmt instead of $30pmt; and

(c) Third, whether the Judge erred in ordering that each party bear its own costs for the trial below on the basis of BFI's poor conduct both before and during the litigation.

Repudiation of the BSA

19 V8's case on appeal is essentially that the Judge erred in finding that BFI's conduct did not amount to repudiation as that finding was against the weight of the evidence before the court. In particular, it contends that BFI demonstrated an unwillingness to carry out its contractual obligations unless V8 complied with the 100mm requirement, which was not a term under the BSA. V8 submits that this would have led a reasonable person to conclude that BFI no longer intended to be bound by the BSA. V8 also appears to suggest that the 12 December 2014 incident could *independently* constitute a renunciation of the BSA.

20 The law on repudiatory breach by renunciation is clear and is not disputed by either party. As this Court stated in *San International* (see above at [10]), in the absence of an express refusal or declaration, "the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions" [emphasis omitted] (at [20]). The defaulting party may still intend to fulfil the contract but "may be determined to do so only in a manner substantially inconsistent with his obligations" (*San International* at [20]). The defaulting party may also "refuse to perform the contract unless the other party complies with certain conditions not required by its terms" (*San International* at [20]). Various precedents have also established that there must be a *clear* intention on the part of the defaulting party not to abide by the contract (see for

example, the decision of this Court in *Ng Chee Weng v Lim Jit Ming Bryan* [2015] 3 SLR 92 at [69]).

21 In our judgment, the Judge was correct in finding that BFI's conduct did not demonstrate an intention to no longer be bound by the BSA, and that BFI's conduct did not therefore amount to a repudiation, and more specifically, a renunciation of the BSA.

22 We affirm the Judge's finding that while BFI behaved poorly, its conduct as a whole did not amount to renunciation of the contract for three reasons. First, BFI's act of issuing credit notes to negate its unilateral increase in pricing is inconsistent with that of a party having no intention to be bound by the contract. Second, we find it pertinent that none of the rejections of deliveries suggested that BFI intended *henceforth* not to be bound by the BSA. In so far as the rejections are concerned, two reasons seem to have been proffered, namely, that BFI had run out of storage space or that the wood chips delivered by V8 were oversized. Neither is illustrative of an intention to renounce the BSA and we do not think that V8 itself had thought so; V8 was content to resume delivering waste wood and wood chips to BFI after each rejection with the final delivery taking place on 13 April 2015, three days after the purported termination of the BSA. Thus, while we accept that BFI did reject deliveries made by V8, what is crucial is that the delivery of waste wood or wood chips always resumed with V8 continuing the deliveries with little protest, if any at all. Thirdly, the same reason applies to the 12 December 2014 incident. Even if we accept that the incident did occur, V8 continued to make deliveries of *waste wood* and did so until 13 April 2015. Although there were no deliveries of *wood chips* after 12 December 2014, we agree with the Judge that V8 did not discharge its burden of proving that this was because of the alleged rejection by

BFI of its oversized wood chips on 12 December 2014. This was not borne out by the evidence before the court.

23 We would also add that what constitutes renunciation and therefore repudiation is largely a question of fact. This is a question that the trial judge who sees the parties and hears their witnesses is in the best position to answer: see, for example, *Forslind v Bechely-Crundall* [1922] SC (HL) 173 at 179, *per* Viscount Haldane. In the present case, we find that there had been no manifest error in the Judge's conclusion that BFI's conduct did not constitute a renunciation or repudiation of the BSA. Consequently, V8 wrongfully terminated the BSA as it had no right to do so. We therefore uphold the Judge's finding and dismiss V8's appeal in this regard.

Remedies

24 Having found that the Judge did not err in finding that V8 had wrongfully terminated the BSA, we now turn to consider the following issues relating to the reliefs sought by BFI:

(a) whether the Judge erred in ordering V8 to pay the outstanding invoices at the price for the disposal of waste wood (*ie*, $30pmt) as opposed to wood chips (*ie*, $13.50pmt);

(b) whether the Judge erred in declining to award damages to BFI for its loss of profits under the onward sale contract with SCG; and

(c) whether the Judge erred in awarding substantial damages to BFI for the shortfall in delivery; and if he did not, whether he erred in awarding damages at the price of $13.50pmt instead of $30pmt.

25 For reasons which we will explain, we uphold the Judge's findings and orders in relation to BFI's claim for payment of the outstanding invoices, and its claim for loss of profits under the onward sale contract with SCG.

Payment for unpaid invoices

26 As explained above (at [22]), we agree with the Judge's finding that V8 did not discharge its burden of proving that it had delivered only waste wood after 12 December 2014 because BFI rejected all future deliveries of wood chips on 12 December 2014. V8 is therefore liable to pay BFI the sums due under the outstanding invoices for the waste wood that it had delivered. We affirm the Judge's order that V8 pay BFI $186,326.92 for the outstanding invoices.

Loss of profits from onward sales to SCG

27 We uphold the Judge's dismissal of BFI's claim for the alleged loss of profits from its onward sale of wood chips to SCG for the same reasons given by the Judge (see the Judgment at [146]–[150]). We would also venture further to add that BFI has not adduced sufficient evidence to demonstrate that the loss it purportedly suffered under the SCG contract as a result of V8's breach of the BSA was within the reasonable contemplation of V8 at the time of entering into the BSA. BFI's case both at trial and on appeal were based on bare assertions – for example, that V8 knew that the wood chips were being loaded onto a barge "going to Thailand" and V8 should therefore know that the wood chips were being sold to somebody in Thailand. BFI's assertion that V8 was informed of the SCG contract in October 2014 is also irrelevant as the SCG contract had to be within the reasonable contemplation of V8 *at the time of contracting BSA* in around July or August 2013.

Damages for the shortfall of delivery under the BSA

28 This leaves us with the issue of damages for the shortfall of delivery under the BSA.

29 The Judge allowed BFI's claim for damages for the shortfall in delivery. Although the Judge found that BFI had omitted to adduce evidence as to its costs savings, and that the burden of proof was on BFI to prove the quantum of its damages, the Judge nonetheless found that it would have been "unjust to award [BFI] nominal damages" (see the Judgment at [141]). The Judge eventually opted to take into account the lower rate of $13.50pmt for the delivery of *wood chips* and use it as the profit which BFI would have earned from the delivery of *waste wood* (see the Judgment at [142]). This was presumably to account for BFI's costs of performing its obligations under the BSA. The Judge's calculations were premised on an earlier finding that V8 would have been likely to deliver only waste wood for the months where there were shortfalls and for the remaining months under the BSA.

30 We are of the view, with respect, that the Judge erred in awarding substantial damages as BFI had failed to prove the actual quantum of its loss.

31 We begin by noting that BFI is not contending that it can claim *both* the expenses it would have incurred under the BSA *and* the profit it would have earned had the contract not been breached. Indeed, counsel for BFI, Mr G Radakrishnan ("Mr Radakrishnan"), seemed to appreciate that such a claim would not be permissible. It is trite law that when a contract is terminated, the object of the court in awarding damages is to place the innocent party, as far as money can do so, in the position he would have been in if the contract had been performed (see, for example, the decisions of this Court in *Hong Fok*

Realty Pte Ltd v Bima Investment Pte Ltd and another appeal [1992] 2 SLR(R) 834 ("*Hong Fok*") at [24] and *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd* [2016] 2 SLR(R) 1056 at [23]). It follows that an innocent party cannot claim for *both* wasted expenditure and loss of profit at the same time. The reason for this, as was stated in *Hong Fok*, is that "a claim for profit is made on the hypothesis that the expenditure had been incurred" (at [59]). Thus any claim for both expenditure and profits would *overcompensate* BFI (see also generally Andrew Phang and Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law & Business, 2012) at paras 1469−1476).

32 At the hearing of the appeal, Mr Radakrishnan submitted that BFI was claiming for the "contract price" on the basis that its gross profits were in fact its net profits because BFI did not incur any cost in performing its obligations under the BSA. Mr Radakrishnan argued that performance of the contract "ended at the gate" of BFI's premises, such that V8 was liable to pay the contract price of $30pmt to dispose of waste wood "at the gate" of BFI's premises and that any cost that BFI incurs thereafter would not be pursuant to the BSA. For example, any treatment or further shredding of the waste wood or wood chips would be done in order to prepare them for onward sale to third parties. The costs incurred in this regard would therefore not be within the scope of the BSA. On this basis, Mr Radakrishnan urged this Court to find that BFI had incurred no cost in performing its obligations under the BSA and to award BFI the full contract price of $30pmt in relation to the shortfall of delivery.

33 As a matter of legal principle, there is nothing wrong with BFI's submission that its gross profits under the BSA were in fact its net profits. Although these may be rare, we do not doubt that there may be some contracts where the innocent party incurs no cost in performing its obligations under the contract and would therefore be entitled to claim the full contract price as its

loss. However, BFI was unable to show that the BSA was such a contract and we are unable to accept Mr Radakrishnan's submission that BFI did not incur any cost in performing its obligations under the BSA. Mr Radakrishnan invited this Court to find that BFI's obligation under the BSA was simply to accept the waste wood and wood chips disposed of by V8. Even if this was so, on BFI's best case, there would still be costs involved in its receipt of the waste wood and wood chips. In particular, BFI incurred costs in weighing the waste wood disposed of at its premises and in supervising the onward disposal of waste wood and wood chips disposed of by V8. This was raised by BFI's own witnesses under cross-examination. First, Eugene had testified that the waste wood and wood chips that were delivered to BFI's premises had to be weighed for billing purposes:

> Court: So you are saying that the weighing [of waste wood] is done at [BFI's] premises?
>
> A: That's right. As for … [the wood chips], the weighing is taking place at [V8's] premises…
>
> …
>
> Q: … You, as the CEO, can't possibly be there for every single one of these 100 deliveries; correct?
>
> A: Yes. We have a [*sic*] weighbridge operators that record all these transactions on a daily basis, yes.

It was not BFI's case that no cost would be incurred in this weighing process of the waste wood, and indeed there was no evidence showing this. Eugene's testimony makes it clear that part of BFI's performance of its obligations under the BFA included weighing the waste wood at its own premises in order to be able to bill V8. In our view, costs must have been incurred in this process.

34 Secondly, both Eugene and another employee of BFI, George Lee Peng Quan ("George"), testified that BFI's employees were involved in supervising the disposal of waste wood and wood chips by V8 in order to ensure that they

complied with the BSA. According to Eugene, BFI had a total of about 70 employees who oversaw the unloading of waste wood and wood chips at 51 Shipyard Crescent where disposals were made. Eugene gave the following evidence:

> Q: … Can you tell us roughly how many employees [BFI] employs?
>
> A: We have a total of about 70 employees.
>
> Q: About 70?
>
> A: Seven zero.
>
> Q: These employees would oversee the unloading of waste wood and wood chips at 51 Shipyard Crescent?
>
> A: Yes.

35 George also testified that a quality controller from BFI would be stationed at the delivery sites to pick out oversized wood chips:

> Court: Does your quality controller also go through the wood pile that is deposited by the V8 truck?
>
> A: Yes. We'll help out.
>
> …
>
> Court: He will go through the wood chips deposited by V8 trucks and deposited by other suppliers?
>
> A: Correct.

36 In fact, George was himself involved in ensuring that the disposals made by V8 complied with the requirements set out in the BSA:

> A: On the operation side, yes, I just had *to ensure that they deliver accordingly. So my job is to ensure that all deliveries made from V8 fulfil to their requirement, to our requirement.*
>
> Court: What requirement is that?
>
> A: Meaning we have a barge for loading the wood chips. They have to deliver and then we have the wood waste to receive, they deliver. So that's my job, to make sure that contractors deliver to what's -- the agreement.

[emphasis added]

37 We therefore find that, even on BFI's best case, some operational costs would in fact have been incurred by BFI in receiving the waste wood and wood chips disposed of by V8 under the BSA. These would include the costs of hiring workers to supervise and inspect the disposals made by V8, as well as to operate the weighbridge and to bill V8 accordingly. It appears to us that this was within the Judge's contemplation when he observed that Biofuel had omitted to include evidence as to its costs of contractual performance, instead of finding that there had in fact been no cost incurred under the BSA (see the Judgment at [141]).

38 Thirdly, the reasons proffered by BFI when it attempted to increase prices for the disposals were that there had been a "substantial rising" of (a) "costs of production and disposal" and (b) "labour cost". These were expressly referenced and relied upon in BFI's letter to V8 dated 12 March 2014. We do not think that BFI can now claim that such costs have nothing to do with the BSA when BFI had in fact tried to increase prices under the BSA on account of these expenses.

39 For these reasons, we are unable to agree that BFI incurred no costs whatsoever in performing its obligations under the BSA. Even on BFI's best case that its obligations under the contract only involved *receiving* the waste wood and wood chips without more, we find that BFI would have incurred costs in receiving the waste wood and wood chips. We therefore reject BFI's submission that its gross profits should be considered its net profits.

40 The next question is whether BFI can be awarded substantial damages despite not having proved its quantum of loss. The Judge held that it could. With respect, we disagree.

41 The starting point of the analysis is that BFI must prove *both* the fact of damage ***and*** its *amount*. We held that this was the legal position in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*") (at [27]) and stated that a claimant cannot make a claim for damages without placing before the court sufficient evidence of the *quantum* of loss it had suffered, even if it would otherwise have been entitled in principle to recover damages (at [31]).

42 On this point, BFI contended that a flexible approach to determining damages should apply. In *Robertson Quay,* we recognised that there were two competing considerations that a court should take into account when assessing damages – while the claimant bears the burden of proving the fact and amount of loss, and therefore must adduce sufficient evidence to quantify the damage, in some cases, absolute certainty and precision as to the quantum of damage would be impossible to achieve (see [30]). This Court thus affirmed the words of Devlin J (as he then was) in the English High Court decision in *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 at 438 that "where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can". We clarify, however, that this does not mean that a claimant such as BFI can simply claim that such evidence is not available or irrelevant, without more. The starting point remains that "a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages" (*Robertson Quay* at [31]). It is only "where the [claimant] has attempted its level best to prove its loss *and* the evidence is cogent" that the court will allow it to recover the damages claimed even if the quantum of loss cannot be determined with exact certainty (*Robertson Quay* at [31]) [emphasis in original].

43 Applying the above principles, we consider, first, that BFI has not demonstrated that there would be practical difficulties in obtaining evidence in relation to its cost savings in the present case. In our judgment, this is not a case on the periphery where, as a matter of practicality, it is unclear whether evidence of cost savings could have been adduced. As a matter of both logic as well as common sense, BFI must surely have known its operational costs and have had access to evidence showing these expenses. Reference may also be made in this regard to s 108 of the Evidence Act (Cap 97, 1997 Rev Ed). This information was in fact expressly alluded to in BFI's letter to V8 dated 12 March 2014 where reference was made to a "substantial rising" of "costs of production and disposal" and "labour cost" (see [38] above). On this basis, the "flexible approach" established in *Robertson Quay* is of little assistance to BFI in this case. In any event, we note that it was *not* BFI's case that precise evidence of the cost of providing services under the BSA was not available.

44 Where the claimant chooses not to adduce any evidence as to its costs savings under the contract, it would be virtually impossible to assess loss (see *Robertson Quay* (at [27])). This seems to be the quandary that the Judge found himself in. Given the complete lack of information as to the quantum of cost savings, and that $30pmt and $13.50pmt were the only two figures available as reference values, the Judge adopted $13.50pmt as the profit margin for the disposal of waste wood, for which the contract price of disposal was $30pmt, even though there was no indication that $13.50pmt was a fair estimate of the loss in fact suffered by BFI. With respect, we do not agree with the methodology. In the present case, given BFI's position not to adduce *any* evidence as to its costs, the court simply has *no basis* to derive a fair estimate of BFI's profit margin. Indeed, there was no basis for the court to assume that BFI had even enjoyed *any profit* under the BSA, particularly given BFI's

unsuccessful attempts to raise prices to meet purportedly rising expenses. In this context, BFI's failure to adduce evidence as to its costs can only lead to one of two findings. First, BFI failed to prove that it had made any profit under the BSA, and consequently failed also to prove that it had suffered any loss as a result of V8's breach. On this premise, the law is clear that only an award of nominal damages ought to have been granted to BFI. Second, that even if BFI had suffered *some* loss, it failed to prove the quantum of its operational costs, and therefore the *quantum* of its loss. Thus, only nominal damages may be awarded. In such a situation, "the problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss" (see James Edelman *et al*, *McGregor on Damages* (Sweet & Maxwell, 20th Ed, 2018) at para 12-004). The conclusion is the same in both situations, namely, that only nominal damages may be awarded.

45 For the reasons set out above, we allow V8's appeal against the Judge's award of substantial damages. We therefore reverse the Judge's award and award only nominal damages of $1,000 to BFI.

Costs for the proceedings below

46 We uphold the Judge's order that each party bear its own costs for the proceedings below. The Judge was justified in taking into account the parties' conduct prior to and during the proceedings and it has not been shown that the Judge's exercise of discretion in ordering that each party bear its own costs was erroneous.

Conclusion

47 In summary, we dismiss BFI's appeal in CA 155/2017 and allow V8's appeal in CA 157/2017 albeit only in relation to the Judge's award of substantial

damages for V8's wrongful termination of the BSA. We set aside the Judge's award of substantial award of damages for the shortfall in delivery and award nominal damages of $1,000 to BFI.

48 We fix the costs of the two appeals at $25,000 to be paid by BFI to V8, inclusive of disbursements. Lastly, the usual consequential orders relating to security for costs will apply.

Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal	Quentin Loh Judge

G Radakrishnan and Ramachandran Shiever Subramanium (Grays LLC) for the appellant in Civil Appeal No 155 of 2017 and the respondent in Civil Appeal No 157 of 2017;
Kok Chee Yeong Jared and Jared Ravin Dass (Rajah & Tann Singapore LLP) for the respondent in Civil Appeal No 155 of 2017 and the appellant in Civil Appeal No 157 of 2017.