Singapore Airlines Ltd *v* CSDS Aircraft Sales & Leasing Inc
[2019] SGHCR 8

Case Number : Suit No 1098 of 2018 (Summons No 368 of 2019)

Decision Date : 30 April 2019

Tribunal/Court : High Court

Coram : Jean Chan Lay Koon AR

Counsel Name(s) : Tan Teck San Kelvin, Chen Chuanjian Jason, Chng Hu Ping (Zhuang Huping) (Drew & Napier LLC) for the plaintiff; Roderick Martin S.C., Rajaram Ramiah, Sharon Chong Chin Yee (RHTLaw Taylor Wessing LLP) for the defendant.

Parties : Singapore Airlines Limited — CSDS Aircraft Sales & Leasing Inc —

Civil Procedure – Judgments and orders

30 April 2019 Judgment reserved.

Jean Chan Lay Koon AR:

1 This is an application by the defendant to set aside a regular default judgment entered pursuant to Order 13 of the Rules of Court (Cap. 332, R 5, 2006 Rev Ed). The facts and procedural history of the case are largely undisputed.

Relevant background facts and procedural history

2 The plaintiff and the defendant entered into an aircraft purchase agreement dated 19 September 2018 ("**Agreement**") whereby the plaintiff agreed to sell and the defendant agreed to purchase a Boeing 777-212 aircraft for a sum of US$6.5 million ("**Purchase Price**").

3 Pursuant to clause 2.1 of the Agreement, the defendant agreed to pay the plaintiff the sum of US$6.25 million ("Balance Sum"), which is the remaining sum after an initial deposit of US$250,000 which had been paid by the defendant on 27 July 2018. Clause 4.1(a) of the Agreement, read together with clause 3, provides for payment of the Balance Sum by the defendant to the plaintiff as a condition precedent to delivery of the aircraft and transfer of the plaintiff's full title of the aircraft to the defendant. It is largely undisputed that several extensions of time were given for payment of the Balance Sum and as of to date, the Balance Sum remains unpaid.

4 I now set out the procedural history of the matter.

5 The plaintiff first filed a writ of summons with a statement of claim ("**SOC**") on 31 October 2018 ("**First SOC**"). In the relief section of the First SOC, the plaintiff essentially pleaded for: (i) an order for specific performance by the defendant of the Agreement; (ii) payment of the Balance Sum of US$6.25 million; (iii) in the alternative, damages to be assessed; and (iv) interests and costs. The writ and First SOC was not served.

6 On 1 November 2018, the defendant sent an email to the plaintiff stating that it was still willing to complete the purchase provided that the deadline for time of closing be extended. The plaintiff responded that an extension would be granted on a number of conditions, including that payment must be made by 2 November 2018. On 2 November 2018, no payment was received by the plaintiff.

7 On 3 November, the plaintiff proceeded to serve the writ and First SOC on the defendant.

8 Upon receipt of the writ and First SOC, the defendant's representative, Ms Lara Ruth Shapiro ("**Ms Lara**"), replied to the plaintiff on the same day by email that "CSDS will perform as per the court filing". According to Ms Lara's supporting affidavit affirmed on 22 January 2019, this was in response to the notice of the writ, which essentially provided the defendant 21 days to make payment of the Balance Sum and to complete performance of the Agreement, or to enter an appearance to defend the suit.

9 On the next day, 4 November 2018, the plaintiff's representative, Mr Richard Hewlett, replied by email that the plaintiff understood the defendant would enter an appearance in the suit within the time stipulated in the Writ. On the same day, the plaintiff's solicitors subsequently sent an email to the defendant attaching a letter effectively stating that the defendant had failed to pay the Balance Sum despite repeated reminders to do so and as such, it was in repudiatory breach of the Agreement. The plaintiff had no choice but to accept the defendant's repudiatory breach and to terminate the Agreement with immediate effect.

10 On 5 November 2018, the plaintiff proceeded to amend its First SOC by deleting their prayer for specific performance and pleaded the above particulars of their acceptance of the defendant's repudiation on 4 November 2018 to ground their claim for damages for breach of law to be assessed ("**SOC (Amendment No.1)**"). SOC (Amendment No. 1) was subsequently served on the defendant.

11 21 days then elapsed without the defendant having entered an appearance. On 28 November 2018, the plaintiff entered a default judgment against the defendant for damages to be assessed, interest on the sum of US$6,250,000 from 31 October 2008 to the date of repayment, at the rate of 4% per annum, compounded monthly and calculated on the basis of the actual number of days elapsed and a 360-day year, and costs.

Main issue of contention

12 It is undisputed that the default judgment obtained in this case was a regular default judgment and that under clause 11(a) of the Agreement, any dispute arising from the Agreement shall be governed and construed in accordance with the law of England.

13 The general law on setting aside of default judgment is trite. For the setting aside of a regular default judgment, the appropriate test is whether the defendant could establish a prima facie defence in the sense of showing that there were triable or arguable issues. The test for setting aside a regular default judgment should not be any stricter than that for obtaining leave to defend in an O 14 application: *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907. In other words, the burden is on the defendant who is seeking to set aside the default judgment to show that there is a triable issue of law or fact.

14 Although there are other issues of fact canvassed by the defendant in this application, it is common ground between parties that the main issue of contention is this case is an issue of law and interpretation of the English cases of *Public Trustee v Pearlberg* [1940] 2 KB 1 (" ***Pearlberg*** ") and *Johnson v Agnew* [1980] AC 367 (" ***Agnew*** "). The defendant seeks to establish that there is a triable issue of whether the plaintiff is entitled to treat the Agreement as being discharged or terminated by the defendant's earlier repeated failures to make payment of the Balance Sum when it had earlier served a writ and the First SOC on the defendant claiming for: (i) specific performance of the Agreement; (ii) payment of the Balance Sum; (iii) in the alternative, damages to be assessed; (iv) interests and costs.

Parties' submissions

15 The learned Counsel for the defendant, Mr Martin Roderick, *S.C.* ("Mr Roderick, *S.C.*"), relied on the English Court of Appeal case of *Pearlberg* to ground his argument that when a plaintiff has an existing claim for specific performance such as the First SOC, the plaintiff is seeking to affirm the existence of the contract and it therefore cannot subsequently seek to discharge or terminate the contract by unilaterally accepting the defendant's earlier failures to pay the Balance Sum as repudiatory breaches. By so doing, the plaintiff was in effective repudiatory breach of the Agreement.

16 Mr Roderick *S.C.* also made reference to excerpt from the *Halsbury's Law of England* Vol 44 (Butterworths London, Fourth Edition, 1983) which effectively summarises *Pearlberg* as standing for the position that where a claimant commenced a claim for specific performance claiming damages as alternative relief *but not rescission*, he could not terminate the contract by accepting the repudiation without first discontinuing the claim (at para 522).

17 The same excerpt at para 522 also highlighted that "rescission" is often frequently and confusingly used in a broader sense to describe a different act, namely, the acceptance by one party to a contract of a repudiatory breach of contract by the other party. Acceptance of repudiation discharges both parties from further performance of their executory obligations under the contract, but the contract is not avoided ab initio and the innocent party may claim damages for breach of contract. A plaintiff may claim both specific performance and rescission (in the sense of acceptance of repudiation) in the alternative, but as these claims are inconsistent with each other he must elect between them at the trial if he has not done so previously: *Agnew* at p 392, per Lord Wilberforce.

18 On the other hand, the learned Counsel for the plaintiff, Mr Kelvin Tan ("Mr Kelvin Tan") argued that *Pearlberg* is no longer good law in light of the House of Lords' decision in *Agnew*. The House of Lords made it clear that there is no difficulty in English law for an innocent party to seek alternative remedies, namely, specific performance on the one part, and in the alternative, damages following from its acceptance of the repudiation. In such a case, the innocent party does not make an election for the remedy sought until it enters judgment: *Agnew* at 392G.

19 Mr Kelvin Tan argued that the present case falls squarely within the ambit of *Agnew*. Paragraphs 12 and 13 of the First SOC made it clear that the plaintiff was seeking common law damages in the alternative to specific performance. The alternative relief for loss and damage that arose from the defendant's breach of the Agreement would clearly only be available if there was no payment of the Balance Sum in performance of the terms of the Agreement. If the defendant had paid the Balance Sum, there could be no loss and damage flowing from the defendant's breach of its obligation to pay the Balance Sum. Therefore, paragraph 13 clearly contemplated the scenario where there is no performance of the defendant's payment obligation, and the plaintiff has to pursue common law damages for breach of contract.

20 In any event, the Court in *Pearlberg* accepted that, unless a plaintiff had, by his pleadings, unequivocally elected to affirm a contract and waived his right to accept the defendant's repudiation and terminate the contract, the plaintiff will be entitled to subsequently elect to terminate the contract. To this end, the plaintiff by virtue of the manner in which the First SOC was drafted, the plaintiff had never been unequivocal in electing to affirm the contract. It is further argued by the plaintiff that *Pearlberg* is in any case distinguishable from the present case.

Legal opinions on English law submitted by each party

21 As clause 11(b) of the Agreement provides that any disputes arising from the Agreement shall

be construed in accordance with English law, the plaintiff and the defendant submitted legal opinions furnished by their respective Queen Counsel, Mr Stephen Moriarty QC ("Mr Moriarty QC") and Mr Akhil Shah QC ("Mr Shah QC")

22 For the plaintiff, it is Mr Moriarty QC's legal opinion that *Pearlberg* is still good law. The Court of Appeal in *Pearlberg* held that it is not open to the plaintiff vendor to rescind the contract, and that he himself, had repudiated the contract by purporting to do so. The reasoning of the Court of Appeal was to the effect that all the while the vendor was seeking specific performance of the contract from the Court, he could not act inconsistently and rescind the contract for non-payment. Before he could rescind for non-payment, he had to abandon his claim for specific performance.

23 It is Mr Moriarty QC's opinion that the facts of the present case are on all fours with *Pearlberg* and *Pearlberg* should apply to this case. It was not open to the plaintiff to terminate the Agreement for repudiation on 4 November 2018: [17], [20] and [24] of Mr Moriarty QC's opinion refer.

24 For the defendant, Mr Shah QC opined that the plaintiff could accept the defendant's repudiation even though the First SOC prayed for specific performance. This is because the First SOC also sought damages in the alternative, and as an alternative claim, those damages were for loss of bargain in the event that specific performance was not awarded or would not be possible. English law permits a claim for alternative relief, and within this context, it was open to the plaintiff to accept the defendant's repudiation after a claim for specific performance had been made. Mr Shah QC accepted that *Pearlberg* had not been expressly overruled by *Agnew*. However, in light of *Agnew*, his view is that *Pearlberg* would be distinguished and decided differently. In brief, Mr Shah QC's opinion is that the plaintiff could accept the defendant's repudiation on 4 November 2018 because the First SOC also sought damages in the alternative.

Facts and holdings in *Pearlberg* and *Agnew*

25 As both parties had made extensive arguments and submissions on the cases of *Pearlberg* and *Agnew*, it is necessary to set out in details the facts and the holdings of each case.

Case facts of Pearlberg

26 In *Pearlberg*, the appeal arose on a counterclaim by Mr Pearlberg who paid a deposit to one Mr Greaves (the vendor) for the purchase of a cotton mill. Half-way through the proceedings, Mr Greaves passed on and one Mr Scholfield became the vendor's executor. Mr Scholfield also passed on and the Public Trustee stepped in as executor of the vendor's estate. The date for completion came and passed but Mr Pearlberg did not complete the sale and purchase of the cotton mill.

27 On 7 July 1932, Mr Greaves issued a writ. Shortly after, he passed on. On 9 November 1932, Mr Scholfield issued a fresh writ claiming for specific performance of the agreement; and in addition or in substitution damages. The writ was not served on Mr Pearlberg until 4 July 1933. On 12 July 1933, Mr Pearlberg entered an appearance. No proceedings were taken on the writ but it was also not taken off the file and remained operative at all material times.

28 On 13 October 1933, Mr Scholfield gave notice to Mr Pearlberg that unless payment is made in 14 days, the contract would be rescinded and the deposit forfeited. On further appeal on 24 October by the purchaser for more time, the vendor indicated that he might be prepared to make a fresh agreement with the purchaser. However, on 28 October, the vendor wrote to the purchaser's solicitor: "As your client has failed to comply with the terms of the notice dated 13 October, we have received definite instructions from our client that the contract must be rescinded and the deposit

forfeited. The matter must therefore be considered as at an end." Mr Pearlberg's deposit was forfeited. He eventually appealed to the English Court of Appeal in respect of the forfeiture of the deposit.

29 The point that was taken on appeal by Mr Pearlberg was that by bringing an action for specific performance, the vendor had elected to treat the contract for sale and purchase of the cotton mill as still on foot. This continued as long as the action remained in being with the consequence that the notice to rescind and forfeit the deposit while the action was still on foot was void.

Holdings and reasoning in Pearlberg

30 According to Slesser LJ, it is clear that by the notice on 13 October 1933, Mr Scholfield had purported to rescind the contract. In the learned judge's opinion, the whole question turns upon the validity of the notice. That Mr Pearlberg was in default is not disputed but it was argued for him that by failing to discontinue the action for specific performance, further time has been given for Mr Pearlberg to complete before hearing of that action; and that the vendor had taken out of his own hands and relegated to the Court the burden of deciding at what date the contract should be completed (at p 9).

31 Slesser LJ held that if the writ was equivocal in nature, whereby a statement of claim claiming recission could be made on a writ for specific performance, there would be force in the argument that such a writ did not necessarily involve action on the contract, and an assumption of its existence. However, in his learned opinion, the writ in this case was not of such nature. The claim was for specific performance of the agreement and for damages in addition to or in substitution for specific performance. The claim for damages in the alternative is *merely ancillary* to the claim for specific performance; and the relief claimed is on the basis of the continued existence of the contract which the defendant is failing to carry out. It followed that, as the action for specific performance had never been discontinued, dismissed for want of prosecution, or waived, it stood as a plea on the record asserting the existence of the contract, and asserting that the defendant is out of time to complete it. Indeed, the writ sought to make the Court compel him to do so. Consequently, owing to the absence of default on his part, the notice of rescission of the contract and claim to forfeit the deposit is bad. The plaintiff himself having repudiated the contract by the notice stating that the contract was at an end (at pp 11-12).

32 Luxmoore LJ also held that it is well-settled that a vendor cannot rescind a contract for sale of land where he himself brought an action for specific performance, which is pending at the date of the alleged rescission, for the claim for specific performance implied an affirmance of the contract (at p 18). The learned judge quoted the rule in William on Vendor and Purchaser that if the vendor takes proceedings to enforce the contract at law or in equity, he waives his right to rescind, though he may revert to it if he procures his proceedings to be effectually discontinued at his own costs before matter comes on to be heard.

33 The learned Lord Justice further held that where a vendor started an action for specific performance it would appear to the Court that the issue of writ is equivalent to a notice to the purchaser that he must complete his purchase at a time which will be fixed by the Court if the vendor succeeded in his action. Having given notice of this fact, he was of the view that it would seem impossible, while the action is pending for the vendor to fix some other and shorter time for completion under some provision of the contract. However, if the action for specific performance is discontinued, the right to fix a new time for completion under the contract would necessarily revive (at p 19).

34 The learned Lord Justice further observed that if the writ was equivocal and there was a claim for specific performance with an alternative claim for rescission, the vendor had not in fact made a definite choice in favour of enforcement of the contract and he would be entitled to rescind the contract. However, in *Pearlberg* case, the writ was for specific performance of the contract and for damages in addition to or in substitution for specific performance. On such a writ, the Lord Justice was of the view that the reference to damages was in substitution for specific performance had no reference to a possible claim to rescission, and would not include it (at pp 19-20).

35 Goddard LJ expressed similar views to the two Lord Justices (at pp 22-25).

Case facts of Agnew

36 In November 1973, the plaintiff vendors entered into a written agreement for the sale of their properties. They were in arrears with the repayment of their mortgage. The agreed price to be paid by the purchaser under the agreement was in excess of the sums required to discharge the mortgages and a loan raised by the plaintiff vendors would have enabled them to buy another property. However, the purchaser failed to complete.

37 In December 1974, the vendors' solicitor issued notice to make time of the essence and fixed 21 January 1974 as the completion date but the purchaser still did not complete. In March 1974, the vendors issued a writ claiming specific performance and damages in lieu of or in addition therefore, and alternatively a declaration that the vendors were no longer bound to perform the contract and further reliefs.

38 In November 1974, the vendors obtained a summary judgment and an order for specific performance was issued. By July 1975, the order for specific performance was still not being carried out and the mortgagees of the properties enforced their securities by force selling the properties. As such, by then, specific performance of the contract had become impossible. The sale proceeds realised by the mortgagees' sale were insufficient to discharge the outstanding mortgages in full.

39 The vendors took no action until November 1976. They then issued a notice of motion seeking: (a) an order that the purchaser should pay the balance of the purchase price under the sales and purchase agreement to the vendors and an inquiry as to damages; or (b) alternatively, a declaration that they were entitled to treat the contract as repudiated by the purchaser and to forfeit the deposit and an inquiry to damages. The first instance judge dismissed the motion. The Court of Appeal allowed the vendors' appeal, holding that the order for specific performance should be discharged and damages awarded in lieu. The purchaser appealed.

Holdings of the House of Lords in Agnew

40 On appeal, the House of Lords dismissed the appeal. In the judgment, Lord Wilberforce stated a few uncontroversial propositions of law (at pp 392 -394):

> First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can *either* treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; *or* he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.

Secondly, the vendor may proceed by action for the above remedies (viz. specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue.

Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.

At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about "rescission ab initio."

Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance.

Fifthly, if the order for specific performance is not complied with by the purchaser, the vendor may *either* apply to the court for enforcement of the order, *or* may apply to the court to dissolve the order and ask the court to put an end to the contract.

41 Lord Wilberforce went on to cite with approval an Australian case which he held was very similar to *Agnew* and that is the case of *McKenna v Richey* [1950] V.L.R. 360. *McKenna v Richey* was a case decided by the Supreme Court of Victoria that, after an order for specific performance have been made, which in the events could not be carried into effect, even though this was by reason of delay on the part of the plaintiff, the plaintiff could still come to court and ask for damages on the basis of an accepted repudiation. Lord Wilberforce held that the following passage from the case was illuminating (at p 397):

The apparent inconsistency of a plaintiff suing for specific performance and for common law damages in the alternative arises from the fact that, in order to avoid circuitry of action, there is vested in the one court jurisdiction to grant either form of relief. The plaintiff, in effect, is saying: 'I don't accept your repudiation of the contract but am willing to perform my part of the contract and insist upon your performing your part - but if I cannot successfully insist on your performing your part, I will accept the repudiation and ask for damages.' Until the defendant's repudiation is accepted the contract remains on foot, with all the possible consequences of that fact. But if, from first to last, the defendant continues unwilling to perform her part of the contract, then, if for any reason the contract cannot be specifically enforced, the plaintiff may, in my opinion, turn round and say: 'Very well, I cannot have specific performance; I will now ask for my alternative remedy of damages at common law.' This, in my opinion, is equally applicable both before and after decree whether the reason for the refusal or the failure of the decree of specific performance is due to inability of the defendant to give any title to the property sold, or to the conduct of the plaintiff which makes it inequitable for the contract to be specifically enforced...."

And later the learned judge said, at p. 376:

> "It is an appropriate case for a court of equity to say: 'As a matter of discretion, this contract should not now be enforced specifically, but, in lieu of the decree for specific performance, the court will award the plaintiff such damages as have been suffered by her in consequence of the defendant's breach. That is the best justice that can be done in this case.'"

42 Lord Wilberforce cited the above passage in *McKenna v Richey* with approval and concluded that he was happy to follow the reasoning in this case (at p 398B).

Application of *Agnew* and *Pearlberg* to the present case

43 Much has been written on the case facts and holdings in *Pearlberg* and *Agnew*. The ultimate question that leaves to be answered is how do these two cases apply to the present case. Before we proceed to apply the cases to the present case, it is important to remind ourselves that the holdings of each court must be viewed in the context of the facts and pleadings in each case. Hence, the need to set out the above in details.

44 The House of Lords' observation in *Agnew* has to be viewed in context with the case facts of *Agnew* and in particular, the pleadings and reliefs sought in the writ. In *Agnew*, the plaintiff vendors first issued a writ claiming for specific performance and damages in lieu of or in addition therefore, *and alternatively a declaration that the vendors were no longer bound to perform the contract and other reliefs*. By seeking the alternative declaration that the plaintiff vendors were no longer bound to perform the contract, what the plaintiff vendors were effectively seeking was an alternative claim for a declaration that they were entitled to treat the contract as terminated by the defendant's repudiatory breach, which in *Pearlberg*'s language, is the alternative claim for rescission. As such, there is no major inconsistency between the holdings in *Pearlberg* and *Angew*, and that is why even Mr Shah QC for the plaintiff agreed that *Pearlberg* has not been effectively overruled by *Agnew*.

45 From the wordings of the writ, it is clear from the outset that the plaintiff vendors in *Agnew* were not making an unequivocal choice of affirming the contract with their concurrent claim for specific performance as they were also seeking an alternative declaration that they were no longer bound to perform the contract due to the defendant's earlier failure to complete the purchase. The plaintiff vendors were clearly keeping their options open. Should events be such that an order for specific performance could not be carried into effect (which eventually took place), the plaintiff vendors reserve the right to seek the declaration that they were no longer bound to perform the contract as the contract had been repudiated by the defendant's earlier failure to complete. In those circumstances, the plaintiff vendors would proceed to sue for damages for breach of contract.

46 The context of Lord Wilberforce's observation is made even clearer when one juxtaposed it with his Lordship's citation of *McKenna v Richey* at p 397D to E of the judgment, where he explained what the effect of a plaintiff suing for specific performance and for common law damages in the alternative is:

> The plaintiff, in effect, is saying: 'I don't accept your repudiation of the contract but am willing to perform my part of the contract and insist upon your performing your part – *but if I cannot successfully insist on your performing your part, I will accept the repudiation and ask for damages*.' Until the defendant's repudiation is accepted the contract remains on foot, with all the possible consequences of that fact. But if, from first to last, the defendant continues unwilling to perform her part of the contract, then, if for any reason the contract cannot be specifically enforced, the plaintiff may, in my opinion, turn round and say: 'Very well, I cannot have specific performance; I will now ask for my alternative remedy of damages at common law.'

47 In fact, this was what happened in *Agnew*. The plaintiff vendors first obtained an order for specific performance through a summary judgment. However, the defendant purchaser still did not complete the sales and purchase of the properties as required under the order. Eventually, the properties were forced sold by the mortgagees and naturally, the order for specific performance could no longer be enforced. Hence, the plaintiff vendors went back to Court to ask for their alternative declaration that they were no longer required to perform the contract on the grounds of defendant's repudiation and to seek their alternative remedy of damages at common law.

48 Nonetheless, this was not the state of the plaintiff's pleadings in its First SOC. The plaintiff pleaded at paragraphs 12, 13 and the reliefs sought were as follows:

> 12. By reason of the aforesaid, the Plaintiff is entitled to specific performance of the Agreement, and payment of the Outstanding Sum from the Defendant.
>
> 13. In the alternative, by reason of the Defendant's aforesaid breaches of the Agreement, the Plaintiff has suffered loss and damages.
>
> ….
>
> And the Plaintiff claims:
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> (i) An order for specific performance by the Defendant of the Agreement;
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> (ii) The outstanding Sum of US$6,250,000;
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> (iii) in the alternative, damages to be assessed;
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> (iv) interest on the Outstanding Sum at the rate of 4% per annum, compounded monthly and calculated on the basis of the actual number of days elapsed and a 360-day year or, in the alternative, interest pursuant to section 12 of the Civil Law Act;
>
> (v) costs; and
>
> (vi) such further or other relief as this Honourable Court deems fit.

49 Nowhere in the First SOC did the plaintiff plead in the alternative, that the defendant's earlier failures to pay the Balance Sum evinced an intention on the defendant's part never to perform its obligations under the Agreement, which amounted to a repudiatory breach; and therefore in the alternative to a claim for specific performance, the plaintiff also seeks the declaration that it is no longer bound to perform the Agreement.

50 If the First SOC had been drafted in such terms, one would be able to say that the plaintiff had not been unequivocal in affirming the Agreement, just like in *Agnew*. It would also be clear that the alternative relief it sought for damages to be assessed at limb (iii) were common law damages arising out of a breach of contract and the defendant would have been hard put to argue that this case does not fall squarely within the parameters of *Agnew*.

51 I am of the considered view that the First SOC was drafted in terms that are more similar to that in *Pearlberg*. The facts of the present case are also more similar to *Pearlberg* than *Agnew*. Unlike in *Agnew*, no order for specific performance has been obtained in this case, which order could not be enforced as a result of events which unfolded and/or unwillingness of the defendant to perform its

part which we saw in *Agnew*.

52 By filing and serving a writ and the First SOC on the defendant claiming for specific performance without an alternative relief for a declaration that it is no longer bound to perform the contract (like in *Agnew*), I agree with the defendant that there is at the minimum a triable issue that this case falls within the parameters of *Pearlberg* and whether the plaintiff was effectively seeking to affirm the existence of the contract and to insist on the defendant performing its part of paying the Balance Sum and completing the purchase. By proceeding to serve the writ on the defendant, the plaintiff was in fact giving the defendant the ultimatum of either satisfying the claim for specific performance within 21 days from the date of service of writ or enter an appearance to defend the claim within the stipulated period. Naturally, that was how the defendant's representative Ms Lara interpreted the plaintiff's claim and cause of action. That was the reason why she responded that the defendant would "perform as per the court filing". Whether the defendant had truly intended or had the means to complete the purchase of the aircraft at the time of response is unclear but it is irrelevant for purpose of this application.

53 It is therefore arguable that in line with the principles of *Pearlberg*, the plaintiff having sought to affirm the contract by serving a statement of claim drafted in terms of the First SOC, which the defendant subsequently indicated that it would perform as per the court filing, the plaintiff cannot subsequently purport to bring the Agreement to an abrupt end on the next day by purportedly accepting the defendant's earlier failures to pay the Balance Sum as repudiation of the Agreement. If the First SOC had contained the alternative relief of seeking a declaration that it is no longer bound to perform the contract, it would have been clear that the plaintiff had kept their options open like the plaintiff vendors in *Agnew*. However, this was not the case.

54 As such, I am of the considered view that there is a triable issue whether the plaintiff was entitled to bring the Agreement to an end by purportedly accepting the defendant's earlier failures to pay the Balance Sum as repudiation when the First SOC was effectively pleading for an order for specific performance without an alternative declaration that it was no longer bound to perform the contract by virtue of the defendant's earlier failures to complete. I am in agreement with the defendant that there is also a triable issue of whether the plaintiff's conduct in purporting to bring the Agreement to an end on 4 November 2018 when it was seeking to affirm the existence of the Agreement with the defendant representing that it would perform as per Court filing, was itself a repudiation of the Agreement by the plaintiff.

55 In light of the foregoing, I allow the defendant's application to set aside the default judgment. It remains of me to thank both learned Counsel's for their able assistance and extensive submissions in this matter.

56 I shall hear parties on costs.

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