IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 3

Suit No 8 of 2017

Between

Sunrise Industries (India) Ltd

… *Plaintiff*

And

(1) PT. OKI Pulp & Paper Mills
(2) Dena Bank Limited

… *Defendants*

JUDGMENT

[Commercial Transactions — Sale of goods — Breach of contract]
[Contract — Variation]

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Sunrise Industries (India) Ltd
v
PT OKI Pulp & Paper Mills and another

[2023] SGHC 3

General Division of the High Court — Suit No 8 of 2017
Valerie Thean J
12–16, 19, 27 September, 14, 21 November 2022

6 January 2023 Judgment reserved.

Valerie Thean J:

Introduction

1 The plaintiff, Sunrise Industries (India) Ltd ("Sunrise"), is a company registered in India. Sunrise is in the business of manufacturing thermosets, thermoplastic-lined equipment, pipes and fittings.[1] The first defendant, PT. OKI Pulp & Paper Mills ("OKI"), is a company incorporated in Indonesia. OKI is in the business of manufacturing pulp, paper and tissue paper.[2]

2 Sunrise and OKI agreed that Sunrise would supply and install pipes, fittings and manholes for a new pump mill owned by OKI on an island in

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1 Mr Joy Kunjukutty's AEIC ("JK AEIC") at para 2 (BAEIC 5).

2 JK AEIC at para 3 (BAEIC 5).

Indonesia (the "Mill").[3] Sunrise was obliged to and did procure a bank guarantee with the second defendant, Dena Bank Limited ("Dena Bank"), a public bank in India.[4] Disputes arose in the performance of these contracts. Eventually OKI invoked the bank guarantee. Sunrise brought this suit thereafter.

Facts

Background to the dispute

3 Parties structured their transaction in relation to OKI's pump mill in two contracts. The first was "Purchase Contract for Delivery of A Complete Sets of FRP-Piping" (*sic*) dated 10 July 2015 (the "Supply Contract").[5] Under this contract, Sunrise was to supply OKI with goods including pipes, fittings and manholes. The contract value of the Supply Contract was initially US$6,647,625.[6] The Supply Contract was amended twice. On 14 September 2015, parties signed the first amendment agreement ("Supply Contract A1").[7] Supply Contract A1 reduced the scope of goods that were to be supplied, but increased the contract value to US$6,925,838.[8] On 10 November 2015, parties signed a second amendment agreement ("Supply Contract A2").[9] Under Supply Contract A2, OKI ordered additional goods, and the value of the Supply Contract rose to US$8,324,131.[10] Parties do not dispute these amendment agreements. Thus, when I refer to the Supply Contract, unless otherwise

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3 JK AEIC at para 5 (BAEIC 5–6).

4 JK AEIC at para 14 (BAEIC 9).

5 27 AB 15403–15666.

6 JK AEIC at para 5(1) (BAEIC 6).

7 JK AEIC at para 8 (BAEIC 7).

8 JK AEIC at para 9 (BAEIC 7).

9 JK AEIC at para 11 (BAEIC 8).

10 Plaintiff's Closing Submissions dated 21 October 2022 ("PCS") at para 15.

specified, I am referring to the Supply Contract incorporating both Supply Contract A1 and Supply Contract A2. I will refer to the goods that were to be supplied under the Supply Contract as the Goods.

4 The contract price of the Supply Contract was to be paid by OKI to Sunrise in the following manner: 10% was to be paid 15 days after the signing of the agreements and OKI's receipt of Sunrise's invoice and bank guarantee; 80% was to be paid by letter of credit issued by OKI; and the final 10% was to be paid after OKI's issuance of a Certificate of Performance Test Acceptance to Sunrise.[11]

5 The second contract was "Purchase Contract for Supervision and Installation Work of A Complete Set of FRP-Piping", also dated 10 July 2015 (the "Installation Contract").[12] Under the Installation Contract, Sunrise was to install the Goods for use in the Mill. The contract value was initially US$1,291,935,[13] but this subsequently increased to US$1,401,880 after amendment agreements dated 14 September 2015 ("Installation Contract A1") and 10 November 2015 ("Installation Contract A2").[14] These amendment agreements corresponded to Supply Contract A1 and Supply Contract A2 respectively. Like with the Supply Contract, any reference to the Installation Contract refers to the Installation Contract incorporating both amendments, unless otherwise specified.

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11 Mr Djung Wi Kuang's AEIC ("DWK AEIC") at para 7(a) (BAEIC 293).

12 28 AB 15667–15781.

13 JK AEIC at para 5(2) (BAEIC 6).

14 JK AEIC at paras 8–13 (BAEIC 7–9).

6 Under the Installation Contract, OKI was to pay Sunrise: the first 20% two months after the arrival of Sunrise's supervisor working continuously at the Mill; the next 20% two months after first payment; 30% after OKI's issuance of a hand over test acceptance; and 30% after OKI's issuance of a Certificate of Performance Test Acceptance.[15]

7 Under Supply Contract A1, Sunrise was required to procure a bank guarantee from Dena Bank for the sum of US$692,583.90 (the "Bank Guarantee"). The Bank Guarantee was procured on 21 September 2015. Because Supply Contract A2 increased the contract value of the Supply Contract, it provided that the Bank Guarantee had to be increased accordingly, to US$832,413.20. On 6 January 2016, the Bank Guarantee was increased to this amount.[16]

8 As stated above at [4], 80% of the Supply Contract price was to be paid by way of letter of credit. On or about 24 September 2015, OKI extended a letter of credit for the sum of US$5,318,100 to Sunrise ("LC1"). This was 80% of the contract value of the unamended Supply Contract. Under Supply Contract A1, however, the letter of credit needed to be in the sum of US$5,540,671.20 to reflect the increased contract value. LC1 was thus amended by OKI on 16 November 2015 to reflect the increased amount ("LC1 A1").[17] LC1 A1 was then amended once more, on 23 December 2015 ("LC1 A2"), when the "last date of shipment" was changed from 3 December 2015 to 29 February 2016.[18] In order to account for the increase in contract value from Supply Contract A1

15 DWK AEIC at para 7(b) (BAEIC 293).

16 JK AEIC at paras 14–17 (BAEIC 9–10).

17 JK AEIC at para 18 (BAEIC 10–11) and 1st Defendant's Closing Submissions dated 21 October 2022 ("1DCS") at para 17.

18 JK AEIC at para 18 (BAEIC 10–11).

to Supply Contract A2, a second letter of credit was issued by OKI on 11 January 2016 ("LC2"). LC2 also reflected 29 February 2016 as the latest date of shipment. [19]

9 Despite LC1 A2 and LC2 indicating 29 February 2016 as the last day of shipment, Clause 5 of Supply Contract A1 provided that Sunrise was to deliver the Section I Goods such that the first consignment arrived at the port of discharge in Indonesia (the "Port of Discharge") on 17 November 2015, and the last consignment arrived at the Port of Discharge on 25 November 2015.[20] Clause 5 of Supply Contract A2 required Sunrise to ensure that the last consignment of Section II Goods arrived at the Port of Discharge on 15 January 2016.[21]

10 The Goods were shipped by Sunrise before 29 February 2016.[22] They arrived at the Port of Discharge on or about 24 March 2016.[23] In respect of the Goods, there are three areas of dispute between the parties. The first is whether the Goods delivered complied with the specifications in the Supply Contract. The second is whether all the Goods that were required to be supplied under the Supply Contract were in fact delivered. The third is whether the Goods were delivered on time.

11 In order to fulfil its obligations under the Installation Contract, Sunrise's position is that it deployed personnel to the project site at the Mill (the "Project

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19 JK AEIC at para 19 (BAEIC 11).

20 28 AB 15838.

21 28 AB 15943.

22 JK AEIC at para 20 (BAEIC 11).

23 PCS at para 213, 1DCS at para 3.

Site") as early as 25 January 2016.[24] Sunrise's general manager for the project, Mr Pradeep Mahadeo Thorat ("Mr Thorat") arrived at the Project Site on or about 25 February 2016.[25] Sunrise's installation works were hindered by various disputes between the parties regarding, amongst other things, the state of the accommodation at the Project Site and OKI's release of moneys under the letters of credit. Sunrise demobilised its installation team pending resolution of these disputes on 8 March 2016.[26] On 18 May 2016, OKI informed Sunrise that it had no interest in continuing business with them.[27] Sunrise therefore never completed the installation works, and never received any payment for the same. A few days later, OKI engaged a different company, PT Piping System Indonesia ("PT Piping"), to complete the installation works.[28]

12 On 10 October 2016, OKI invoked the Bank Guarantee and directed Dena Bank to pay the sum of US$832,413.20 to it. The evidence of OKI's only witness in this suit, its mills procurement coordinator Mr Djung Wi Kuang ("Mr Horison"), is that OKI did so to satisfy (in part) the amounts due to it from Sunrise for various breaches of the Supply Contract.[29] In Sunrise's view, there was no basis for OKI to do so because Sunrise had performed its obligations under the Supply Contract.[30]

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24 JK AEIC at paras 223–224 (BAEIC 115–116).

25 JK AEIC at paras 209 and 223 (BAEIC 109 and 116); DWK AEIC at para 53(a) (BAEIC 351).

26 JK AEIC at para 270 (BAEIC 134).

27 JK AEIC at para 374 (BAEIC 175).

28 DWK AEIC at para 76 (BAEIC 361).

29 DWK AEIC at para 61–62 (BAEIC 356–357).

30 JK AEIC at para 385 (BAEIC 181).

Procedural history

13 Sunrise first commenced proceedings in India against OKI and Dena Bank (the "Indian Proceedings"). In response, OKI took out an application seeking to dispose of the Indian Proceedings for lack of jurisdiction. The Supply Contract and Installation Contract had exclusive jurisdiction clauses in favour of Singapore.[31] By the time OKI's application was heard, Sunrise had already commenced this suit in Singapore. The Indian Proceedings thus came to an end.[32]

14 This suit was commenced on 6 January 2017.[33] Sunrise sought injunctions to restrain OKI from calling on the Bank Guarantee and Dena Bank from releasing the Bank Guarantee until the determination of this action. Their summons for an injunction was heard urgently on an *ex parte* basis on that same day, and Tan Lee Meng SJ granted the injunctions sought.[34] On 28 April 2017, OKI took out an application for the interim injunctions to be set aside. After hearing parties, Tan SJ allowed OKI's application and the interim injunctions were discharged on 21 June 2018 (see *Sunrise Industries (India) Ltd v PT OKI Pulp & Paper Mills and another* [2018] SGHC 145).[35] The sum of US$832,413.20 was eventually transferred by Dena Bank to OKI on or about 23 May 2019.[36] Dena Bank did not enter an appearance and took no part in these

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31 JK AEIC at para 386 (BAEIC 182).

32 JK AEIC at para 388(5) (BAEIC 184).

33 JK AEIC at para 399 (BAEIC 190).

34 JK AEIC at para 402 (BAEIC 191).

35 JK AEIC at para 409 (BAEIC 194).

36 DWK AEIC at para 65 (BAEIC 357).

proceedings.[37] On 13 September 2022, leave was granted for the claim against Dena Bank to be withdrawn with no order as to costs.[38]

15 On 24 May 2017, OKI filed its defence as well as a counterclaim (the "counterclaim"). On the same day, it issued formal notices of termination of both the Supply Contract and the Installation Contract to Sunrise.[39]

Parties' cases

Sunrise's case

16 Sunrise contends that it fully performed all its obligations under the Supply Contract. As such, it is entitled to the full contract price from OKI, and OKI is not entitled to retain any of the Bank Guarantee that it currently holds. Mr Joy Kunjukutty ("Mr Kunjukutty"), managing director of Sunrise, and Mr Ganapathy Subramanian Viswanath ("Mr Viswanath"), a technical director of Sunrise, gave evidence on behalf of Sunrise.

17 Sunrise's responses to OKI's allegations of breach are as follows. There was no delay because the delivery dates in the Supply Contract were varied by agreement. Thus, when the Goods were delivered on or about 24 March 2016, that was in accordance with the Supply Contract. Sunrise supplied manholes in accordance with the drawings provided by OKI, and supplied all the Goods that were required to be delivered under the Supply Contract. Accordingly, Sunrise seeks:

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[37] JK AEIC at para 405 (BAEIC 191).

[38] Transcript, 13 September 2022, p 3 lines 10–11.

[39] JK AEIC at paras 407–408 (BAEIC 192–194).

(a) damages in the sum of US$832,413.20, representing the amount paid to OKI under the Bank Guarantee;[40] and

(b) damages in the sum of US$832,413.20, representing the 10% of the Supply Contract value that OKI has not paid to Sunrise.[41]

18 Regarding the Installation Contract, Sunrise contends that OKI wrongfully repudiated the Installation Contract, which Sunrise accepted. It therefore seeks the following damages in respect of this repudiation:

(a) damages in the sum of US$856,633.60, representing losses suffered as a result of OKI's wrongful repudiation of the Installation Contract;[42] and

(b) damages in the sum of US$600,000, representing Sunrise's loss of business resulting from OKI's repudiation of the Installation Contract.[43]

OKI's case

19 OKI's case is that Sunrise breached the Supply Contract by:

(a) delivering the Goods late;

(b) delivering Goods which did not comply with the contractual specifications;

(c) failing to deliver certain special tools; and

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40 PCS at para 241.

41 PCS at para 254.

42 PCS at paras 417 and 437.

43 PCS at para 438.

(d) failing to fulfil the requirements to supply "Site Warehouse", "Site Office" and "Site Preparation".

20 OKI therefore contends that it is entitled to significant damages under the Supply Contract. The Bank Guarantee was called to satisfy these damages, and OKI is entitled to retain the same.[44] In addition to retaining the Bank Guarantee, OKI seeks:

(a) the return of US$7,491,718.80, being the 90% of the Supply Contract value that it has paid to Sunrise;[45]

(b) damages of US$584,496 and IDR7,080,400 for losses in respect of Sunrise's non-compliant Goods;[46] and

(c) damages of US$84,498, being the sum it paid for the "Site Warehouse", "Site Office" and "Site Preparation".[47]

21 OKI alleges that Sunrise was in breach of the Installation Contract. Sunrise's defective performance of its obligations, refusal to perform installation works and imposition of additional conditions on OKI entitled OKI to terminate the Installation Contract, which it did on 18 May 2016.[48] OKI seeks the following damages from Sunrise:

(a) liquidated damages in the sum of US$144,154.50, representing 10% of the Installation Contract value;[49]

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44 1DCS at para 170.

45 1DCS at paras 167–168.

46 1DCS at paras 135 and 138.

47 1DCS at para 141.

48 1DCS at para 152.

49 1DCS at para 122.

(b) damages of IDR61,200,000 and US$441,224 representing costs incurred by OKI that should have been borne by Sunrise under the Installation Contract;[50]

(c) damages in the amount of US$8,666, representing rental charges owed by OKI to Sunrise;[51] and

(d) reimbursement for the costs incurred in engaging PT Piping to complete the installation works.[52]

Issues

22 The positions taken by parties give rise to the following issues:

(a) Did Sunrise breach the Supply Contract?

(b) If so, what are the relevant remedies?

(c) Did Sunrise breach the Installation Contract?

(d) If so, was OKI entitled to terminate the Installation Contract?

(e) In either event, whether OKI was entitled to terminate or was in breach by so terminating, what are the appropriate remedies?

23 For reasons I explain, I hold that Sunrise was in breach of both contracts and OKI was entitled to terminate the Installation Contract.

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50 1DCS at paras 145, 146 and 150.

51 1DCS at para 151.

52 1DCS at para 165.

Did Sunrise breach the Supply Contract?

Delay

24 The Supply Contract stipulated certain "Delivery Dates". Clause 5 of Supply Contract A1 provided that Sunrise was to deliver the Section I Goods such that the first consignment arrived at the Port of Discharge on 17 November 2015, and the last consignment arrived at the Port of Discharge on 25 November 2015.[53] In fact, the first consignment arrived on 6 November 2015[54] but the last consignment only arrived on or about 24 March 2016.[55]

25 For Supply Contract A2, Sunrise was obliged under Clause 5 to ensure that the last consignment of Section II Goods arrived at the Port of Discharge on 15 January 2016.[56] In fact, the Section II Goods only arrived at the Port of Discharge on or about 24 March 2016.[57]

26 Sunrise's position is that the Delivery Dates were varied in line with the amendments made to the letters of credit. LC1 A2 and LC2 both stated that the "last date of shipment", the date on which the Goods should be loaded on to the carrier, was 29 February 2016. Sunrise argues therefrom that the Supply Contract was varied such that its obligation was to ensure the Goods were shipped out by 29 February 2016.[58]

53 28 AB 15838.

54 PCS Annex A S/N 12; 15 AB 8317.

55 1DCS at para 3.

56 28 AB 15943.

57 1DCS at para 3.

58 PCS at para 40.

27 For the reasons that follow, I am not satisfied that the Supply Contract was varied in respect of the Delivery Dates.

Effect of the amendments to the letters of credit

28 OKI does not dispute that LC1 A2 and LC2 were amended to reflect 29 February 2016 as the last date of shipment, and that OKI agreed to this amendment. OKI disagrees that this amendment had the effect of varying the underlying Supply Contract.[59]

29 Sunrise argues that "[i]t is trite that a change of date on a letter of credit is deemed to be a variation of the contract".[60] I disagree with this proposition, and I deal with the authorities Sunrise relies upon.

30 In *South Caribbean Trading Ltd v Trafigura Beheever BV* [2004] All ER (D) 334 (Nov), parties entered an agreement whereby the plaintiff ("SCT") was to sell to the defendant ("Trafigura") some barrels of oil. One of the issues which the court considered was whether the date of delivery under one of the contracts had been agreed to be varied. In a telephone conversation, Trafigura's representative promised that the letter of credit would be extended. Sunrise highlights the court's finding that (at [105]):

> … the assent of [Trafigura] to the extension of the letter of credit until 30 June expiring July 2001 was an effective variation of Contract 5536 to that effect. That is because it was a new agreement supported by mutual promises - on the part of Trafigura to accept delivery of product at a date different from 31 March at a fixed price and on the part of SCT that, the blending operation having been much delayed, would successfully be completed by the new delivery date.

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59 1DCS at para 42.

60 PCS at para 64.

31 However, this was not a statement of legal principle but simply a factual finding in the context of that case. SCT's case was that "on 14 and 15 March 2001 it was agreed between [SCT] and [Trafigura] that the time for delivery by SCT under Contract 5536 was to be extended from 31 March to 30 June with Trafigura's letter of credit to be amended consistently with the former to permit shipment up to 30 June and its validity for presentation of documents to be up to 15 July 2001" (at [54]). The extension of the letter of credit was consequential to an agreement to amend the underlying contract. It was not SCT's case that the agreement to extend the letter of credit was, *in itself*, a variation of the underlying contract.

32 In *W.J. Alan & Co. Ltd. v El Nasr Export and Import Co.* [1972] 2 QB 189, Lord Denning M.R. held that, where one party to a contract has by his conduct induced the other party to believe that he will not insist on his strict legal rights under a contract, he has waived his rights and cannot afterwards insist on them if the other party has acted on that belief differently from how he would have otherwise acted. This case is not relevant as Sunrise confirmed during the trial that its case was that the Supply Contract had been varied, not that OKI had waived Sunrise's breach.[61]

33 In *China Resources (S) Pte Ltd v Magenta Resources (S) Pte Ltd* [1997] 1 SLR(R) 103 ("*China Resources*"), the letter of credit was amended to provide for a last date of shipment on 14 December 1991. The Court of Appeal found that the sellers were in breach of contract when they failed to deliver by this date (at [31]). However, the fact that the underlying contract had been initially varied to provide for a 14 December 1991 deadline was not disputed. There is no suggestion in this case that the last delivery date under a letter of credit is

[61] Minute sheet, 27 September 2022.

conceptually the same as the delivery date under the underlying sale of goods contract.

34 *Hartley v Hymans* [1920] 3 KB 475 is also not of assistance to Sunrise. Sunrise relies on McCardie J's holding that the buyer was estopped from saying that the delivery period had expired on the contractually stipulated date, or from asserting that the contract had ceased to be valid on that date. McCardie J held that the buyer's conduct, in requesting delivery after the expiry date, had led the seller to believe that the contract was still subsisting, and the seller had acted on that belief to great expense. This is not relevant to the present case. Sunrise is not alleging estoppel but a variation of the Supply Contract.

35 Thus, none of the authorities cited by Sunrise stand for the proposition which it argues is "trite". Certainly, as a factual matter, when parties agree to vary the required delivery dates under a sale of goods contract, they will almost certainly amend the delivery date on any letter of credit accordingly. Otherwise, the letter of credit would serve no practical purpose. The seller will not be able to receive payment even though he has complied with the contractual deadline. Nonetheless, *the converse does not necessarily follow*. While the agreement to extend the delivery date under a letter of credit could mean that parties had reached an agreement to vary the underlying contract, it could also indicate that the buyer was, while willing to accept delivery and make payment, reserving his rights to recover damages caused by the seller's delay. In order to pay for the Goods and fulfil his own obligations under the contract, he would have to amend the letter of credit accordingly. Therefore, the amendments to LC1 and LC2, and the negotiations leading up to those amendments, are significant only as part of the factual matrix from which I must ascertain if Sunrise and OKI agreed to vary the Delivery Dates under the Supply Contract.

Analysis of factual matrix

36 Coming to the factual matrix, I first consider the correspondence between the parties surrounding the amendments to LC1 and the opening of LC2.

37 LC1 was issued on 24 September 2015. On 7 October 2015, Sunrise sent an e-mail to OKI stating that LC1 reflected the wrong amount. In this e-mail, Sunrise stated:[62]

> Under the circumstances you are requested to kindly amend the LC for the following at the earliest possible.
>
> 1. LC amount will be USD 5,540,671.20
>
> 2. Date of last shipment 30 days from the date of receipt of your amended LC.
>
> 3. Date of expiry of LC 15 days after last shipment.
>
> 4. LC advising bank, kindly advise the LC through our advising bank only.
>
> You are requested to kindly confirm the above points, so that we can start processing of the shipment.

This was followed by some chasers from Sunrise. On 28 October 2015, Mr Horison replied that LC1 was being processed, and on 29 October 2015 he sought confirmation from Sunrise that OKI would amend the Last Shipment Date from 10 October 2015 to 13 November 2015, and the expiry date from 31 October 2015 to 4 December 2015.[63] I pause to note that, at this point, the proposed last shipment date still came before the Delivery Date for the Section I Goods under the Supply Contract (25 November 2015).

[62] 12 AB 6912.

[63] 13 AB 7397.

38 In response, Sunrise replied that it required the last shipment date on the letter of credit to be 30 days from the date of receipt of the letter of credit, and the expiry date to be 21 days from the last shipment date. It explained that "[t]he last date of shipment will be changed based on the date of letter of credit amendment" and that time was required for the booking of vessels and containers, and making shipping arrangements.[64] Implicit in this e-mail was that Sunrise would not begin to make shipping arrangements *until* it received a letter of credit with the correct terms.

39 Mr Horison responded that LC1 had already been amended according to the terms stated in his earlier e-mail. He asked Sunrise to "please try your best to delivered this [*sic*] goods before the deadline".[65] On 31 October 2015, Sunrise arranged for the shipment of goods under the Supply Contract and informed OKI that it had done so.[66] However, not all the Section I Goods were shipped in this shipment. On 5 November 2015, Sunrise informed OKI that they would ship the remaining Section I items once they received the amended LC.[67]

40 LC1 A1 was obtained by OKI on 6 November 2015. It reflected 10% of the price of Supply Contract A1, a last shipment date of 3 December 2015 and an expiry date of 24 December 2015.[68] OKI argues that the amendment to the last shipment date was only done because Sunrise threatened to delay shipping the balance Goods if it was not done. On 9 November 2015, OKI had still not sent LC1 A1 to Sunrise, and Sunrise stated that "as soon as we receive the

[64] 13 AB 7396.

[65] 13 AB 7395.

[66] JK AEIC at para 124 (BAEIC 72); DWK AEIC at para 47(a) (BAEIC 333).

[67] 14 AB 7614.

[68] 28 AB 15939.

amended letter of credit as per Section I change order, we will despatch all the pending materials and will complete the Section I Change order".[69] LC1 A1 was provided to Sunrise on or about 16 November 2015.[70]

41 On 28 November 2015, OKI raised an issue with Sunrise because it had heard that the final shipment of Section I Goods was going to be shipped with the Section II Goods. OKI noted that this meant that work would not be able to start until 20 January 2016, and said "THIS WILL BE A DISASTER PLAN". OKI asked for Sunrise to immediately make alternative shipping arrangements and explained that it had manpower on site whose presence would be a waste if the Goods had not arrived.[71] Sunrise's response was to highlight that it only received advance payment from OKI on 13 November 2015, it only received LC1 A1 on 16 November 2015, and it had not yet received payment under LC1 A1. It also stated that it had "already taken necessary actions to expedite the balance shipment".[72]

42 On 3 December 2015, Sunrise informed OKI that it had been trying to ship the Goods at the earliest possible time, but it had been unable to do so due to "non availability of booking on the vessels". It then noted that the last date of shipment was 3 December 2015 (that day) and the expiry date was 24 December 2015. Sunrise said the following:[73]

> In this connection, you have two option as follows, because we have already informed to you in our various mails that we require 30 days minimum for shipment from the date of receipt of amended letter of credit.

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69 14 AB 7725.

70 JK AEIC at para 18 (BAEIC 11).

71 16 AB 9034.

72 16 AB 9033.

73 16 AB 9093.

> 1. You will accept the discrepancies for the last date of shipment while negotiating the documents for the shipment up to 16.12.2015 and negotiation upto 06.01.2016.
>
> 2. You will amend the letter of credit for last date of shipment and negotiation date accordingly.
>
> We are awaiting for your immediate confirmation to enable us to proceed further in the matter.

43 Further, on 7 December 2015, Sunrise explained to OKI that it would be easier for Sunrise to find a shipper for the balance Section I Goods if they were shipped together with the Section II Goods for the following reasons:[74]

(a) the balance Section I Goods included major raw materials which were hazardous in nature and required special permission for shipment;

(b) the balance Section I Goods only required five containers, and this was posing difficulty in obtaining a booking with its shipping forwarder; and

(c) the Section II Goods were ready for shipment, and also included raw materials that required special permission.

Thus, Sunrise asked OKI to open LC2, and make advance payment under Supply Contract A2 so that it could plan the shipment of the balance Section I Goods together with the Section II Goods.

44 On 14 December 2016, OKI told Sunrise that it was still waiting for a letter from Sunrise for "extended LC expired date & last delivery time".[75] On 16 December 2015, Sunrise sent OKI a letter of request, seeking to amend the

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74 16 AB 9135.

75 17 AB 9429.

last shipment date under LC1 A1 to 28 February 2016 and the expiry date to 21 March 2016,[76] in accordance with its plan to ship the balance Section I Goods with the Section II Goods. Ultimately, on 23 December 2015, OKI agreed to this amendment (save that the last shipment date was amended to be 29 February 2016 instead of 28 February 2016) and LC1 A1 became LC1 A2.[77]

45 As for LC2, OKI first provided Sunrise with a draft on 28 December 2015.[78] On 30 December 2015, it asked Sunrise: "How about the latest shipment date? should we put 29 feb 2016 (as per amendment of AA1?"[79] LC2 was then opened on 11 January 2016 with a last shipment date of 29 February 2016.[80]

46 Mr Horison's evidence is that OKI never agreed to extend the time for delivery of the Goods under the Supply Contract. The timelines as stated in the Supply Contract always remained important to OKI to ensure that there were no delays for the Mill. OKI had "no choice" but to agree to amend the last date of shipments in the letters of credit so that Sunrise would take steps to ship the Goods. When LC2 was opened, the last date of shipment was stated to be 29 February 2016 because Sunrise had indicated that it would be shipping the balance Section I Goods and the Section II Goods together.[81]

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76 28 AB 15996.

77 28 AB 16030–16031.

78 18 AB 10498.

79 19 AB 10557.

80 28 AB 16080.

81 DWK AEIC at para 47 (BAEIC 332–333).

47 Mr Kunjukutty also did not offer clear evidence of an agreement by both parties to extend time. He conceded it was his assumption, in the following way:[82]

> Q: 25th November is the last date of arrival, correct?
>
> A: Yes.
>
> Q: Okay. The last date of arrival, according to Sunrise, has not been amended?
>
> A: It is---it is automatically amended when we communicated them---

And later:[83]

> Q: So your position is that because---actually I'm not quite clear. So your position is that the---because the last date of shipment is amended from 10th of October to November 2015, the last date of arrival is automatically amended? That's your position?
>
> …
>
> Q: No, no, is it answer yes or no?
>
> A: Yes.

48 Even later, he relies on a lack of objection by OKI:[84]

> Q: Okay. Is it your evidence that because there was no objection to automatically extending the dates, that's why Sunrise has this entitlement to ship 30 days after the letter of credit is opened?
>
> A: Yes, agree.

49 Sunrise's case may be said to be that it offered to vary the Delivery Dates by its various e-mails, and it assumed that OKI agreed. It cannot be fairly said, however, that there was any acceptance on the part of OKI. When OKI agreed

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[82] Transcript, 13 September 2022, p 129 lines 23–27.

[83] Transcript, 13 September 2022, p 138 lines 9–15.

[84] Transcript, 13 September 2022, p 143 lines 19–22.

to amend the last date of shipment in LC1 and opened LC2 with a last date of shipment after the Delivery Date, it was simply ensuring that Sunrise could receive payment under the letters of credit so that Sunrise would ship the Goods, as it was already obliged to do. OKI's correspondence reflected vexed indulgence, rather than agreement in a contractual sense. It was not forgoing its right to liquidated damages for delivery after the Delivery Dates stated in Clause 5.1. None of the correspondence between the parties suggests that OKI had done so. Nor was there any reason why it would do so. As expressed in their e-mail at [41] above, the deadlines were important to them. As I explained at [35] above, parties may have good reasons for agreeing to extend the validity and last shipment date of a letter of credit *without* agreeing to a change in the deadline in the underlying contract. Sunrise has adduced insufficient evidence to prove that OKI's agreement to amend the letters of credit was anything more than just that.

50 In this context, it is important to note that the Supply Contract expressly set out a process for the variation of Delivery Dates. Clause 5.2 read as follows:[85]

> 5.2 Alteration In Time Schedule
>
> *If* the fulfilment of the Supplier's obligations is delayed by reasons which, according to the Contract, *entitle* either Party to alteration of the Target Time Schedule for Deliveries in Annex VII Appendix 1, then the time limits indicated in this Clause 5 and the payments in Clause 3 of the Contract Text will be respectively altered *when required by the Party concerned.*
>
> Should any such delays, the reasons for which are caused by Purchaser, causes significant additional expenses to the Supplier, the Purchaser shall compensate the Supplier for such documented additional expenses directly and reasonably incurred.

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85 27 AB 15473.

> *All* such changes of time limits or compensation for additional expenses *shall be agreed in writing* by the Parties within four weeks *from either Party's written notice that such delay has become evident*. Possible compensations shall be included in change order lists.
>
> [emphasis added]

51 Contrary to the wording of Clause 5.2, Sunrise did not in writing notify that it was entitled to an alteration of the time schedule. Sunrise raised for the first time in closing oral responses that all that was required for Clause 5.2 was anything in writing. In my judgment, whatever correspondence parties had could not fairly be said to have been sufficient notice nor agreement in writing for the purposes of Clause 5.2. The correspondence did not even refer to Clause 5.2.

52 The overall picture that emerges is simply that OKI knew that Sunrise was going to deliver the Goods after the Delivery Dates. In order to receive the Goods, it facilitated delivery by amending its letters of credit. This does not amount to a variation. Variation of the terms of a contract does not occur as a matter of course where an innocent party tolerates tardiness. Variation requires offer and acceptance between parties that is supported by consideration: *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [36].

53 Sunrise points to the fact that LC1 A2 and LC2 were ultimately drawn down on 22 April 2016, which was after their respective expiry dates.[86] It argues OKI must have asked its bank to allow payments to be released to Sunrise, and that this means that OKI knew that Sunrise was entitled to payment under the letters of credit because the Goods had been shipped by their last payment

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[86] PCS at para 94.

dates.[87] This does not assist Sunrise. Even if Clause 5.1 had not been varied, Sunrise was entitled to payment under the letters of credit because it had delivered the Goods to OKI. Clause 5.1 did not entitle OKI to withhold 80% of the contract price if the Delivery Dates were not met. It only entitled OKI to liquidated damages (the maximum of which was provided to be 10% of the contract price).[88] Thus, the release of the moneys under the letters of credit does not suggest that Clause 5.1 must have been varied. OKI had no contractual basis to withhold payment.

54 I conclude therefore that parties did not mutually agree to a variation of Clause 5.1 of Annex III of the Supply Contract.

No consideration

55 For good measure, OKI also contends Sunrise has failed to identify any consideration in the event of any variation. In *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 ("*Ma Hongjin*"), the Court of Appeal considered and rejected arguments that the requirement of consideration should be abolished in the context of variations or modifications to a contract: at [60]–[94].

56 Sunrise makes three points in response. First, it contends that OKI is not entitled to raise a lack of consideration because it failed to raise this point in pleadings. Sunrise relies on the Court of Appeal's decision in *Lim Zhipeng v Seow Suat Thin and another matter* [2020] 2 SLR 1151 ("*Lim Zhipeng*") for the proposition that a defendant must plead a lack of consideration if it wishes to

87 PCS at paras 96 and 103.

88 27 AB 15474.

deny a variation on that basis.[89] However, *Lim Zhipeng* does not stand for this proposition. In *Lim Zhipeng*, the appellant's case as set out in his statement of claim was based on a purported deed of guarantee by the respondent. In response, the respondent pleaded that "she never intended the Guarantee to be a Deed of Guarantee … and/or there was no consideration for the [Respondent] signing the Guarantee" (at [49]). This was denied by the appellant in his reply. The trial judge held that the purported deed was invalid, and therefore the guarantee would only be enforceable if it was supported by consideration. The trial judge dismissed the appellant's claim because consideration had not been adequately pleaded in his statement of claim (at [19]). The Court of Appeal disagreed, and held at [54] that:

> Given that the issue of consideration was not raised until the Respondent filed her Defence and Counterclaim, it would not have been appropriate for the Appellant to pre-empt the issue and raise in it in his statement of claim. This is particularly so as the Appellant's claim was premised on a "*deed* of guarantee" [emphasis added], for which consideration was not required for validity. We add that even if the claim was not premised on a deed, it is not necessary for a plaintiff to plead consideration until the absence of consideration is raised as a defence.

Thus, *Lim Zhipeng* stands for the proposition that a plaintiff cannot be faulted for failing to expressly plead consideration in its statement of claim. It does not stand for the proposition that a defendant is only entitled to raise lack of consideration if it has been pleaded. *Lim Zhipeng* is therefore irrelevant in this case – OKI is not suggesting that Sunrise's claim should fail due to its failure to identify consideration in its statement of claim. It is Sunrise that is suggesting that OKI's defence which involves an absence of consideration ought to have been pleaded. To consider this issue, Sunrise's statement of claim is relevant.

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[89] Plaintiff's Supplementary Closing Submissions dated 21 November 2022 at paras 9–13.

57 In Sunrise's statement of claim, it pleaded that it "completed its performance of its contractual obligations under the Supply Contracts in a timely fashion in the month of February 2016" at para 7. At para 30, it pleaded that it had not breached any of the terms of the Supply Contracts and that it had completed its obligations under the Supply Contracts. It did *not* expressly refer to any variation of the Delivery Dates in the Supply Contract. With no allegation of a variation of the Supply Contract, OKI could not respond in its defence that there was a lack of consideration for that variation. Sunrise's position is thus that OKI ought to have amended its defence, or filed a rejoinder, after Sunrise raised in its reply the allegation that the latest dates of shipment in the Supply Contract had been extended. Neither option would have been appropriate given that Sunrise itself did not amend its statement of claim to incorporate reference to the variation.

58 Thus, there is nothing preventing OKI from arguing that the purported variation of the Supply Contracts was not supported by consideration. Sunrise relies on this variation, and the onus is on Sunrise to establish that the Supply Contracts were validly varied.

59 Sunrise's second alternative contention is that Clause 5.2 dispensed with the need for any consideration.[90] The Court of Appeal in *Ma Hongjin* accepted at [36] that parties could, by agreement, dispense with the requirement of consideration. Sunrise argues that Clause 5.2 did so dispense with consideration. A plain reading of the Clause (see [50] above), with its reference to compensation in the second and third paragraphs, reflects that it was envisaged that consideration be discussed between parties when the clause was exercised.

[90] Plaintiff's Oral Response to 1st Defendant's Closing Submissions dated 14 November 2022 at paras 16–18.

I have held at [51] that Sunrise did not issue the requisite notice under the clause, and thus Clause 5.2 would in any event be inapplicable.

60 As a third alternative, Sunrise argues that there was consideration. The Court of Appeal in *Ma Hongjin* accepted at [65] that any factual benefit (in line with *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 ("*Williams*")) could satisfy the requirement of consideration. Sunrise's position is that very little is required by way of consideration where parties are in a commercial relationship (see *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [102]–[103]). Only a practical benefit is required and Sunrise cites the practical benefit OKI received from the receipt of the Goods. It relies upon *Williams,* where the factual benefit of the timely performance of the contract was considered consideration for an increase in the contract price. Of course, in *Williams*, parties had come to an agreement. In the present case I have held that parties did not have such an agreement. As such, there was no properly accepted delivery date. Instead, OKI was faced, on a rolling basis, with continued tardiness. No factual benefit was conferred by Sunrise's continual delay. Nor did Sunrise offer anything in exchange for OKI agreeing to extended timelines; they simply assumed that OKI would accept the situation. With no proper renegotiation or fresh bargain struck, while Sunrise did eventually supply all the material it had promised to supply, the lateness remained a breach for which variation would have required fresh factual benefit. The facts of this case are more akin to *Foakes v Beer* (1884) 9 App Cas 605, where it was held that a promise to accept part payment of a debt was unenforceable for lack of consideration, than to *Williams*.

Conclusion on delay

61 I therefore find that the Delivery Dates within Clause 5.1 of Annex III were not varied. Sunrise was in breach of the Supply Contract by failing to comply with the Delivery Dates in Clause 5.1.

Non-compliant manholes

62 It is not disputed that Sunrise did not supply OKI with manholes that complied with the specifications set out in Clauses 1.1(a) and 1.2 of Supply Contract A1 read with Attachment I of Supply Contract A1, and Clause 1 read with Attachment III of Supply Contract A2 (the "Specification Clauses").[91] Sunrise's case is that it had supplied manholes which followed instead the specifications contained in revised drawings which were accepted by OKI, and that this means they did not breach the Supply Contract.[92] It is not disputed that Sunrise supplied manholes in accordance with revised drawings that were signed by OKI on 22 September 2015. The issue here is therefore what the applicable specifications were under the Supply Contract.

63 I accept that the applicable specifications were those contained in the drawings which OKI accepted. The documentation shows a pre-contract understanding that the specifications in the Specification Clauses would be modified subsequently. On 7 May 2015, Mr Jamaluddin from OKI's technical team told Mr Horison that: "Drawing revision can be done after selection of supplies as *per site condition and requirement*" [emphasis added].[93] Mr Horison followed on with instruction to Mr Atanu of Sunrise: "Please kindly print out

91 Transcript, 13 September 2022, p 158 line 24 to p 159 line 26.

92 PCS at para 147.

93 2 AB 763.

and sign that manhole drawing now to process commercial based on this *preliminary data first*" [emphasis added].[94] OKI and Sunrise were aware that the specifications in the Specification Clauses of the Supply Contract were to be preliminary, and revisions were to be made after selection of supplies. There was no agreement to reduce the contract price in the event that smaller manholes were needed.

64 This arrangement was necessary because the precise specifications of the manholes depended upon measurements on the ground as well as the condition of the ground. Mr Horison accepted in cross-examination that the site was a green field area on an island. The manholes were to be installed underground, and the ground condition such as its gradient and the existence of plants would affect the size of manhole needed. He thus accepted that standard size manholes would not be appropriate, and the required specifications could only be finalised once someone made measurements on site.[95]

65 Mr Horison conceded that OKI had accepted Sunrise's revised drawings but alleged that OKI was forced to do so.[96] However, his evidence was not consonant with the documentation. The context behind OKI's acceptance of the revised drawings is as follows. In early September 2015, a dispute arose between OKI and Sunrise about the specifications of the manholes. Sunrise sent OKI a document dated 8 September 2015 (the "MTO") containing certain specifications. However, Sunrise later pointed out that the specifications in the MTO did not match the drawings which had been approved by OKI's technical team. On 17 September 2015, Mr Alain Dion from OKI's technical team

94 2 AB 770.

95 Transcript, 15 September 2022, p 63 line 31 to p 64 line 28.

96 Transcript, 15 September 2022, p 73 lines 9–22.

proposed that a set of manhole drawings be printed and initialled for inclusion in the Supply Contract, and that "Sunrise should list as part of their MTO and for each manhole the diameter and height so that the MTO would match with the drawings".[97] This reflects the initial agreement Sunrise and OKI's technical team had prior to the contract, and shows that the specifications in the drawings were to take precedence. Following this, on 21 September 2015, Mr Horison sent an e-mail to Mr Michael Wong ("Mr Wong"), the person in charge of the Project. In this e-mail he asked Mr Wong to confirm which specifications should be used: those in the signed MTO, or those in the drawings which had not been signed by OKI. He highlighted that some manholes manufactured based on the drawings had heights below two metres, when the price of the Supply Contract had been calculated based on a minimum height of two metres (the specification in the MTO).[98] In cross-examination, he explained that he was highlighting the loss incurred as the manholes were smaller.[99] There was no response from Mr Wong to this e-mail. However, the next morning, Mr Jamaluddin responded with: "Enclosed file Sunrise drawing signed".[100] Thus, the pricing and specifications of the manholes had been specifically accepted by the technical team both prior to contract and in its fulfilment. Mr Atanu was then informed also on 24 September 2015. Sunrise and OKI's technical team worked together on the various drawings up to 10 November 2015.[101]

66 Therefore, on 24 September 2015, the parties were in agreement that the specifications were those in the drawings. Any personal opposition that

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[97] 12 AB 6419.

[98] 12 AB 6418.

[99] Transcript, 15 September 2022, p 71 line 29 to p 72 line 2.

[100] 12 AB 6418.

[101] 14 AB 7865.

Mr Horison had to this was never acted upon by OKI. However, when the Supply Contract was signed on 28 September 2015, it appears that there must have been a mistake because the Specification Clauses included the specifications from the MTO. Nevertheless, it is clear that the intention to use the specifications in the revised drawings remained. As counsel for OKI rightly conceded, OKI would have been extremely vexed if the manholes had been delivered per the specifications in the MTO because they would not have been usable for the plant.[102] Thus, OKI received precisely what it bargained for: manholes which could be used on the plant with specifications that had been approved by its technical team. The claim that Sunrise supplied non-compliant manholes is not genuine, and this will be made even more clear when I consider the manner in which OKI calculated its apparent loss arising from this alleged breach, which I deal with in passing.

67 OKI seeks damages in respect of Sunrise's supply of non-compliant manholes in the sum of US$584,496. The first time OKI specified US$584,496 as the sum overcharged for the manholes was in its Defence and Counterclaim (Amendment No 2) dated 13 August 2019.[103] OKI arrived at this sum because it is the difference between the price paid by OKI and the price which it claims it should have been charged based on the actual size of the Goods received.[104]

68 OKI relies on *Bridgeman Pte Ltd v Dukim International Pte Ltd* [2013] SGHC 220, where the plaintiff breached the contract by overcharging the defendant and the court awarded the defendant damages amounting to the

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102 Transcript, 14 November 2022, p 49 lines 10–19.

103 1st Defendant's Defence and Counterclaim (Amendment No 2) dated 13 August 2019 at para 50(e) (SDB 82).

104 1DCS at para 131.

difference between the price that the defendant should have been charged under the contract and the price that the defendant was actually charged (at [51]). OKI argues that smaller manholes have a lower value since less material would be used to make them. Thus, the amount that it should have been charged for the non-compliant manholes is the Supply Contract price reduced in proportion to the reduction in size of the manholes supplied.[105] To illustrate, I use one manhole as an example:[106]

Manhole No.	**Height as per Supply Contract**	**Height of manhole supplied**	**Price as per Supply Contract**	**Price that should have been charged**
OK-01	2,130	1,010	US$3,734	US$1,771

69 The issue with this methodology is that it assumes that the market value of the manholes is directly proportionate to their size. I do not accept that this is necessarily the case. No evidence was adduced by OKI to suggest that this is the case. Instead, OKI relies on *Giedo Van Der Garde BV and another v Force India Formula One Team Ltd (Formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2372 (QB) ("*Giedo Van Der Garde BV*").[107] There, an agreement was reached for the defendant to, amongst other things, allow the plaintiff to drive 6000km in its Formula 1 car. Ultimately, the defendant only allowed the plaintiff to drive 2004km. In awarding damages, the court held that "loss is to be assessed by reference to the value of the kilometres and associated benefits which should have been but were not provided" (at [487]). However, the court went on to explain that:

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105 1DCS at para 135.

106 29 AB 16531.

107 1DCS at para 134.

> The assessment of that value is a matter of evidence. The value of the withheld benefits is not the same as or determined by, and is indeed conceptually quite distinct from, the contract price. The contract price may in an appropriate case be part of the evidence from which an inference may be capable of being drawn as to the value of the withheld services, but it may not. If there is evidence that the contract represented a good deal for the Claimant, in that he acquired the right to the services contracted for for a price lower than the market price or their market value, any inference as to market value that might otherwise be drawn from the contract price must yield to such evidence and the inferences to be drawn from it. Equally if the evidence shows that it was a bad deal for the Claimant the contract price must yield to such evidence as the more reliable source from which to draw inferences as to value.

Thus, the court's ultimate concern was the *market value* of the benefit not provided. The contract price was simply one piece of evidence that was relevant. Further, *Giedo Van Der Garde BV* does not stand for the proposition that the market value of a non-provided benefit can be assumed to be directly proportionate to the contract price. Admittedly, the damages awarded in *Giedo Van Der Garde BV* were directly proportionate to the benefit lost. The court held that the plaintiff had not been provided the benefit of 3,730km out of 6,000km, and thus there was a 62.17% loss in this regard. The value of this lost benefit was held to be $1,865,000 (at [498]), which is 62.17% of $3m, which was the contract price (at [3]). However, it is clear that the court arrived at this conclusion after considering expert evidence on the value of driving 4,000km in a Formula 1 car (see [488]–[494]), and did not do so by assumption.

70 There was no such expert evidence adduced by OKI as to the market value of the manholes. There was therefore nothing to suggest that the value of the manholes was directly proportionate to their size. In fact, the prices charged for the manholes under the Supply Contract suggested that their values were *not* directly proportionate to their size. For example, OK-01's size would be $0.7668m^3$. OK-06's size would be $7.52m^3$. Thus, OK-06 was 9.81 times the size

of OK-06. However, the price of OK-06 under the Supply Contract (US$25,751) was only 6.90 times of OK-01's price (US$3,734). Therefore, I do not accept that the market value of the manholes can be obtained simply by reference to their size. OKI did not contract for the supply of manholes to be resold to a third party. Conversely, OKI contracted for the supply of goods it required to install in the Mill. The manholes were custom-drawn and built, and there is no evidence that they were not installed by PT Piping. Nor is there any evidence that the manholes failed to serve the purpose upon installation due to their specifications. I should mention that while Mr Horison stated that OKI spent IDR7,080,400 (roughly US$453) to modify the manholes for use,[108] the particular document exhibited details manpower costs which were likely accounted for in the installation price paid to PT Piping.

71 A final issue in this context was OKI's contention as to the non-delivery of a manhole. On or about 16 October 2015, Sunrise provided OKI with a president summary which indicated that it was to provide 16 manholes of certain dimensions pursuant to Supply Contract A2.[109] It is not disputed that Sunrise only supplied OKI with 15 of these manholes although its case was that 16 were manufactured.[110] It is also undisputed that 15 were sent because OKI only needed 15 of these manholes, and its technical team had told Sunrise this.[111] Supply Contract A2 was signed on the basis of the drawings and the directions of the technical team to be supplied later. Because the technical team no longer required the last manhole and told Sunrise this, there is no issue of non-delivery.

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[108] DWK AEIC at para 71 (BAEIC 360); 29 AB 16528.

[109] 13 AB 7175.

[110] Transcript, 13 September 2022, p 171 lines 5–9.

[111] Transcript, 15 September 2022, p 81 lines 8–11; 15 AB 8160 and 8166.

In any event, as it was not disputed that OKI did not require the last manhole, there is no loss arising from the lack of delivery of the last manhole.

Non-delivery of special tools

72 OKI alleges that Sunrise breached the Supply Contract by failing to supply "tools, special tools, consumables, plant and machineries" ("Special Tools") along with the Goods, within the meaning of Clause 4.5 of Annex I Appendix 5 of the Supply Contract.[112]

73 However, OKI does not seek damages in respect of this alleged breach. It relies on the non-delivery of Special Tools in order to establish its entitlement to maximum liquidated damages under the Supply Contract. Given my conclusion above that Sunrise breached the Supply Contract by failing to meet the Delivery Dates, I conclude at [80] below that it is entitled to maximum liquidated damages under the Supply Contract. As such, I need not consider this alleged breach.

Failure to prepare site, site warehouse and office

74 Under the Supply Contract, Sunrise was to supply OKI with a "Site Warehouse", "Site Office" and "Site Preparation". OKI alleges that Sunrise did not do so.[113]

75 OKI's allegation is not borne out by the evidence. Between 4 January 2016 and 4 February 2016, Sunrise informed OKI that it would be preparing a site office and fabrication shed.[114] On 16 March 2016, Sunrise's Mr Thorat

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[112] 1DCS at para 80.

[113] 1DCS at para 93.

[114] 19 AB 10619; 10 AB 11288.

reported that their "workshop container office" had been broken into.[115] In an e-mail on 30 March 2016, Sunrise informed OKI that the "Site Warehouse", "Site Office" and "Site Preparation" had already been completed at the site.[116] OKI did not refute this.

76 Further, these offices would have been necessary to the installation phase of the project, which was ultimately completed. There was no evidence that OKI paid any other entity to prepare the warehouse, office or site. The amount claimed for this item comprised merely a demand for repayment of amounts paid to Sunrise based on invoices issued by Sunrise.[117]

77 I therefore accept Sunrise's position that it did supply the "Site Warehouse" and "Site Office", and complete "Site Preparation".

Remedies under the Supply Contract

Liquidated damages

78 Under Clause 6.1 of Annex III of the Supply Contract (read with Clause 6.5 of Annex III), OKI was entitled to liquidated damages amounting to 10% of contract price if the shipment was delayed by more than six weeks.[118] As mentioned earlier, shipment only completed on or around 24 March 2016. This was more than six weeks after both the Delivery Dates in Supply Contract A1 and Supply Contract A2. Thus, OKI is entitled to liquidated damages of US$832,413.20.

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[115] 23 AB 13377.

[116] 25 AB 14222.

[117] 1DCS at para 141; 28 AB 15854 and 15954.

[118] 27 AB 15474–15475; 1DCS at para 118.

79 Sunrise submits that, because OKI has used all the Goods supplied under the Supply Contract for the construction of the Mill, and the Mill has been in operation since December 2016, OKI has suffered no loss. Therefore, its claim for maximum liquidated damages is entirely inequitable and constitutes unjust enrichment.[119] This argument is misconceived. First, a party does not need to prove loss to entitle itself to liquidated damages. This would defeat the purpose of liquidated damages, which are intended to "facilitate recovery of damages without the difficulty and expense of proving actual damage": *Chitty on Contracts* (Hugh G. Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) at para 29-205. Second, it cannot reasonably be said that the fact that the Mill is now in operation and the Goods have all been used means that OKI has suffered no loss. They received the Goods late, and one can generally expect losses to flow from that fact. That is precisely why Clause 6.1 of Annex III exists in the Supply Contract. Third, Sunrise has produced no authority for the proposition that unjust enrichment, which is ordinarily an independent cause of action, can be used as a defence to a claim in contract.

80 Thus, I award OKI liquidated damages under the Supply Contract of US$832,413.20.

OKI's claim for return of price paid

81 Finally, OKI seeks a full refund of the amounts paid to Sunrise under the Supply Contract, being US$7,491,718.80.[120]

82 OKI argues that under Clause 16.1(c) of Annex III of the Supply Contract, it was entitled to terminate the Supply Contract if "delivery of the

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119 PCS at para 222.

120 1DCS at para 168.

[Goods] has been delayed so much that [OKI] is entitled to the maximum amount of liquidated damages as stated in the [Supply Contract] or if such a delay becomes obviously imminent or a major repair obligation has not timely started".[121] OKI did so on or about 24 May 2017. Clause 16.1(c) also provides that should the Supply Contract be terminated by OKI, Sunrise was to return all paid payments received with 12% annual interest.

83 I reject OKI's submission. Its entitlement to unilaterally terminate the Supply Contract arose when the Goods were delayed by more than six weeks, which was in January 2016 for Supply Contract A1 and February 2016 for Supply Contract A2. The fact is that, at that point in time, OKI did not terminate the Supply Contract. Instead, OKI agreed to amend the letters of credit such that they could make payment for Sunrise's delivery of the Goods. Having elected not to exercise its entitlement to terminate the Supply Contract in January or February 2016, and allowing OKI to ship the Goods, OKI was no longer entitled to rely on Clause 16.1(c). Clause 16.1(c) clearly envisages a situation in which the Goods had not yet been shipped, or in which the Goods were non-functional. Neither situation is applicable here. Sunrise points out that the letters of credit expired on 21 March 2016, and delivery was only completed on 24 March 2016. Thus, in order for OKI's bank to make payment to Sunrise, OKI would have to authorise payment despite the discrepancy.[122] I accept that this was likely the case, and OKI authorised the payment of the balance 80% of the Supply Contract price on 22 April 2016.[123] This indicates that Sunrise supplied the Goods as required under the Supply Contract, albeit with delay – and the issue of delay is the function of the liquidated damages clause.

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[121] 27 AB 15480.

[122] PCS at para 97.

[123] DWK AEIC at para 45 (BAEIC 331–332).

84 Thus, there is no basis for OKI to claim a refund from Sunrise.

Sunrise's entitlement to final 10%

85 Sunrise claims that it is due the final 10% of the contract price payable under the Supply Contract. OKI claims that it is not, because the final 10% of the contract price only becomes payable upon a Certificate of Performance Test Acceptance as defined by the Supply Contract being issued to Sunrise, and no such certificate has been issued.

86 The relevant clause is Clause 3.1 of the Supply Contract which provides:[124]

> 3.1 The terms of payments for the Price of the [Goods] is as follows:
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> …
>
> 10% of the Price of the [Goods] … to be paid by telegraphic transfer in 30 days after [OKI] has received [Sunrise's] original invoice and the Certificate of Performance Test Acceptance issued and signed by authorized representatives of [OKI].

The Certificate of Performance Test Acceptance is defined in Clause 1 of Annex III of the Supply Contract as follows:[125]

> the Certificate Issued by the Purchaser to the Supplier, that the Plant has met the Performance Guarantees as per Annex II Appendix 1 and has fulfilled all the conditions stated in the model Certificate of Performance Test Acceptance in Annex II Appendix 3.

87 OKI's argument is that the effect of these provisions is that the payment of the final 10% of the contract price was expressly tied to *Sunrise's* installation

[124] 28 AB 15837; 15942.

[125] 27 AB 15467.

of the Goods.[126] The Certificate of Performance Test Acceptance would only be issued upon *Sunrise's* completion of installation works – and this never happened in light off Sunrise's repudiation of the Installation Contract. In my view, this reading of Clause 3.1 is unduly narrow. In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131], the Court of Appeal endorsed, among others, the following canons as a guide for interpreting contracts:

(a) The interpretation exercise is based on the whole contract and is a holistic approach. Courts are not excessively focused on a particular word, phrase, sentence, or clause. Rather, the emphasis is on the document as a whole.

(b) Due consideration is to be given to the commercial purpose of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.

(c) A construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.

88 OKI's submission is premised on the proposition that Sunrise's obligations under the Supply Contract included installing the Goods. If Sunrise's obligations did not extend to personally installing the Goods, there would be no reason for them to be denied any part of the contract price as long as the Goods were installed and were in good working condition. The preamble

[126] 1DCS at para 185.

to the Supply Contract states that Sunrise is "willing and able to sell and deliver the [Goods] to [OKI] in accordance with the terms and conditions set forth in [the Supply Contract]".[127] Clause 11 of Annex III of the Supply Contract sets out the general obligations of Sunrise.[128] None of the clauses therein refer to an obligation on the part of Sunrise to install the Goods. Of course, this is entirely understandable given that parties had agreed a separate Installation Contract. Even looking at Clauses 3.1 and 11 in isolation, there is no clear indication that the Goods must be installed by Sunrise. I therefore do not accept that, on an objective interpretation of the Supply Contract as a whole, installation fell within Sunrise's obligations. Thus, my interpretation of Clause 3.1 is not one whereby Sunrise is only entitled to full payment if it *personally* completes the installation works. The final 10% is payable as long as OKI has certified that the relevant performance guarantees and conditions as defined in Clause 1 of Annex III of the Supply Contract[129] have been met. The Supply Contract was for the provision of the Goods; and the relevant time to assess whether the Goods have been fully supplied was at the time of completion of installation.

89 OKI issued to PT Piping a completion certificate in respect of the installation works which was dated 16 April 2016 but signed by OKI on 18 and 19 June 2017.[130] Further, OKI has accepted that the installation works for the Goods completed in December 2016, and the Mill is presently in operation.[131] In response to Sunrise's claim for the final 10%, OKI did not allege that any of

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[127] 27 AB 15406.

[128] 27 AB 15477–15479.

[129] 27 AB 15468–15469.

[130] 30 AB 16536–16872.

[131] 1st Defendant's Defence & Counterclaim (Amendment No 2) dated 13 August 2019 at para 43(dd) (SDB 79); Transcript, 19 September 2022, p 11 lines 25–32.

the Goods were faulty or did not meet the performance requirements stated in the Supply Contract. It simply relies on the fact that no Certificate of Performance Acceptance Test in the narrow sense (*ie*, one issued by OKI in respect of installation works carried out by Sunrise) has been issued. In the circumstances, I am satisfied that the Goods complied with the performance guarantees and conditions, and therefore Sunrise is entitled to the balance 10% of the Supply Contract price.

Sunrise's entitlement under the Bank Guarantee

90 The Bank Guarantee was issued pursuant to the Supply Contract. It is undisputed that OKI had paid up to 90% under the Supply Contract at the time that OKI called on the Bank Guarantee. This was the amount that Sunrise was entitled to at that juncture, because its case relies on the certificate issued by PT Piping approved by OKI in June 2017.[132] At the same point in time, based on my findings above, OKI was also entitled to liquidated damages of 10%. It was therefore appropriate at that juncture for OKI to call upon the Bank Guarantee to recoup that amount. Accordingly, no relief is granted to Sunrise for the call on the Bank Guarantee.

Did Sunrise breach the Installation Contract?

91 According to OKI, Sunrise breached the Installation Contract by failing to perform the installation works by the agreed times as set out in Clause 5.1 read with Annex VII Appendix 1 of the Installation Contract.[133] This then entitled OKI to terminate the contract.

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[132] PCS at para 267.

[133] 1DCS at para 102.

92 Sunrise has two key responses. First, it alleges that the timeline set out in the Installation Contract does not apply.[134] Sunrise argues that the timeline whereby mobilisation was to be completed by 21 September 2015 and installation work was to be completed by 31 January 2016 is inapplicable because it must be read with the specified shipping schedule, which provided that the Goods were only to begin arriving on 25 October 2015.[135] However, Sunrise has not explained what the appropriate timeline is, or how it complied with it. I note that Sunrise accepts that 28 February 2016 was the appropriate "Start-Up Date" under Clause 5.1 of the Installation Contract, being the date beyond which delay of installation work entitled OKI to liquidated damages.[136] There is no dispute that as of 28 February 2016, the installation work had not been completed by Sunrise. Thus, the relevance of this argument is unclear. Sunrise clearly failed to complete the installation works within the time stipulated in the Installation Contract.

93 Second, Sunrise claims that it was ready, willing and able to perform the Installation Contract and did in fact perform some installation works. In this regard, Sunrise highlights that the following is clear from the correspondence between parties from November 2015 to April 2016:[137]

(a) Sunrise had taken steps to deploy the necessary personnel to the Project Site;

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[134] PCS at para 281.

[135] PCS at paras 282–283; 28 AB 15776.

[136] PCS at para 411.

[137] PCS at para 394.

(b) OKI had caused delays in the procurement of the necessary visas and work permits for Sunrise's personnel, and delays in providing and finalising the installation drawings and schedule;

(c) OKI failed to provide reasonable accommodation for Sunrise's personnel at the Project Site;

(d) OKI unreasonably demanded that Sunrise make three-month advance payment before it would provide the requisite accommodation for Sunrise's personnel, despite there being no agreement to do so;

(e) work had been done in setting up the container office/warehouse; and

(f) work had been done fabricating manholes on-site, shifting manholes, marking manholes and cutting the manholes.

94 Notably, Sunrise's response is not that it fully performed its obligations under the Installation Contract. Rather, its response is that it had performed some of its obligations, was willing to perform fully, but was unable to do so due to OKI's conduct. Nevertheless, none of OKI's conduct that Sunrise complains of amounted to a breach of the Installation Contract, nor did it constitute conduct for which Sunrise was entitled to delay performance under the Installation Contract.

95 A key aspect of the dispute between parties that led to Sunrise's demobilisation concerned the accommodation facilities for Sunrise's personnel. In an e-mail on 2 March 2016, Mr Thorat highlighted to OKI that the housing arrangements for Sunrise's personnel were unsatisfactory, and that despite concerns having been raised with OKI, OKI was not remedying the situation.

Sunrise's personnel therefore had to stay in unsatisfactory conditions since 25 February 2016. In the circumstances, Sunrise had to hold off on further deployment of its manpower, and had to consider demobilising the team already in Indonesia until the housing issues had been solved.[138] The same day, Mr Kunjukutty sent an e-mail to OKI stating that Sunrise was not able to create any housing facilities at the Project Site due to various constraints. He also stated that Sunrise would pay for accommodation provided by OKI, but it had to be provided immediately. Otherwise, Sunrise would not be able to send more personnel from India.[139] On 8 March 2016, Mr Kunjukutty informed OKI that Sunrise's personnel still had not been provided with the requisite housing facilities and Sunrise therefore had "no choice but to demobilise the team". He also told OKI that Sunrise would not be mobilising any further personnel unless and until it received confirmation on the availability of the requisite facilities.[140] Sunrise's team and Mr Thorat left the Project Site a few days later.[141]

96 Subsequently, Mr Thorat met with OKI's representatives who agreed to attend to the housing issues and meal arrangements for Sunrise's personnel. However, they requested that Sunrise make advance payment before they readied the accommodation.[142] Sunrise describes this as an unreasonable and particularly onerous obligation that had not been agreed between parties.[143]

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[138] JK AEIC at para 262(9) (BAEIC 129).

[139] JK AEIC at para 263 (BAEIC 130).

[140] JK AEIC at para 270 (BAEIC 134).

[141] JK AEIC at para 278 (BAEIC 137).

[142] JK AEIC at para 282 (BAEIC 139).

[143] PCS at para 399.

97 Clause 4 of Annex I Appendix 1 of the Installation Contract provided the following:[144]

> WORKING CONDITIONS FOR SUPERVISORS
>
> [Sunrise] shall arrange and furnish facilities for the Installation personnel:
>
> – Site Office
>
> – Furnish the Site Office
>
> …
>
> Accommodation and Food Services
>
> [Sunrise] shall provide accommodation for supervisor, and [Sunrise] shall provide food service for supervisor.

At trial, Mr Kunjukutty accepted that the obligation to provide accommodation and food services was on Sunrise, not OKI.[145] He accepts also that pursuant to the above clause, Sunrise was to "arrange the living camp with local standard for its management and workers."[146] However, he contends that there was an "understanding" that OKI would provide Sunrise with the appropriate housing facilities and that Sunrise would pay OKI for the same.[147] Sunrise did not plead the existence of such an understanding, nor was any documentation on its terms produced. In any case, even if there was such an understanding, there was nothing which prevented OKI from demanding advance payment for providing the services which were truly Sunrise's responsibility under the Installation Contract.

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[144] 28 AB 15678.

[145] Transcript, 14 September 2022, p 35 lines 3–7.

[146] JK AEIC at para 265 (BAEIC 130).

[147] PCS at para 337; JK AEIC at para 266 (BAEIC 130–131).

98 I accept that there was no prior agreement that Sunrise would pay in advance for accommodation provided by OKI. However, neither was there an agreement that OKI would not require advance payment. This is illustrated by the fact that, when OKI requested advance payment, Mr Thorat's response was not that this was contrary to prior agreement, but that it had been put up for approval with management.[148] Given that there was no agreement either way on advance payment, Sunrise was subject to OKI's terms if it chose to rely on OKI to provide accommodation. When I raised this, counsel for Sunrise submitted that "if that's a doubt, that can't be used as a reason to terminate a contract … because both parties have not agreed to that."[149] That is precisely the point. The absence of an agreement either way about advance payment meant that Sunrise could not use it as a reason to demobilise from the Project Site and neglect its obligations under the Installation Contract.

99 Based on the terms of the Installation Contract, Sunrise had no basis to expect that OKI would provide its personnel with accommodation or food services. Therefore, dissatisfaction with the state of the accommodation which OKI nevertheless agreed to provide, or with the payment terms offered by OKI, did not entitle Sunrise to delay its performance under the Installation Contract. OKI's conduct did not constitute a breach of the Installation Contract, which said nothing about its provision of accommodation for Sunrise's personnel. What Sunrise did in response, however, was a breach of the Installation Contract. Sunrise demobilised its personnel from the Project Site which prevented it from performing its obligation to install the Goods.

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[148] 23 AB 13379.

[149] Transcript, 14 November 2022, p 34 lines 22–24.

Was OKI entitled to terminate the Installation Contract?

100 Given that Sunrise breached the Installation Contract, the next question is whether OKI was, as a result of that breach, entitled to terminate the Installation Contract.

101 It is first important to identify when exactly the Installation Contract was terminated. There are three possible dates. First, there is 24 May 2017, when OKI's solicitors served on Sunrise a "NOTICE OF TERMINATION".[150] Second, there is 18 May 2016, being the date when OKI informed Sunrise by e-mail that it had "no interest to continue business with [Sunrise] anymore" and "[a]ll [its] rights under the contract shall be claimed from [Sunrise] to the fullest extent possible".[151] Finally, there is 7 April 2016, when Mr Horison accepted that he told Mr Thorat to leave the Project Site, and that essentially he was saying that he did not want Sunrise to perform the Installation Contract anymore.[152]

102 The Installation Contract cannot have been terminated by OKI on 7 April 2016, because after that date, the correspondence shows that OKI and Sunrise still contemplated that the Installation Contract would be performed. On 12 April 2016, OKI requested payment from Sunrise for processing fees so that it could obtain work permits for ten of Sunrise's personnel.[153] At this point, parties were still operating on the basis that they were to perform their obligations under the Installation Contract. On 3 May 2016, OKI urged Sunrise

150 29 AB 16508.

151 27 AB 15177.

152 Transcript, 16 September 2022, p 80 line 6 to p 81 line 15.

153 JK AEIC at para 352 (BAEIC 166).

to dispatch its personnel to start installation work without any further delay.[154] The position changed, however, with OKI's 18 May 2016 e-mail. In this e-mail, OKI made clear that it did not wish for Sunrise to perform the installation works. A few days later, OKI engaged another company to perform the installation works instead (see [11] above). Thus, at this point, OKI had elected to terminate the Installation Contract in response to Sunrise's breach. Because the Installation Contract was terminated as at this date, it follows that the later notice of termination issued by OKI's lawyers was of no effect.

103 OKI submits that it was entitled to terminate the Installation Contract for two reasons. First, Sunrise refused to perform its installation work and insisted on imposing additional conditions that had not been agreed, which constituted a repudiatory breach. Second, the Installation Contract expressly provided OKI with an entitlement to terminate.

104 I have found that Sunrise breached the Installation Contract because of its delay, at [92] above. The installation works were not completed by 28 February 2016, the stipulated Start-up Date, and they remained uncompleted when the Installation Contract was terminated on 18 May 2016. As I find at [109] below, this entitled OKI to the maximum liquidated damages under the Installation Contract. Clause 24.1 of Annex III of the Installation Contract provides:[155]

> **TERMINATION**
>
> In addition to what has been stated elsewhere in this Contact, [OKI] shall be entitled to terminate unilaterally this Contract, or part of it and/or the Installation Work of the Plant or a part thereof:

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154 26 AB 15143–15144.

155 28 AB 15705–15706.

> …
>
> c) if the Installation Work of the Plant has been delayed due to the activities of [Sunrise] so much that [OKI] is entitled to the maximum amount of liquidated damages as stated in the Contract Text or if such a delay becomes obviously imminent or
>
> …

Accordingly, OKI was entitled to terminate the installation contract on 18 May 2016. This falls within Situation 1 at [113] of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 (*"RDC Concrete*"), which is where "[t]he contractual term breached clearly states that, in the event of certain event or events occurring, the innocent party is entitled to terminate the contract." The Installation Contract clearly states that, where Sunrise's delay is such that maximum liquidated damages are payable, OKI is entitled to terminate.

105 OKI's case on their acceptance of Sunrise's repudiatory breach is also made out. In *RDC Concrete* at [93], the Court of Appeal held that a party is entitled to elect to terminate a contract when the other party "by his words or conduct, simply renounces its contract inasmuch as it clearly conveys to the other party to the contract that it will not perform its contractual obligations at all" [emphasis in original omitted]. The Court of Appeal further explained in *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2022] 1 SLR 302 ("*iVenture*") at [64], that:

> A renunciation of contract occurs when one party by words or conduct evinces an intention not to perform or expressly declares that he is or will be unable to perform his obligations in some material respect, and short 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. For example, the party in default may intend to fulfil the contract but may be determined to do so only in a manner substantially inconsistent with his obligations, or may *refuse to perform the contract unless the other party complies with certain conditions not required by its terms*: *San International Pte Ltd*

> *(formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20].
>
> [emphasis added]

The Court of Appeal went on to explain at [65] that:

> … a refusal to perform a contract unless the other party complies with an invalid condition will not necessarily amount to a repudiation and much depends on all the facts and circumstances of the case: *Mayhaven Healthcare v Bothma and another (trading as DAB Builders)* [2009] 127 Con LR 1 at [30]. *The question is whether iVenture Card's refusal to perform the Service Level Agreement on condition that Big Bus performed the Licence Agreement and the Reseller Arrangement would lead a reasonable person to conclude that it no longer intended to be bound by the Service Level Agreement.*
>
> [emphasis added]

106 In the present case, the position is made clear by an e-mail sent by Sunrise to OKI on 17 May 2016, the day before OKI elected to terminate the Installation Contract.[156] Sunrise informed OKI that despite repeated reminders and requests, it had not received payment "as per the terms and conditions of the contract", and hence it would "not be interested to continue the contract". Sunrise then stated that, if OKI was interested, it could amend its order in the following respects:

(a) extend the contract for delivery and installation;

(b) release the final 10% payment for the Supply Contract; and

(c) release 100% payment for the Installation Contract under an irrevocable letter of credit.

This e-mail is unambiguous. Sunrise had no intention of abiding by the terms of the Installation Contract. It was requesting that OKI do what it was not

156 26 AB 15142.

contractually required to do, whether by the Supply Contract or the Installation Contract. As explained at [4] above, the final 10% under the Supply Contract was only payable upon the issuance of a Certificate of Performance Test, which at this point had not been issued. As for the Installation Contract, Sunrise was only entitled to payment of the first 20% after its supervisor had been working on the Project Site continuously for two months (see [6] above). If OKI did not comply with Sunrise's requests, it was not interested to continue the Installation Contract. Sunrise has not put forward any other characterisation of this e-mail. This e-mail cannot be reasonably characterised in any other manner.

107 In addition, by the time this e-mail was sent, Sunrise had already demobilised its team and had made clear that it would not remobilise until OKI arranged for accommodation (see [95] above). As explained, OKI had no obligation under the Installation Contract to do so. Further, Sunrise had stated that the delays to the installation works were due to OKI's failure to release payment under LC1 A1.[157] On Sunrise's own case, the Installation Contract and Supply Contract were separate agreements.[158] OKI therefore had no obligation under the Installation Contract to release payment under the Supply Contract. By stating that this was a reason for the delay in installation works, Sunrise was effectively telling OKI that it would only perform if OKI complied with its unilaterally imposed condition to make payment under a separate contract. A reasonable person would certainly conclude that Sunrise no longer intended to be bound by the Installation Contract.

108 OKI was therefore entitled to terminate the Installation Contract when it did so on 18 May 2016.

[157] 26 AB 15135–15136.

[158] PCS at para 5.

Remedies under the Installation Contract

Liquidated damages

109 Under Clause 6.1 read with Clause 6.2 of the Installation Contract, OKI is entitled to liquidated damages of up to 10% of the contract price if the installation work was delayed. OKI is entitled to 1.5% of the contract price for each week of delay for the first four weeks, and 2.5% for each subsequent week.[159] Clause 5.1 provides that the "Start-up Date" to be used "[f]or the purpose of calculating liquidated damages under Clause 6" is 28 February 2016.[160] I interpret this to mean that the delay referred to in Clause 6 is delay after 28 February 2016. The installation works were not completed by 28 February 2016, and they remained uncompleted when the Installation Contract was terminated on 18 May 2016. By this time, there had been more than six weeks of delay. OKI is therefore entitled to maximum liquidated damages under the Installation Contract, amounting to US$144,154.50.

Reimbursement for replacement contractor

110 OKI also seeks to recover from Sunrise the costs it incurred in engaging PT Piping to complete the installation works. It relies on Clause 24.1 of Annex III of the Installation Contract.[161] As partially set out at [104] above, Clause 24.1 sets out various situations in which OKI is entitled to terminate the Installation Contract. It then states:[162]

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159 28 AB 15674.

160 28 AB 15673.

161 1DCS at para 165.

162 28 AB 15706.

> *Alternatively to the termination*, as stated above, [OKI] shall be entitled to allow a new contractor to complete the delivery of the Installation Work of the Plant at the expense of [Sunrise] …
>
> [emphasis added]

111 As I found at [108] above, and on OKI's own case,[163] OKI *did* terminate the Installation Contract. It therefore cannot rely on this part of Clause 24.1 which provides it with an alternative to termination. OKI also seeks to recover this sum as general damages flowing from Sunrise's breach, in that OKI would not have incurred the costs of engaging PT Piping but for Sunrise's breach in failing to complete the installation work, which I consider in the next section.

General damages claimed by OKI

112 OKI also claims the following:

(a) IDR35,700,000 for accommodation, food and travel arrangements that it provided for Sunrise's personnel;[164]

(b) IDR25,500,000 for the installation of three air conditioning units for containers storing hazardous materials;[165]

(c) US$8,666 in rental charges for equipment;[166]

(d) IDR20,934,815,000 for PT Piping to complete the installation works (counsel for OKI agreed that this was approximately US$1.339m);[167] and

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163 1DCS at para 152.

164 1DCS at para 145.

165 1DCS at para 146.

166 1DCS at para 151.

167 PCS at p 234; Transcript, 14 November 2022, p 67 lines 3–18.

(e) US$441,224 for transporting materials within the Project Site during PT Piping's installation works.[168]

113 OKI would have incurred the cost of the Installation Contract but for Sunrise's breach. Thus, OKI may only recover from Sunrise the costs that it incurred in excess of the Installation Contract price. Had the Installation Contract been performed, OKI would have incurred US$1,401,880, being the contract price. As a result of Sunrise's breach, OKI in fact spent the total of the sums at items (a) to (d): IDR20,996,015,000 plus US$8,666 (approximately US$1.35 million). As for item (e), the invoices produced by OKI to substantiate its claim for US$441,224 indicate that the cost would be allocated to PT Piping.[169] When this was put to Mr Horison in cross-examination, he did not give a clear answer as to whether the cost had been borne by OKI or by PT Piping. He simply reiterated that the cost ought to have been borne by Sunrise under the Installation Contract. In the circumstances, it is unclear whether or not OKI charged PT Piping the sum of US$441,224. Therefore, there is insufficient evidence that the cost of transporting materials within the Project Site amounting to US$441,224 was borne by OKI. Thus, despite Sunrise's breach, OKI in fact spent *less* than the Installation Contract price to receive installation of the goods.

114 It is a well-established rule of mitigation that an innocent party which successfully avoids loss by taking steps in mitigation is not entitled to damages from the party in breach. At [24], the Court of Appeal in *The "Asia Star"* [2010] 2 SLR 1154 explained that:

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168 1DCS at para 150.

169 29 AB 16509–16512.

> … the aggrieved party who goes beyond what the law requires of it and avoids incurring any loss at all will not be entitled to recover any damages (see *McGregor on Damages* at para 7-097 and *British Westinghouse Electric* at 689–690). In such a case, the aggrieved party's efforts will in effect confer a gratuitous benefit on the defaulting party.

OKI successfully avoided losses by procuring a contract with PT Piping for a lower price. Its total actual expenditure on installing the Goods is less than the contract price of the Installation Contract. Thus, it is not entitled to recover any general damages. OKI relies on the case of *Yew San Construction Pte Ltd v Ley Choon Constructions and Engineering Pte Ltd* [2019] SGHC 285 ("*Yew San*"), where damages were awarded to a main contractor in respect of works that were within its subcontractor's scope of works, but had in fact been completed by the main contractor due to the subcontractor's failure to complete them. While this is somewhat similar to OKI incurring costs to carry out tasks that fell within Sunrise's scope of works, the crucial difference is that in *Yew San*, the main contractor paid the subcontractor for its works (see [5] and [227]). Here, OKI made no payment to Sunrise under the Installation Contract.

Conclusion

115 OKI is owed US$832,413.20 under the Supply Contract as liquidated damages (see [80] above). However, it has already received this sum by calling on the Bank Guarantee. Sunrise is entitled to the remaining 10% of the Supply Contract price of US$832,413.20 (see [89] above). OKI is owed US$144,154.50 as liquidated damages under the Installation Contract (see [109] above). The final sum is therefore US$688,258.70 in favour of Sunrise, and I award Sunrise this sum, with interest at 5.33% from the date of its writ.

116 Parties are to write in within 14 days of today in respect of costs.

Valerie Thean
Judge of the High Court

Christopher Anand s/o Daniel, Ganga d/o Avadiar, Yeo Yi Ling Eileen, Saadhvika Jayanth and Lim Yi Zheng (Advocatus Law LLP) for the plaintiff;
Kirpalani Rakesh Gopal, Oen Weng Yew Timothy and Shawn Lin (Drew & Napier LLC) for the first defendant;
the second defendant absent and unrepresented.