UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd
[2008] SGHC 188

Case Number : Suit 409/2005

Decision Date : 31 October 2008

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Leong Kah Wah, Derek Tan and Koh See Bin (Rajah & Tann) for the plaintiff; Gan Seng Chee, Benjamin Seow, Prakash Nair and Leong Lu Yuan (Ang & Partners) for the defendant

Parties : UMCI Ltd — Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd

Insurance

Civil Procedure – Disclosure of documents

Contract – Misrepresentation

31 October 2008

Lee Seiu Kin J:

1 The plaintiff is a semiconductor foundry that manufactures advanced process integrated circuits for applications spanning every major sector of the semiconductor industry. It is a subsidiary of Taiwan-based United Microelectronics Corporation. It utilises cutting-edge foundry technologies that enable sophisticated system-on-chip designs, including 0.13mm copper, 90nm copper, and mixed signal/RFCMOS. The defendant is an insurance company related to the Tokio Marine & Fire Insurance Co Ltd ("TMFI").

2 The defendant insured a consignment of cargo ("the Cargo") comprising 26 crates containing various equipment for the plaintiff's foundry in Singapore. The Cargo was manufactured by Applied Materials Inc ("AMAT") in Austin, Texas and was transported by air from the USA to Singapore. The Cargo was collected by the freight forwarder from AMAT's premises at Austin, Texas on 23 April 2004 and delivered to the air carrier, China Airlines, at Dallas Fort Worth Airport ("DFW"). The Cargo arrived in Singapore on 29 April 2004 and three out of the 26 crates (namely crate nos 9, 15 and 25) were found with obvious signs of physical damage, including broken planks, activated tilt indicators and activated shock indicators. Upon inspection, the contents of crate nos 15 and 25 were found to be damaged. The plaintiff's claim in this suit is in respect of the content of crate no 15, a PVD Chamber ("the PVD Chamber"), valued at US$1,250,000.

3 The insurance was provided by the defendant under an open policy of marine cargo insurance bearing policy no MOP-03-2003 dated 14 January 2003. Pursuant to that open policy a marine cargo declaration was made and a policy (policy no 02780782) dated 23 April 2004 was issued in respect of the Cargo. The amount insured was US$5,830,000, covering all risk of loss or damage to the cargo during the voyage from AMAT's premises in the USA to the plaintiff's premises in Singapore.

4 On 15 April 2008, at the conclusion of the trial, I gave judgment in favour of the plaintiff in the sum of US$1,240,000 plus interest at 5.33% from 6 June 2005 (the date of the writ). I also awarded costs to the plaintiff on a standard basis. The defendant has since appealed against the whole of my order and the following are the grounds of my decision.

Background Facts

5 The plaintiff began construction of its foundry in Singapore in April 2001. In July 2001, the plaintiff engaged Willis (Singapore) Pte Ltd ("Willis") to look for an insurer for the project cargo to be shipped to the plaintiff's premises. Willis prepared a document entitled "project marine cargo insurance questionnaire" setting out a list of questions relating to the type of shipments that were expected to be received by the plaintiff. Together with an insurance summary, the completed questionnaire was sent by Willis to various insurers, including the defendant. On 22 October 2001, TMFI indicated that it was willing to underwrite the risk. The initial quotes obtained from various insurers were collated by Willis and presented to the plaintiff. The plaintiff did not immediately take out the insurance as there was some uncertainty in the project schedule. It was only after the plaintiff proceeded with the expansion works in June 2002 that insurance cover became necessary. On 30 December 2002, TMFI agreed to underwrite the risk and also suggested that the defendant, which is its Singapore subsidiary, might be interested in underwriting the risk. The defendant eventually confirmed that it would agree to issue the policy on the terms proposed by its head office TMFI.

The first claim

6 On 22 January 2003, shortly after commencement of the inurance policy, a cargo consisting of 22 cases containing one 300 mm Endura System 401529 was found to be damaged on arrival in Singapore. In particular, one of the crates was found with its shock watch indicator activated and another crate was found with a hole at its lower side. An Endura SIP EnCore TaN chamber was found damaged. The plaintiff made a claim against the defendant who, after conducting investigation, paid on the claim. The sum paid was US$1,143,095. This was the replacement cost on the basis that the chamber was a very sophisticated piece of equipment designed to operate to very fine tolerance levels, and also on account of the tight time constraints.

The Willis Report

7 Following this first claim, Willis carried out a review of the plaintiff's position under the policy in March 2003. Willis noted that a total of six claims had been made under the policy since its inception. Willis pointed out that the defendant might revise the terms or the rates or even cancel the policy. Willis advised the plaintiff to consider a number of options, including placing the risks involved on the suppliers or the freight forwarder, improving the risk management of the risk and looking for another insurer. The plaintiff agreed to conduct a marine cargo risk control review with Willis to see whether any steps could be taken to minimise the risks involved in transporting the project cargo and marine cargo. This was done by Willis in consultation with the plaintiff, and a report ("the Willis Report") was issued in late April 2003. A copy of the Willis Report was forwarded to the defendant on 25 April 2003. The plaintiff also provided Willis with an implementation plan in relation to the recommendations in the Willis Report, which Willis forwarded to the defendant.

The rate adjustment

8 Shortly after receiving the Willis Report as well as the plaintiff's implementation plan, the defendant sent an email dated 5 May 2003 to Willis stating that the risk control review was acceptable with two changes: (i) pre-shipment inspection should be conducted for shipments exceeding US$1m instead of US$3m; and (ii) each supplier should provide adequate numbers of shock and tilt indicators in accordance with their specifications. In addition, the defendant stated that it intended to raise the rates charged for the policy as well as deductibles. Negotiations ensued and on 3 June 2003 an agreement was finally reached on the rates and deductibles. Subsequent to this, the Cargo was shipped and damage to the PVD Chamber was discovered on 29 April 2004. The plaintiff

filed the writ in this action on 6 June 2005.

Defence

9 The defendant relied on the following defences:

(a) The Cargo was damaged at AMAT's premises before it was handed over to the freight forwarder at origin.

(b) The packing of the Cargo was insufficient or unsuitable for the journey.

(c) Damage to the Cargo was caused by inherent vice or nature of the subject matter insured and is an excluded peril under the insurance contract.

(d) The plaintiff had in breach of contract, duty of good faith, duty at law, used a fraudulent device or means to improve the plaintiff's prospects of obtaining against the defendant a settlement or better settlement or winning at trial.

(e) The plaintiff had failed to co-operate in the investigation of the claim in that it had failed to provide the defendant all supporting documents and information promptly and concealed or suppressed documents and information from the defendant.

(f) The plaintiff had made misrepresentations of material facts to procure insurance coverage by the defendant.

The defendant also challenged the plaintiff's contention that it is entitled to the measure of damages claimed.

Where was PVD Chamber damaged

10 It was not disputed that the PVD Chamber was manufactured at the AMAT factory at Austin, Texas, USA. The evidence showed that the PVD Chamber was rolled out of the AMAT Austin factory clean room in a wrapped condition to the shipping dock located beside it. There it was fixed to a wooden floating base then lifted by a forklift to a truck and transported to Western Industries Corporation for crating. After crating, it was transported to Ryder Finished Goods at 710 Howard Lane, Austin, from where it was picked up by trucking contractor, Three Way Inc and trucked to DFW on 23 April 2004. At DFW, it was handed to the ground handler for China Airlines and loaded into the aircraft. It eventually arrived in Singapore on 29 April 2004 and found to be in a damaged condition at Changi Airport.

11 The evidence of the witnesses along this chain of events are as follows:

(a) Mr Mark Vara was the manager of operations project planning group of AMAT. Although he had no direct knowledge of the Cargo, he gave evidence of the manufacturing process, particularly with regard to the extensive series of tests a machine such as the PVD Chamber would have undergone to ensure that it was in proper working condition. In his affidavit, he exhibited the test reports for the PVD Chamber which showed that it had been tested and approved.

(b) Mr Marcos Cortez ("Mr Cortez") was the senior manager (corporate packaging engineering) of AMAT at the material time. He gave evidence that upon completion of a PVD Chamber such as the PVD Chamber in question it is wrapped in protective plastic sheet and a metal shipping frame

is affixed to its base to enable it to be secured to the crate. It is then wheeled out of the manufacturing clean room to a shipping dock where an external contractor affixes it to a lumber shipping base. This shipping base contains a special floating cushion to protect the equipment from forces, shocks and vibrations in the ordinary course of carriage. The equipment is then transported to an external shipping contractor of AMAT whose responsibility is to affix the various components to wooden pallets and/or shipping bases, together with other shipping infrastructure where necessary, in preparation for packaging and shipment. The external shipping contractor used by AMAT for the Cargo was Western Industries Corporation whose premises is located about seven miles from the AMAT Austin factory. Mr Cortez said that there were tilt and shock watches during this seven-mile journey, but he said that there would be inspection at transfers and any damage observed on arrival would be immediately noted.

(c) Mr Melvin Alexander ("Mr Alexander"), surveyor from Crawford & Company, inspected the contents of the Cargo at Western Industries Corporation before they were crated. This comprised five of the 67 boxes which were eventually packed in the 26 crates. Although the contents were wrapped and already affixed to shipping base, he saw nothing to indicate any damage, much less of the sort that was discovered upon arrival in Singapore.

(d) Mr Saeed Al-Ayoubi ("Mr Ayoubi") was the operations manager of Morrison Express Corporation ("Morrison"), the freight forwarder. At the material time, he was based at DFW. He gave evidence that he arranged for Three Way Inc to collect the Cargo from AMAT at Austin, Texas and to truck it to the warehouse of China Airlines at DFW.

(e) Mr Pres Welles, the driver from Three Way Inc, accepted the crates from 710 Howard Lane, Austin, Texas. He did not observe any damage to the surface of the crates. Mr Welles said that he delivered the Cargo to China Airlines at DFW without incident.

(f) The last witness who saw the Cargo before its arrival in Singapore was Mr Ayoubi at DFW. He gave evidence that he supervised the handover of the crates to China Airlines at DFW on 23 April 2004. As each crate was unloaded from the trucks, he made a visual inspection of its external condition and stuck a label to it. This inspection was carried out jointly with one of the truck drivers. Mr Ayoubi saw no apparent damage to crates and none of the shock watches and tilt watches was activated. Mr Ayoubi also exhibited a letter he wrote on 6 May 2004 to Mr Tim Huang, the China Airlines representative at DFW, in which Mr Ayoubi put on record what Mr Huang told him on 26 April 2004, *viz* that the China Airlines ground handling agent at DFW had found two crates with red shock watches activated. Mr Ayoubi also recorded in that letter that Mr Huang told him that the pallet with the crate containing the PVD Chamber had fallen off the dolly while it was being loaded on the plane. Mr Ayoubi further identified a China Airlines damage report in which it was recorded that a pallet fell off the dolly during loading.

(g) It was accepted that the Cargo was conveyed to Singapore by China Airlines. Upon inspection at Changi Airport, a crack was observed in a panel of crate no 15. The tilt watch on the cracked panel was not activated, but another tilt watch on the side of cracked panel was activated. This indicated that the crate had been tilted on that axis, *ie* on either direction of cracked panel. Upon opening the crate, the PVD Chamber was found to be tilted towards the cracked panel, the rear stabiliser bolts had broken off and the lumbar bracing lifted slightly.

12 The defendant did not have any eye-witnesses in relation to the transit of the Cargo and was hampered in that respect. However it called Mr Mitchell J Collins ("Mr Collins"), the managing director of PCS Packaging Software Ltd, to give expert evidence on whether insufficient packaging was a proximate cause of the damage to the PVD Chamber. Mr Collins constructed a theory as to the

possible cause of the bolt breaking due to inadequate fastening and the bolt had broken due to vibration in transit. I found it rather speculative as it required a number of assumptions, principally that the bolt was loose at the outset. While this theory could be within the realm of possibility, it is necessary to view this in the context of the totality of the evidence before me. The plaintiff called its own expert, Mr Neil Smith, a director of Airclaims Services (Far East) Pte Ltd. He constructed a theory on the mode of failure centred around a tip-over of the crate containing the PVD Chamber which was also within the realm of possibility.

13 From the evidence of the experts as well as the surrounding evidence, principally the fact that the eye-witnesses reported no damage to the crate up to the point of handover to China Airlines at DFW, I found on a balance of probability that the damage had occurred between that point and its arrival at Changi Airport. I am also satisfied that, on the basis of the physical evidence of the crate and PVD Chamber as well as the available eye-witnesses' accounts of its transit, that the damage was the result of a tip-over. This is also consistent with the documents which recorded an incident in which the crate had fallen off the dolly at DFW during loading into the aircraft. I recognised that this evidence was technically hearsay and Mr Ayoubi, who gave evidence of those documents, did not witness the incident. This evidence was important only from the point of view of considering whether this was or was not consistent with my finding that the damage was caused by the crate tipping over.

14 Finally, the defendant pointed out that the plaintiff had not discharged its burden of proving that the PVD Chamber was in good order and condition at the commencement of risk under the insurance policy in that there was no evidence from any eye-witness of the condition of the PVD Chamber before it left AMAT's premises. I did not accept this submission. The evidence before me is that there was an incident at DFW that accorded with the physical evidence discovered when the Cargo arrived in Singapore. Coupled with the evidence from various parties along the way, including the relevant documents, it was my view that the plaintiff had discharged this burden on a balance of probability.

Packing insufficient or unsuitable for journey

15 Mr Collins, the defendant's expert, opined that the packaging was insufficient for the rough handling that could be expected in the transportation of a cargo of this nature, particularly one that was top heavy and in which forklifts would be used to lift it at various points of the transit. In particular, Mr Collins opined that the packaging ought to have been designed to protect the PVD Chamber from a fall or tip-over. On behalf of the plaintiff, Mr Cortez from AMAT gave evidence that the crate was designed to protect the PVD Chamber from a vertical drop of 12 inches. But it was not designed to protect the PVD Chamber from damage in the event of a tip-over. Therefore the only issue is whether the insurance cover included this risk.

16 The representative from AMAT had stated that they only designed the packaging against a vertical drop of 12 inches but not against a tip-over. The plaintiff had relied on AMAT, the manufacturer of the PVD Chamber, to design its packing appropriate for its transport by air to Singapore. There is nothing in the Willis Report that indicated that this aspect was altered and that the plaintiff was to procure AMAT to package the Cargo to a higher standard of protection. It is also my view that it would not be unreasonable for AMAT to design the packaging on the assumption that there would be no tip-over of the Cargo in transit. Indeed the requirements for shock and tilt watches are to record and monitor incidents of falls and excessive tilting at various stages of the transit, and if the packaging were to completely protect a tip-over, then those watches would not really be necessary.

17 My finding was that the insurance contract covered this risk; indeed it is one of the main reasons for purchasing insurance cover.

Damage to cargo caused by inherent vice/subject matter insured an excluded peril

18 This third point overlaps the second. The defendant contended that the screws and bolts that sheared were not in accordance with the plaintiff's vendors' specification and/or were otherwise insufficient and/or under-strength. In addition, the design of the PVD Chamber together with the packaging system designed for the system was flawed and/or insufficient. There was no evidence to support the assertion that it was insufficient for the design load of a 12 inch drop. The best case for the defendant was that the packing was not sufficient to protect the PVD Chamber in the event it tilted and fell over, which AMAT had stated was not what it was designed for. The plaintiff had relied on the manufacturer to ensure the PVD Chamber was adequately packed for the journey and had entered into the insurance contract for the very purpose of insuring against damage during carriage.

Plaintiff used a fraudulent device or means to improve prospects of settlement or trial

19 The defendant pleaded that the plaintiff had, in breach of contract and/or its duty of good faith or at law, used a fraudulent device or means, fraudulently and/or recklessly, to improve the plaintiff's prospects of obtaining a settlement, or a better settlement, from the defendant, or of winning at trial against the defendants. However the defendant did not pursue this point in submission. In any event I agreed with the plaintiff's submission that there was no evidence of recklessness or lack of good faith on the part of the plaintiff's representatives on the matter.

Plaintiff failed to co-operate in investigation of the claim

20 The defendant submitted that the plaintiff had, in breach of contract or its duty of good faith or duty at law, failed, refused and/or neglected to co-operate in the investigation of the claim by providing the defendant with all supporting documents and information promptly, and/or had concealed and/or suppressed documents and information from the defendant for the proper consideration of the claim. The defendant relied on the following assertions:

(a) The plaintiff had submitted the Crawford Report which stated *inter alia*, that fillers were used for packing.

(b) The surveyor was actually not able to confirm the identity, order and condition of the PVD Chamber.

(c) The plaintiff withheld a cargo checklist which showed damage at origin and the defendant had to apply to Court to compel disclosure of this document.

(d) The plaintiff had failed, refused and/or neglected to answer sufficiently, or answer at all, the queries contained in *inter alia*, the letters to the plaintiff from Messrs Ang & Partners dated 7 December 2004 and 11 January 2005.

21 The plaintiff contended that it had fulfilled its duty to co-operate in that it had provided the defendant's surveyors with access to the plaintiff's premises and the damaged PVD Chamber, as well as supplied all documents and information in its possession and answered the defendant's questions to the best of its ability. The plaintiff made the following points:

(a) The defendant's surveyor, Mr Tan Swee Then ("Mr Tan") of McLarens Singapore Pte Ltd

("McLarens") admitted in cross-examination that the plaintiff had provided the defendant with all the documents and information in their possession and have answered the defendant's questions to the best of their ability.

(b) Save for the AMAT packing specifications, the defendant's expert, Mr Daniel Debretton-Gordon ("Mr Debretton-Gordon") of Belfor Asia Pte Ltd ("Belfor") could not point to any other document or information which was not provided by the plaintiff upon his request.

(c) The plaintiff initially did not disclose to the defendant the incorrect UMCi cargo checklist because the person involved had not realised that it existed until sometime later.

(d) Where documents or information were not immediately in the plaintiff's possession or knowledge, the plaintiff had obtained or attempted to obtain them from third parties. The plaintiff pointed to the evidence of Mr Tan who confirmed that for queries which the plaintiff was unable to answer, the plaintiff had sought the relevant information from AMAT.

(e) When the defendant's surveyors and experts wished to meet or interview personnel from third party organisations, the plaintiff arranged for such meetings and/or interviews, *eg* the plaintiff arranged for AMAT to meet with McLarens and/or Belfor so they could obtain the necessary information from AMAT. At the request of McLarens, the plaintiff arranged for them to interview Mr Zachery Lin of Bee Hup Seng Kinetic Pte Ltd.

(f) Although Mr Tan and Mr Debretton-Gordon have stated in their affidavits of evidence-in-chief that the plaintiff had failed to co-operate with them, during cross-examination, they conceded that their statements were inaccurate and that the lack of co-operation was in reference to AMAT's refusal to provide the defendant with the requested packing specifications.

(g) The failure to provide the defendant with the packing specifications was not due to the plaintiff's failure to co-operate with the defendant. The packing specifications were not within the possession, custody or control of the plaintiff. The plaintiff had approached AMAT for the specifications but was told that AMAT would not release the specifications.

(h) The AMAT packing specifications were in any event not necessary for the defendant's investigation. The failure of the plaintiff to provide the same therefore is not a breach of the plaintiff's duty to co-operate with the defendant.

(i) Although AMAT had refused to release the packing specifications, AMAT had suggested alternative means of providing the necessary information to McLarens and/or Belfor. In accordance with AMAT's suggestion, Belfor provided AMAT with specific questions about the packaging. These questions were answered by AMAT.

(j) Mr Tan and Mr Debretton-Gordon agreed that they were eventually able to finalise their respective reports without the packing specifications of AMAT.

(k) Although the defendant had claimed that the plaintiff refused to answer the questions set out in letters from the defendant's solicitors dated 7 December 2004 and 11 January 2005, the plaintiff had in fact provided answers to these questions to the best of their ability. Insofar as the plaintiff had not provided specific answers to the questions set out in those letters, the plaintiff contended that the information sought by the defendant had been provided on previous occasions. Although such information or documents were not within the plaintiff's knowledge or possession, the plaintiff had nevertheless approached the relevant persons and had asked them

to respond to the defendant.

(l) The questions set out in the letters from the defendant's solicitors dated 7 December 2004 and 11 January 2005 were not necessary for the investigation of the claim and were irrelevant, vexatious and oppressive.

22 The plaintiff's duty to co-operate entails taking reasonable steps to provide the defendant with the information and documents sought by the defendant – see generally *Halsbury's Laws of England* vol 25 (Butterworths, 4th Ed, 1978) pp 269-272; *Napier v UNUM Ltd* [1996] 2 Lloyd's Rep 550 at 553; *Challenge Finance Ltd v State Insurance General Manager* [1982] 1 NZLR 762 at 766; *Super Chem Products Ltd v American Life and General Insurance Co Ltd* [2004] 2 All ER 358 at 370. On the evidence, I was satisfied that the plaintiff had complied with its duty to co-operate with the defendant.

Misrepresentations of material facts

23 The defendant contended that it was entitled to avoid liability under the policy on account of certain misrepresentations made by the plaintiff. In order to avoid liability the defendant must show that:

(a) the representations made were false;

(b) the representations made were material - see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427 at 430, *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116; and

(c) the representations made were relied on by the defendants – see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427; *Glencore International A.G. v Alpina Insurance Company Limited* [2004] 1 Lloyd's Rep 111 at 132–133, *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116.

24 The defendant contended that the following misrepresentations were made by the plaintiff in the Willis Report:

(a) The plaintiff would select forwarders that are registered members of a recognised freight forwarding body and experienced in handling semi-conductor equipment.

(b) The plaintiff would carry out pre-shipment inspection of cargo to be conducted by a third party at AMAT'S premises.

(c) The plaintiff would require a UMCi cargo checklist (a sample of which was attached to the marine cargo risk review) to be completed by the vendors, forwarders, ground mover and UMCi staff when they took over the Cargo from the previous party.

(d) Corrective and preventive actions ("CPAs") would be taken to prevent recurrence of cargo damage, and formal documentation and follow-up procedure would be established to assess the actual implementation and effectiveness of the CPAs.

(e) The plaintiff would send representatives to the airport to witness the loading and unloading of the Cargo.

25 The defendant also contended that the plaintiff had represented in the project marine cargo

insurance questionnaire that the Cargo would be packed in accordance with ANSI/EIA Standards, which was untrue and this also entitled it to avoid liability.

26 In relation to the first set of representations pertaining to the Willis Report, the plaintiff contended that they were true and that the defendant had not proven otherwise. The plaintiff pointed out that Ms Sylvia Loke ("Ms Loke") had testified that the plaintiff had put in place the requirement for pre-shipment inspection. This was consistent with the evidence of Mr Alexander who testified that he had attended at Western Industries Corporation to conduct a pre-shipment survey of the Cargo before it was crated on 21 April 2004. Both Mr Goh Ah Kit ("Mr Goh") and Ms Loke testified that the plaintiff's representatives attended at the airport to oversee the unloading of Cargo on at least three occasions where permission was granted by the airport authorities. Mr Goh testified that the UMCi cargo checklist had been in use by the plaintiff before the Willis Report. The plaintiff had instructed its freight forwarders to record the details of the transit on the checklist. Mr Goh's testimony was consistent with the testimony of Mr Ayoubi, who confirmed that he was required to and did use and complete the UMCi cargo checklist for the plaintiff's shipments. Ms Loke gave evidence that the plaintiff had taken such actions to prevent recurrence of certain events causing damage.

27 The plaintiff pointed out that the Willis Report disclosed three main points:

(a) The packing was to be in accordance with vendors' specifications.

(b) Ground agents were outside the control of the plaintiff or Morrison.

(c) The conclusion cited the inevitability of the risk.

The plaintiff submitted that point (c) was the major reason for the purchase of the insurance coverage.

28 The plaintiff also pointed out that the defendant's surveyor, Mr Tan, who had been provided with a copy of the Willis Report and tasked by the defendant to investigate and report on the representations therein, had given evidence that they were true. Further, Mr Tan had testified that he was of the view that the plaintiff's freight forwarder, Morrison, was a reputable one.

29 I found on the evidence that the defendant had not proved that the representations complained of were untrue.

30 Additionally, there was no evidence that the representations in the Willis Report were relied upon by the defendant apart from a bare statement in the affidavit of evidence-in-chief of Mr Minoru Sakuta ("Mr Sakuta"), the defendant's deputy general manager. There was no document which showed that the representations in the Willis Report were considered by the defendant in assessing the risk and/or determining the rates to be applied to the policy. In particular, none of the defendant's marine underwriting profile forms mentioned the representations in the Willis Report. Although the correspondence did discuss the recommendations in the Willis Report, there was no mention of the representations therein. The addendum issued by the defendant to record the agreement reached between the parties did not mention the representations in the Willis Report, indeed, addendum no 2 to the policy stated that "all terms and conditions remain unchanged".

31 The defendant's expert witness, Mr Lincoln Colin Michael, suggested that the absence of any documentation discussing the representations in the Willis Report meant that the representations were not relevant or relied on by the defendant.

32 As for the representation in the project marine cargo insurance questionnaire that the Cargo would be packed in accordance with ANSI/EIA Standards, the defendant did not adduce any evidence to show that the PVD Chamber was not packed in accordance with ANSI/EIA Standards. Furthermore, the information in the project marine cargo insurance questionnaire was provided in 2001, at which time, the plaintiff had not decided on the exact model of the machinery to be purchased and was not aware of the exact manner in which such machinery would be packed. The defendant was eventually informed that the machines would be packed in accordance with the methods decided by AMAT. Mr Sakuta confirmed in cross-examination that the defendant was informed in the Willis Report that the equipment would be packed in accordance with AMAT's specifications.

33 Therefore I concluded that there was no misrepresentation in relation to the project marine cargo insurance questionnaire.

Quantum of Damages

34 In the premises, the defences failed and I found the defendant liable under the insurance contract. Under the terms of the policy, the value of the Cargo insured is the contract value plus 10% plus all duties and taxes incurred. Pursuant to the terms of the policy, the Cargo was insured for US$5,830,000 (being the contract value of US$5,300,000 plus 10%) and the premium was computed with reference to this amount.

35 The plaintiff submitted that it was entitled to the full replacement cost of the PVD Chamber as it was reasonable under the circumstances to replace rather than repair. After the PVD Chamber had been uncrated, it was examined by Mr Lee Ching Wen, the plaintiff's technical manager. He was of the view that the internal components of the PVD Chamber were damaged and that in order to ascertain which of its internal components were damaged, it would have to be sent back to its manufacturers, AMAT. Mr Lee was of the opinion that this was not feasible and that the most prudent course of action would be to purchase a replacement PVD chamber. Accordingly, the plaintiff purchased a replacement PVD chamber from AMAT at the cost of US$1,250,000.00. The plaintiff submitted that this decision was not only reasonable but was consistent with the views of the defendant's surveyor, Mr Tan of McLarens, and its expert, Mr Debretton-Gordon of Belfor. Mr Debretton-Gordon stated that it was not possible to determine the extent of the damage to the PVD Chamber without returning the PVD Chamber to its manufacturers, AMAT. He also stated that AMAT is likely to be the only party capable of repairing the PVD Chamber and that AMAT might not agree to repair the PVD Chamber. Further, AMAT stated that it was not equipped or staffed to repair the PVD Chamber and that it did not recommend such repairs. In any event, the estimated repair cost provided by AMAT exceeded the replacement cost of the PVD Chamber.

36 The defendant did not really dispute these points but merely pointed out that the cargo insurance policy was only concerned with damage to the subject-matter of the insurance and not the economic loss which may flow from the loss of, or damage to, the Cargo. As such, for the purposes of the measure of damages under the cargo insurance policy, considerations such as the potential economic loss resulting from the system not being operational in time was not a relevant factor. The PVD Chamber was replaced because it was the most expedient method of getting the system to be operational in time, the decision being made about a week after the damage was first discovered and repair options were not seriously explored until much later. However this did not address the point that the estimate of the cost of repair from AMAT, the only entity capable of performing the task, was higher than the replacement cost.

37 Under the clause in the policy entitled "Institute Replacement Clause", the sum recoverable may not exceed the cost of replacement, which I found was proved to be US$1,250,000. As there was a

"deductible" of US$10,000 for each loss, the quantum of damages that the defendant would be liable to the plaintiff for was US$1,240,000. I accordingly gave judgment for the plaintiff against the defendant in the sum of US$1,240,000, plus interest at 5.33% from date of writ, *ie* 6 June 2005. I also awarded the plaintiff its costs on a standard basis.