IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 204

Suit No 1062 of 2017
(Consolidated with Suit No 1073 of 2017)

Between

NSL Oilchem Waste Management Pte Ltd

… *Plaintiff*

And

Prosper Marine Pte Ltd

… *Defendant*

Suit No 853 of 2017

Between

NSL Oilchem Waste Management Pte Ltd

… *Plaintiff*

And

(1) Ong Yi Ling, Eileen
(2) Daniel Lee Khan Wee
(3) Ong Cheng Ho

… *Defendants*

Suit No 1048 of 2016

Between

NSL Oilchem Marine Pte Ltd

… *Plaintiff*

And

Prosper Marine Pte Ltd

… Defendant

JUDGMENT

[Contract] — [Contractual terms]
[Contract] — [Breach]
[Debt and Recovery] — [Counterclaim] — [Right of set off]
[Credit and Security] — [Gurantees and indemnities]
[Admiralty and Shipping] — [Carriage of goods by sea] — [Bareboat charterparties] — [Breach]

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NSL Oilchem Waste Management Pte Ltd
v
Prosper Marine Pte Ltd and other suits

[2020] SGHC 204

High Court — Suit Nos 1062 of 2017, 853 of 2017 and 1048 of 2016
Lee Seiu Kin J
16, 17, 18, 19, 22, 23 July, 2, 7, 8, 13, 14, 15, 16, 28, 29, 30 August, 25 November 2019, 9, 10, 28 January 2020; 13 April 2020

29 September 2020 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 These disputes arise from the unfortunate breakdown of a 14-year long commercial relationship between NSL Oilchem Waste Management Pte Ltd ("NOWM") and Prosper Marine Pte Ltd ("Prosper Marine"). The three suits in question, "Suit 1062", "Suit 853" and "Suit 1048", all concern debts owed by Prosper Marine to NOWM.

2 Suit 1062 is a claim on unpaid invoices issued between June 2015 and October 2016, under two contracts concluded by the parties in May 2014 (see [13] below). This debt is contested by Prosper Marine, which counterclaims for damages arising out of alleged breaches of these contracts. Suit 853 is a call on personal guarantees given by Prosper Marine's directors to satisfy NOWM's unpaid invoices (see [32] below). Finally, Suit 1048 is a claim for unpaid charter

hire and Prosper Marine's breaches of a charterparty for a vessel known as "Prosper 9" (see [27] below).

3 I find in favour of NOWM on all three suits. My reasons are found in the following:

(a) Suit 1062, which has been consolidated with 1073 of 2017 ("the 2014 Contract suits") at [55]

(b) Suit 853 ("the Directors' Guarantee suit") at [157]

(c) Suit 1048 ("the Charterparty suit") at [161]

Facts

Background

4 NOWM is a company in the business of treating marine and land-based "slop", a collective term to describe a liquid mixture of water, hydrocarbons and solids.[1] This is to be distinguished from "sludge", which describes semi-liquid slurry waste oil sediments.[2] At the material time, NOWM did not have its own slop collection operation and relied entirely on contractors to collect and deliver slop to its MARPOL 1 Marine Waste Management Reception Centre ("NOWM's plant" or "the plant"). Once there, the slop is treated within reactor tanks which separate the sediment, oil and water in the slop via a process

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1 Anthony Goh's Affidavit of Evidence in Chief ("AEIC") at p 15, paras 12-13 of expert report.

2 Robert Lim's AEIC at para 8.

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involving heating and settlement.[3] Besides the revenue earned from receiving and treating marine and land-based slop, NOWM profits from selling recycled fuel oil ("RFO") extracted from the slop.

5 Prosper Marine's commercial relationship with NOWM dates back to the time of its incorporation in 2002. A "one-stop centre" for various maritime services including the collection, transport and disposal of marine slop within Singapore port limits,[4] Prosper Marine had a longstanding practice of treating its marine slop at NOWM's plant. I pause to observe that the only other National Environment Agency ("NEA")-approved slop reception facility in Singapore belongs to Singapore Cleanseas Pte Ltd ("Cleanseas").[5] In addition to disposing marine slop at NOWM's plant, Prosper Marine would purchase RFO produced at the plant, which it would resell to its customers outside Singapore at a mark-up of approximately 15%.[6]

6 The parties' symbiotic commercial arrangement depended heavily on a finely balanced system of capacity management. The process begins with slop being delivered by Proper Marine's slop tankers to the reactor tank. Once full, the slop in the tank is heated by steam piped through an array of heating tubes at the base of the tank. The slop surrounding the tubes get heated up and rise to the top of the tank while the cooler slop flows down. This convection process ensures the slop is evenly heated. The elevated temperature promotes separation of the oil from the water. The oil, being of lower density, rises to the top. Solid

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3 Robert Lim's AEIC at para 10.

4 Ong Cheng Ho's AEIC at paras 5 and 7.

5 Bernard Tay's AEIC p 14, para 3.1 of expert report.

6 Ong Cheng Ho's AEIC at para 40.

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matter, being the densest, descends to the bottom. Water remains in between. Separation may take anything from a few days to a week or more. When it is completed, the oil is removed to be stored in RFO tanks to await collection by RFO tankers. The water would be piped to the on-site wastewater treatment plant where it will be treated to the level of purity required by NEA and before it is discharged into the sea. NOWM had seven reactor tanks and three RFO tanks.[7] NOWM relied on Prosper Marine to maintain sufficient capacity in its fleet of RFO tankers to remove the RFO from the RFO tank. If the RFO tank is full, then the oil from a reactor tank cannot be discharged into the RFO tank. And if the reactor tank is full, NOWM would not be able to receive slop brought in by Prosper Marine's slop tankers. This is further complicated by two factors. The first is that the plant has a jetty which is affected by the tides which means that vessels bringing slop or removing RFO might be delayed on this account. The second is that the processing time for oil/water separation is sometimes affected by the quality of the slop brought in and it is not uncommon for separation in a particular tank to take a much longer period to complete. Therefore, given the number of reactor tanks and RFO tanks, as well as the processing time to separate the oil from the water in the slop, there would need to be a certain rate at which Prosper Marine is required to remove the RFO and deliver slop in order for the plant to operate at optimum level. The commercial arrangement between the parties was as precarious as it was complementary. Despite this, the early years of the parties' relationship were smooth sailing.

7 The first notable hiccup arose in 2007 when a fire broke out at NOWM's plant. NOWM was suspended from receiving marine slop for a year (from 2007

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[7] Anthony Goh's AEIC p 16 at para 21 and p 17 at para 24.

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to 2008). During this time, Prosper Marine discharged marine slop at Cleanseas' facility instead.[8] After NOWM's licence was restored, Prosper Marine would deposit marine slop at Cleanseas when there was a processing issue at NOWM's plant.[9] There were also times when Prosper Marine would have more slop to collect from its customers than what its tankers could carry. In those situations, they arranged for Cleanseas, which had its own slop collection vessels, to collect the slop and finally treat it at their plant.[10]

8 Importantly, however, business with Cleanseas was never considered to be a long-term solution. Cleanseas was Prosper Marine's direct competitor.[11] With its own slop collection vessels, Cleanseas had its own customer base for the sale of RFO and naturally prioritised its own jobs over Prosper Marine's.[12] Cleanseas' treatment services were also more expensive than NOWM's. Up until 2014, Cleanseas charged Prosper Marine $13 per cubic metre ("cbm") of marine slop discharged at its plant and imposed a minimum charge of $2,400 on the total volume of slop discharged.[13] In contrast, NOWM only charged $3 per cbm of slop.[14]

9 The 2007 fire also affected NOWM. Two of its slop processing reactor tanks (Tanks A and B) were damaged, compromising the plant's overall slop

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8 Robert Lim's AEIC at para 45.

9 Notes of Evidence ("NEs") 16 August 2019, p 13 lines 2 – 4.

10 NEs 16 August 2019, p 14 lines 5 – 13.

11 Daniel Lee's AEIC at para 29; NEs 16 August 2019, p 10 lines 3 -11.

12 Daniel Lee's AEIC at para 28.

13 NEs 16 August 2019, p 30 lines 1 – 10; *eg*. Agreed Bundle S/N 180 – Tax Invoice dated 11 May 2014, AB 3926.

14 NEs 16 August 2019, p 31 lines 8 – 17.

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processing capacity. This eventually prompted Prosper Marine to request for NOWM to refurbish these tanks .[15] NOWM agreed, on condition that it would receive a minimum monthly revenue of $54,000 from slop discharge over two years to defray its costs.[16] Prosper Marine guaranteed this $54,000 figure by offering to deliver 18,000 cbm of slop for treatment at NOWM's plant every month, at a rate of $3 per cbm of slop. Additionally, Prosper Marine agreed to pay liquidated damages of $3 for every cbm of shortfall. The parties agreed to these terms via a letter dated 26 May 2010:[17]

> … [NOWM] will proceed with the work to refurbish and upgrade of Tank A and Tank B …
>
> In consideration of [NOWM's] additional investment in the slop processing capacity, Prosper Marine hereby commits to deliver a minimum quantity of 216,000 cubic metre of marine slop per year, with estimated nett oil content of 36,000 metric tons, for a period of two years. Quantity commitment shall commence from the date of successful commissioning of the tanks.
>
> Should Prosper Marine Pte Ltd be unable to deliver the minimum annual quantity, [NOWM] shall charge Prosper Marine S$3.00 per cubic meter of the quantity of slop that Prosper Marine failed to deliver.
>
> The current charge for reception, treatment and handling of the slop levied by [NOWM] shall remain unchanged at S$3.00/S$4.00 per cubic metre.

10 The finalised arrangement was in effect from March 2011 to March 2013.[18] Yet, even after March 2013, Prosper Marine continued to pay NOWM

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15 Robert Lim's AEIC at para 49.

16 Robert Lim's AEIC at para 51.

17 Agreed Bundle S/N 10 – Jeffrey Fung's Letter dated 26 May 2010 ("Refurbishment cum Upgrading of Tank A and Tank B […]"), AB 127.

18 NEs 13 August 2019, p 143 lines 13 to 16.

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a monthly fee of $54,000 for discharging slop at NOWM's plant.[19] According to NOWM, this was done on the understanding that this would help to defray the costs of slop treatment operations.[20] The benefit of this arrangement for Prosper Marine was that it continued to receive a preferential rate for slop disposal vis-à-vis the rate being offered at Cleanseas.[21]

11 There was one other notable aspect of the parties' commercial arrangements. Since at least 2003, NOWM had extended multiple lines of credit to Prosper Marine.[22] This had allowed Prosper Marine to, among other things,[23] continue purchasing RFO from NOWM for reselling to its customers.[24] But the credit extended by NOWM had limits. NOWM's ability to extend this credit depended on how much trade insurance its insurer, Atradius Credit Insurance NV ("Atradius"), was prepared to cover. Atradius' willingness, in turn, was determined by the size of Proper Marine's debt to NOWM.[25] In other words, Prosper Marine's access to credit depended heavily on its ability to manage its debts to NOWM.[26] As I shall explain, Prosper Marine was clearly unable to do so.

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19 NEs 13 August 2019, p 143 line 21 to p 144 at line 2.

20 NOWM's Opening Statement at para 13.

21 NEs 13 August 2019, p 144 at lines 17 – 25.

22 Ong Cheng Ho's AEIC at para 43.

23 Ong Cheng Ho's AEIC at para 43.

24 Jeffrey Fung's AEIC Vol. 1at para 22.

25 Agreed Bundle S/N 435 – Lim Teck Kee's Email dated 14 August 2014, AB 4840.

26 Agreed Bundle S/N 435 – Lim Teck Kee's Email dated 14 August 2014, AB 4840.

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12 As of February 2013, Prosper Marine was heavily in arrears, owing NOWM some $10.63m.[27] In an attempt to rectify this, Prosper Marine proposed a payment schedule promising monthly payments of at least $2m between April 2013 to October 2013 ("April 2013 Agreement").[28] This was done with a view to bringing the accounts receivable balance ("AR Balance") down to $6m, which would have brought the balance comfortably below the $7m trade credit limit later set by Atradius.[29] However, the plan proved too optimistic, and Prosper Marine eventually failed to honour the agreement.[30] As of January 2014, the AR balance remained at around $9m.[31] This would be the first of many (failed) attempts to manage Prosper Marine's debts.

The 2014 Contracts

13 Against this backdrop, the parties entered into two contracts on 5 May 2014 (the "2014 Contracts") to formalise and mirror their business relationship. The first of these pertained to the disposal of marine slop and/or sludge at the NOWM plant ("the Disposal Contract").[32] The second concerned the sale of RFO ("the RFO Contract").[33]

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27 Agreed Bundle S/N 45 – Lim Teck Kee's Email dated 4 April 2013, AB 1327.

28 Agreed Bundle S/N 45 – Lim Teck Kee's Email dated 4 April 2013, AB 1327.

29 Agreed Bundle S/N 72 – Atradius' Credit Limit Decision dated 2 July 2013, AB 1431.

30 Agreed Bundle S/N 115 – Lim Teck Kee's Email dated 10 January 2014, AB 1767; Lim Teck Kee's AEIC Vol. 1, LTK – 9.

31 Agreed Bundle S/N 123 – Statement of Accounts from NSL OilChem Waste Management Pte Ltd to Prosper Marine, as at 31st January 2014, AB 1837.

32 Agreed Bundle S/N 157 - Contract for the Disposal of Marine Slops and Sludges between NSL OilChem Waste Management Pte Ltd and Prosper Marine Pte Ltd ("Disposal Contract"), AB 3778.

33 Agreed Bundle S/N 156 - Contract for Ex-Wharf Sale of Recycled Fuel Oil ("RFO Contract"), AB 3767.

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The Disposal Contract

14 The Disposal Contract governed Prosper Marine's discharge of waste slop and sludge at NOWM's wharf. The 2014 Contract suits centred on four main parts of the contract. The first was a minimum volume obligation. Pursuant to cl 2.6, para 1.1 of Schedule 1 and para 1.5 of Schedule 1, Prosper Marine undertook to deliver for treatment at least 18,000 cbm of waste slop every month (at a rate of $3 per cbm) and further, to pay $3 for every cbm of shortfall. In this sense, the Disposal Contract was very much a continuation of the parties' May 2010 business arrangement (see [9] above). Clause 2.6 is reproduced below:[34]

> [Prosper Marine] hereby undertakes to discharge a minimum volume of waste slops ("the Minimum Volume") as stated in Schedule 1. [Prosper Marine] shall be liable to pay liquidated damages at the rate stated in Schedule 1 per metric ton of waste slops below the Minimum Volume which [Prosper Marine] is obligated to discharge at [NOWM's plant]. Parties to this Agreement shall be at liberty to renegotiate the Minimum Volume or to establish a formula to determine the Minimum Volume or any charges thereto, as set out in Schedule 1, from time to time.

Prosper Marine was also obliged, pursuant to cl 4.3, to make prompt payments to NOWM, "without withholding, set-off, counterclaim or any other deduction of any nature whatsoever".[35]

15 Second, in the event of non-payment, NOWM was granted several entitlements under the Disposal Contract. These are set out in cl 4.5:[36]

> … [I]f [Prosper Marine] shall fail to perform any of its obligations hereunder including but not limited to [Prosper Marine's]

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34 Agreed Bundle S/N 157 - Disposal Contract, AB 3781.

35 Agreed Bundle S/N 157 – Disposal Contract, AB 3783.

36 Agreed Bundle S/N 157 – Disposal Contract, AB 3783.

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> failure to make payment of any of the Charges or other monies due to [NOWM] under this Agreement, [NOWM] shall have the right to:-
>
> 4.5.1 declare that the credit period granted by [NOWM] to [Prosper Marine] in respect of any and/or all invoice(s) already issued under this Agreement or otherwise to [Prosper Marine] shall be cancelled and the invoice(s) rendered due and payable immediately;
>
> 4.5.2 limit or vary the credit as to term and/or amount;
>
> 4.5.3 require payment from [Prosper Marine] in advance of the performance of the Services; and/or
>
> 4.5.4 suspend immediately the performance or further performance of any of the Services herein without any liability to [Prosper Marine] whatsoever, howsoever caused;
>
> and upon such notification by [NOWM] to [Prosper Marine], [Prosper Marine] agrees that the terms of payment shall be duly amended in accordance with the notification.

Conversely, cl 5.1 entitled Prosper Marine to challenge invoices issued by NOWM where there was a bona fide dispute. This was subject to Prosper Marine providing written notice of the nature of the dispute within seven days of receipt of the invoice along with any relevant details.[37]

16 Third, the Disposal Contract provided for both a minimum and maximum loading rate for slop discharge at NOWM's plant (see cl 6.5). The minimum loading rate was 50 m^3 per hour while the maximum was 100 m^3 per hour.[38] The minimum and maximum loading rates were to form the two poles of a safety range. That is, it was contractually agreed between the parties that, in the interest of safety, slop should be discharged at a rate between 50 to 100

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37 Agreed Bundle S/N 157 – Disposal Contract, AB 3783.

38 Agreed Bundle S/N 157 – Disposal Contract, AB 3784.

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m^3 per hour.[39] Prosper Marine also undertook to exercise due diligence in maintaining the rate of discharge between the specified rates and was "liable to [NOWM] for any loss, damage or injury arising out of the failure of [Prosper Marine's] Vessel to maintain or observe the … maximum discharge rate…"[40]

17 Fourth, certain clauses under the Disposal Contract indemnified NOWM against liability:[41]

> 6.1 For the avoidance of doubt, [NOWM] *shall not in any event or circumstance be liable for any direct, indirect, consequential or economic loss, damage, cost or expense* (whether for loss of profit, loss of use, loss of contracts or otherwise) or other claims for consequential compensation of any kind or nature whatsoever … which arise under, out of, or howsoever in connection with the performance of the Service, incurred or suffered by [Prosper Marine] its employees, servants, agents, subcontractors, and/or any other third party.
>
> …
>
> 6.4 For the avoidance of doubt, save as expressly provided herein, [NOWM] shall in no circumstances whatsoever, regardless of [NOWM's] negligence or otherwise, *be liable for any claims for demurrage, port dues or any other vessel detention claims* in respect of [Prosper Marine's] vessels …
>
> [emphasis added]

The RFO Contract

18 The crux of the RFO Contract is found at Schedule 1 wherein the parties agreed to the following:[42]

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39 NEs 14 August 2019, p 28 lines 14 – 24.

40 Agreed Bundle S/N 157 – Disposal Contract, AB 3784.

41 Agreed Bundle S/N 157 – Disposal Contract, AB 3783-3784.

42 Agreed Bundle S/N 156 –RFO Contract, AB 3776.

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> 1.1 [NOWM] hereby agrees to sell, *at [NOWM's] option*, and [Prosper Marine] agrees to buy 4,000-4,500 metric tonnes of recycled fuel oil per month for the duration of this Agreement.
>
> 1.2 [NOWM] shall be entitled to deliver twenty (20) per cent (%) more or less of the quantity specified in Clause 1.1 of Schedule 1 above and [Prosper Marine] shall be liable to take delivery of the same and pay Charges for the quantity actually delivered.
>
> [emphasis added]

19 Several of the provisions in the RFO Contract mirror those in the Disposal Contract. For example, NOWM had the option of charging Prosper Marine late payment interest (under cl 5.5). It was also entitled to "immediately suspend the performance or any further performance of its obligations under [the RFO Contract] without any liability to [Prosper Marine], whatsoever, howsoever caused".[43]

20 Besides this, there are several other terms of interest. It is notable that under cl 3.2, NOWM made no representation or warranty as to the quality of its RFO[44] save that it would correspond in quality with the samples taken from Prosper Marine's vessels (cl 3.1).[45] NOWM was also at liberty to direct Prosper Marine to take delivery of RFO from its plant at any time on any working day by way of a "Sales cum Delivery Order" in writing or a notification. All verbal communications were to be confirmed in writing (cl 2.7).[46] Prosper Marine in turn undertook to take delivery of the RFO within two working days or a later

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43 Agreed Bundle S/N 156 - RFO Contract, AB 3772.

44 Agreed Bundle S/N 156 –RFO Contract, AB 3771.

45 Agreed Bundle S/N 156 - RFO Contract, AB 3771.

46 Agreed Bundle S/N 156 - RFO Contract, AB 3770.

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date as agreed, pursuant to cl 2.8.[47] It was also required to raise any disputes as to the quality of NOWM's RFO within three working days of delivery, together with details of the loss and/or damage suffered and other relevant details (cl 12.4).[48]

21 There was no provision for NOWM to give notice of its suspension of performance and cl 6.1 excluded claims against NOWM "arising out of the demurrage, detention or port dues".[49] Prosper Marine was also entitled to raise any disputes on invoices issued by NOWM within 14 days of receipt by way of notice together with relevant details (cl 5.6).[50]

Managing Prosper Marine's debts

The UOB guarantees

22 As stated earlier, the April 2013 Agreement ultimately fell through (see [12] above) and by October 2013, the AR balance had ballooned to $9.1m, [51] significantly in excess of the original $6m target (set by NOWM) and the $7m trade credit limit (set by Atradius). Consequently, Prosper Marine sought to secure a bank guarantee from United Overseas Bank ("UOB") in NOWM's favour.[52] This was obtained in March 2014 (the "2014 UOB Guarantee"), guaranteeing a sum of up to $2m and being valid from 14 February 2014 to 13

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47 Agreed Bundle S/N 156 - RFO Contract, AB 3770.

48 Agreed Bundle S/N 156 - RFO Contract, AB 3775.

49 Agreed Bundle S/N 156 - RFO Contract, AB 3772.

50 Agreed Bundle S/N 156 - RFO Contract, AB 3772.

51 Agreed Bundle S/N 123 - Statement of Accounts from NSL OilChem Waste Management Pte Ltd to Prosper Marine, as at 31st January 2014, AB 1837.

52 Agreed Bundle S/N 110 – Eileen Ong's email dated 23 December 2013, AB 1573.

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February 2015.[53] Prosper Marine subsequently secured a further guarantee from UOB dated 21 April 2015 (the "2015 UOB Guarantee").[54] On NOWM's insistence, Prosper Marine renewed the 2015 UOB Guarantee on 31 March 2016, thereby extending it to 20 April 2017.[55]

The imposition of credit hold

23 Despite the issuance of the 2014 UOB Guarantee, Prosper Marine's AR balance continued to escalate throughout 2014. This directly threatened NOWM's trade insurance coverage. As such, in a letter dated 6 June 2014, NOWM requested a minimum of $1.6m to be paid every month in order to bring down the AR balance.[56] In that regard, Prosper Marine was told at a meeting between the parties' representatives on 4 August 2014 that its AR balance of about $9m had to be brought down to $7m.[57]

24 Following negotiations, the parties reached an agreement on repayment, the details of which were recorded in the following manner in an email from Mr Lim Teck Kee, NOWM's finance manager from 2012 to 2015, (the "20 January 2015 Email"):[58]

> As discussed in [Prosper Marine's] office this afternoon, It is agreed that [Prosper Marine] will pay $500k for Jan 2015 and $500k for Feb 2015. From March 2015 onwards [Prosper

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53 Agreed Bundle S/N 137 AB – 2014 UOB Guarantee, AB 2323 to 2324.

54 Agreed Bundle S/N 1102 – 2015 UOB Guarantee, AB 8016 to 8017.

55 Agreed Bundle S/N 2148 – 2015 UOB Guarantee Amendment AB 14198.

56 Lim Teck Kee's AEIC Vol. 2, LTK-11.

57 Lim Teck Kee's AEIC Vol. 1, at paras 41 – 42; Agreed Bundle S/N 435 - Lim Teck Kee's Email dated 14 August 2014, AB 4840

58 Agreed Bundle S/N 861 – Lim Teck Kee's email dated 20 January 2015, AB 6833.

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> Marine] will maintain the payment of previous month's sales plus a certain amount to bring down the AR balance to an acceptable amount of $6m based on the latest RFO price by July 2015.

25 It is not surprising why NOWM was so keen to reduce Prosper Marine's large AR balance. As noted at [11] above, the credit limit extended to Prosper Marine depended on the amount of trade insurance coverage provided to NOWM by Atradius. Pursuant to the terms of this insurance policy, invoices had to be paid within 210 days (i.e. the sum of a maximum extension period ("MEP") of 150 days and a maximum credit term of 60 days).[59] Failing this, there would be an automatic stoppage of insurance coverage[60] and NOWM would not be insured for any loss sustained in relation to invoices submitted at the expiry of the MEP[61].

26 Unfortunately, by 31 March 2015, three invoices totalling $535,354.12 remained outstanding beyond the MEP.[62] Atradius' coverage was therefore suspended for all new invoices issued by NOWM to Prosper Marine on credit terms from 1 April 2015.[63] NOWM was caught in a difficult position. On one hand, there was good reason to withhold further business from Prosper Marine, lest it dug itself into a bigger hole. On the other hand, it was necessary for Prosper Marine to resell RFO and collect slops for discharge at NOWM in order

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59 Jeffrey Fung's AEIC at para 145; Agreed Bundle S/N 501 – Atradius Credit Limit Decision dated 4 September 2014, AB 5095.

60 Agreed Bundle S/N 2627 – Atradius Modula Policy dated 2 September 2016, AB 16080.

61 Agreed Bundle S/N 2627 – Atradius Modula Policy dated 2 September 2016, AB 16080 – 16081.

62 Jeffrey Fung's AEIC Vol. 1 at para 148; Jeffrey Fung's AEIC Vol. 3, JF-35.

63 Jeffrey Fung's AEIC Vol. 1 at para 149

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to generate revenue that could go towards paying down the AR balance.[64] On balance, NOWM decided to continue its business with Prosper Marine but sought to minimise its exposure to risks from new transactions. Thus, with effect from July 2015, NOWM decided to impose a credit hold on Prosper Marine such that subsequent RFO purchases by the company were strictly on cash terms.[65]

The sale of Prosper 9

27 By 11 May 2015, Prosper Marine was once again behind on its payment commitments.[66] In another attempt to reduce its AR balance, Prosper Marine executed a deed for "Sale & Purchase of the Vessel 'Prosper 9'" ("the Deed") on 12 August 2015.[67] Under cl 3.1 of the Deed, the purchase price of $7.5m was to be applied in the following manner:[68]

(a) $5,817,400 to settle the outstanding mortgage on Prosper 9; and

(b) $1,682,600 to set-off Prosper Marine's outstanding liabilities as set out in Schedule B of the Deed.

28 NOWM (or its nominee) also agreed to charter Prosper 9 back to Proper Marine for slop/sludge collection operations at a monthly hire of $120,000 for

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64 NOWM's Opening Statement at para 29.

65 Low Chin Nam's AEIC, Vol. 1 at para 25.

66 Agreed Bundle S/N 1173 – Christy Song's email dated 18 May 2015, AB 8425.

67 Agreed Bundle S/N 1504 – Sale & Purchase of the Vessel "Prosper 9" ("Prosper 9 Deed"), AB pp 10780 to 10851.

68 Agreed Bundle S/N 1504 – Prosper 9 Deed, AB 10783.

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a period of 36 months (cl 8.1 of the Deed).[69] Pursuant to this agreement, NSL Oilchem Marine Pte Ltd ("NOM"), NOWM's nominee company, entered into the "BIMCO Standard Bareboat Charter, Code Name: 'BARECON 2001'" (the "Charterparty") on 27 August 2015.[70] Prosper Marine was to make payment of its monthly charter fees in a lump sum, no later than every 30 running days in advance.[71] Delays would result in a 1% late payment interest (cl 11 of the Charterparty). Moreover, failure to make payment in accordance with cl 11 would entitle NOM to terminate the Charterparty and repossess Prosper 9 (cl 28(a)(i) and 29 of the Charterparty).[72]

29 During the charter period, Prosper Marine was to maintain Prosper 9 in (i) a good state of repair; (ii) efficient operating condition; and (iii) in accordance with good commercial maintenance practice (cl 10 of the Charterparty).[73] Prosper Marine was also required to keep Prosper 9's "[c]lass fully up to date with the Classification Society" specified in the Charterparty, *ie*, Bureau Veritas, as well as maintain necessary certificates (cl 10(a)(i)).[74] By way of background, Bureau Veritas is a classification society appointed by the Marine Port Authority ("MPA") to perform statutory certification and survey

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69 Agreed Bundle S/N 1504 – Prosper 9 Deed, AB 10786.

70 Agreed Bundle S/N 1560 – BIMCO Standard Bareboat Charter, Code Name: 'BARECON 2001' ("Prosper 9 Charterparty"), AB 11225 – 11240.

71 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11229.

72 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11232 – 11233.

73 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11228.

74 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11228.

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services for Singapore-flagged vessels.[75] A certification by Bureau Veritas is necessary for vessels, such as Prosper 9, to legally operate in Singapore waters.[76]

30 Lastly, upon expiration/termination of the Charterparty, Prosper Marine was to redeliver Prosper 9 "in the same state and condition as she was delivered … at the commencement of [the charter], ordinary fair wear and tear excepted" (cl 38 of the Charterparty).[77] This included "all outfit, equipment and appliances" on-board Prosper 9 as at 25 August 2015 (cl 10(f) of the Charterparty).[78]

31 Shortly after signing the Charterparty, NOM came to know of potential maintenance issues with Prosper 9. In that regard, NOM engaged Captain Thanabalasingam s/o Balakrishnan ("Captain Thana") as a consultant to advise it as well as to liaise with surveyors in relation to the maintenance of Prosper 9 and her class certification. This role extended to monitoring the vessel's Bureau Veritas survey status reports. A report of particular interest was Bureau Veritas' attestation to the condition of the ship following an inspection on 19 September 2016 (the "19 September Report").[79] This report listed some 37 outstanding deficiencies on Prosper 9. Prosper Marine had to address these issues as a condition for class certification.[80] Besides this, OHC Shipmanagement Pte Ltd

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75 NEs 8 August 2019, p 154 at lines 1 to 5.

76 NEs 13 August 2019, p 26 at lines 14 to 22.

77 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11239.

78 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11228.

79 Agreed Bundle S/N 2697 – Bureau Veritas Attestation of Inspection Carried Out on 19 September 2016, AB 16498 - 16499.

80 NEs 8 August 2019, p 164 at lines 7 to 13; NEs 13 August 2019, p 1 at lines 8 to 18.

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carried out a separate survey, revealing further problems with Prosper 9,[81] and the inspection report issued by Petrotech Marine Consultants Pte Ltd ("Petrotech") identified still further issues.[82]

The Directors' Guarantee

32 Even with the sale of Prosper 9, Prosper Marine's AR balance as of August 2015 remained significantly above its stipulated credit limit.[83] It was also unable to catch up with its running breaches of the MEP on outstanding invoices. NOWM therefore considered it necessary to take even greater steps to minimise its exposure. In line with these considerations, Mr Raymond Tay Chun Yee ("Mr Raymond"), who had taken over as NOWM's finance manager in June 2015, secured confirmation (via an email dated 17 September 2015) that Prosper Marine would (i) give a joint and several guarantee by its shareholders and directors in NOWM's favour ("deed of guarantee"); and (ii) allow a second charge on its properties as collateral on the outstanding AR balance.[84]

33 Accordingly, Mr Ong Cheng Ho ("Mr Ong" or "Albert Ong"), Miss Eileen Ong ("Miss Ong") and Mr Daniel Lee (collectively, the "Prosper Directors") executed a "Deed of Guarantee and Indemnity of the Obligations of

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81 Agreed Bundle S/N 2706 – OHC Shipmanagement Pte Ltd Report (Condition Survey Report), AB 16536 – 16550.

82 Agreed Bundle S/N 2762 – Petrotech's Inspection Report of MT 'Prosper 9', AB 16936 – 16993.

83 Agreed Bundle S/N 800 – Statement of Accounts Statement of Accounts from NSL OilChem Waste Management Pte Ltd to Prosper Marine, as at 31st August 2015, AB 6350.

84 Agreed Bundle S/N 1619 – Raymond Tay's email dated 17th September 2015, AB 11495.

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Prosper Marine Pte Ltd to NSL Oilchem Waste Management Pte. Ltd."[85] (the "Directors' Guarantee"), the key terms of which are reflected in cll 1 and 2:[86]

> 1. The [Prosper Directors] **HEREBY JOINTLY AND SEVERALLY AND UNCONDITIONALLY AND IRREVOCABLY GUARANTEE** to [NOWM] the payment of all monies owed by [Prosper Marine] as principal or as surety and whether solely or jointly with any other person or persons (in partnership or otherwise) and the [Prosper Directors] **HEREBY JOINTLY AND SEVERALLY UNDERTAKE AND AGREE** to pay to [NOWM] on demand by [NOWM] all monies owed by [Prosper Marine] on, before or after the date of this Deed, **PROVIDED ALWAYS** and it is hereby agreed that the liability of the [Prosper Directors] under this Deed shall not apply or extend to any moneys or liabilities which were incurred or owing by [Prosper Marine] to [NOWM] before 1 April 2015.
>
> 2. The [Prosper Directors] **FURTHER UNDERTAKE AND AGREE** to pay to [NOWM]:-
>
> (a) all legal and other costs, charges and expenses (on a full indemnity basis) incurred by [NOWM] in the preservation and enforcement of its rights under this Guarantee and under any security given therefor (including but not limited to costs and expenses incurred by [NOWM] in engaging solicitors in issuing letters of demand and the like); and
>
> (b) interest on the amount demanded by [NOWM] under Clause 1 hereof from the date of demand and on the said costs, charges and expenses from the date on which the same were incurred by [NOWM], in each case until the date of payment by the [Prosper Directors] to [NOWM] (both before and after judgment), at such rate as may be determined by [NOWM] in its absolute discretion.
>
> [emphasis in original]

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85 Agreed Bundle S/N 1754 – Director's Guarantee & Indemnity, AB pp 12131 to 12140.

86 Agreed Bundle S/N 1754 – Director's Guarantee & Indemnity, AB pp 12132.

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Beyond this, it was agreed that the Directors' Guarantee would be a continuing guarantee until all moneys and obligations owed by Prosper Marine to NOWM had been "satisfied and discharged in full" (per cl 3 of the Directors' Guarantee).[87]

34 As for Prosper Marine's agreement to have a second charge on its properties (at [32] above), little follow up action was taken for several months. It was only in March 2016 that the parties reached a decision that NOWM would address "up to $2m of the outstanding AR with [its] net equity" in three commercial units located at WCEGA Tower ("the Properties").[88]

The March 2016 restructuring

35 Some of these measures (the UOB Guarantees, the sale and chartering of Prosper 9 and the second charge placed on the Properties) were eventually collated and recorded by Mr Jeffrey Fung ("Mr Fung"), NOWM's chief executive officer, in a letter dated 24 March 2016 (the "24 March letter").[89] Beyond this, the 24 March letter recorded a formal restructuring of the parties' business relationship. The main change in respect of the Disposal Contract was that the fixed monthly sum of $54,000 which Prosper Marine had been paying for slop treatment (see [14] above) was replaced with a new fee structure based

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87 Agreed Bundle S/N 1754 – Director's Guarantee & Indemnity, AB pp 12133.

88 Agreed Bundle S/N 2101 – Law Choong Ming's email dated 21 March 2016, AB pp 14049, 14051.

89 Jeffrey Fung's AEIC Vol. 3, JF-56; Agreed Bundle S/N 2118 – NOWM's Letter dated 24 March 2016, AB 14102-14103.

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on the amount of marine slop discharged each month. The relevant changes to Schedule 1 of the Disposal Contract are reproduced below.[90]

> I. Average monthly net oil content for waste marine oily slops discharged by [Prosper Marine] shall be at or above 10%.
>
> II. Charges for the use of treatment and dispose of waste marine oily slops that [Prosper Marine] shall be liable to pay [NOWM]:
>
> - For the first 5,000m^3 = $15,000 flat fee
> - Next 5,000m^3 @ $2.00/$m^3$
> - Any quantity exceeding 10,000m^3 @ $1.40/$m^3$
> - Should average monthly net oil content fall below 10%, charges shall be doubled for waste marine oily slop volume above the first 5,000m^3.
>
> III. [NOWM] shall no longer pay rebate [*sic*] for the oil content in the waste marine oily slops to [Prosper Marine].
>
> IV. [These terms] shall be valid for 12 months from date of this letter.

The 24 March letter clarified that all other terms within the Disposal Contract would remain valid.[91]

36 Schedule 1 of the RFO Contract also saw notable changes. While Prosper Marine had previously been obliged to purchase, at NOWM's option, 4,000 to 4,500 cbm of RFO per month (see [18] above), the 24 March letter

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90 Agreed Bundle S/N 2118 – NOWM's Letter dated 24 March 2016, AB 14102.

91 Agreed Bundle S/N 2118 - NOWM's Letter dated 24 March 2016, AB 14102, para 1(e).

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stipulated that Prosper Marine would only have to purchase as much RFO as that extracted from the slop it discharged at NOWM's plant every month:[92]

> I. [NOWM] will sell RFO to [Prosper Marine] at 30% Platts Price Index. [Prosper Marine] will commit to procure RFO based on agreed specifications, and of volume equivalent to the net oil content of the waste marine oily slops, failure [*sic*] which [NOWM] reserves the rights to suspend slop reception to [Prosper Marine] and claim for loss of sales revenue equivalent to the quantity undersold.
>
> II. Payment will be in cash terms.
>
> III. [These terms] shall be valid for 12 months from date of this letter.

37 As acknowledged by Mr Ong in cross-examination, the effect of the above changes was to link the amount of slop discharged by Prosper Marine to its monthly RFO collection.[93]

Subsequent developments

38 Despite all of this, Prosper Marine continued to fall behind on payments due to NOWM/NOM.[94] Additionally, it continually tried to renegotiate the terms that had been set out in the 24 March letter.[95] It also transpired that the Properties were not worth $2m, as initially represented.[96] They were therefore insufficient forms of security. NOWM then suggested that Prosper Marine could

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92 Agreed Bundle S/N 2118 - NOWM's Letter dated 24 March 2016, AB 14102, para 1(f).

93 NEs 14 August 2019, p 74 at line 15 to p 75 at line 4.

94 Agreed Bundle S/N 2200 – Raymond Tay's email dated 12 April 2016, AB 14424.

95 See for *eg*, Agreed Bundle S/N 2226 – Ong Cheng Ho's email dated 19 April 2016, AB 14501.

96 Agreed Bundle S/N 2474 – Chia Tong Hee's email dated 11 July 2016, AB 15463.

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pledge an alternative five properties "as second charge against [NOWM's] credit line"[97] but Prosper Marine turned down this proposal. Mr Ong explained that all of Proper Marine's properties "ha[d] bank commitment[s] which may not be ideal to resolve".[98]

39 Separately, on 1 August 2016, NOM issued a letter of demand via its solicitors for $400,000, representing over three months' worth of unpaid charter hire as well as interest at a rate of 1% per month.[99] Prosper Marine was informed that unless this sum was paid by 4 August 2016, NOM reserved its rights to commence legal proceedings and/or terminate the Charterparty. Despite some attempts to make payment,[100] Prosper Marine ultimately could not repay significant portions of these invoices. NOM therefore proceeded to terminate the Charterparty and repossess Prosper 9 on 16 September 2016.[101]

40 Upon the repossession of Prosper 9, NOM arranged for a class condition survey to be carried out on Bureau Veritas on 19 September 2016.[102] Beyond this, NOM also arranged for an underwater inspection of Prosper 9's hull by Underwater Contractors Pte Ltd ("Underwater Contractors") on 20 September

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97 Agreed Bundle S/N 2485 – Chia Tong Hee's email dated 12 July 2016, AB 15474.

98 Agreed Bundle S/N 2511 – Ong Cheng Ho's email dated 25 July 2016, AB 15599.

99 Agreed Bundle S/N 2533 – Letter of Demand dated 1 August 2016, AB pp 15689 to 15690.

100 Agreed Bundle S/N 2599 – Eileen Ong's email dated 25 August 2016, AB 15947; Tay Chun Yee's AEIC at para 97.

101 Agreed Bundle S/N 2670 – Gurbani & Co's Letter to Prosper Marine dated 16 September 2016, AB 16328 – 16329.

102 Agreed Bundle S/N 2697 – Bureau Veritas Attestation of Inspection Carried Out on 19 September 2016, AB 16498 - 16499.

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2016.[103] The Bureau Veritas survey identified a total of 37 issues, ranging from problems with the rescue boat to problems with the boiler.[104] The underwater inspection on the other hand, found approximately 90% marine growth across all inspected areas.[105] Many expenses arose from this. NOM bore them all. First there was the cost of the inspections.[106] Then, there was cost of repairing, reinstating or replacing the damage and/or parts of Prosper 9.[107] Finally, there was the cost of cleaning the barnacles and/or other marine growth on Prosper 9's hull and underwater parts.[108]

41 To make matters worse, NOM discovered that four of Prosper 9's cargo tanks were substantially full of what appeared to be solidified oil or sludge[109] and had to incur expenses to identify and discharge these substances.[110] These included the fees of Intertek Testing Services Pte Ltd ("Intertek"),[111] which carried out testing to determine the flash points and densities of the sludge to

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103 Agreed Bundle S/N 2786 – Underwater Contractors' Invoice, AB 17062.

104 Agreed Bundle S/N 2697 – Bureau Veritas Attestation dated 19 September 2016, AB 16498.

105 Agreed Bundle S/N 2694 – Underwater Contractors' Diver's Report dated 20 September 2016, AB 16432.

106 Footnotes stated in NOWM' Closing Submissions dated 20 March 2020 at para 679

107 Footnotes stated in NOWM's Closing Submissions dated 20 March 2020 at paras 688 – 690.

108 Agreed Bundle S/N 2893 – Invoice for 14 August 2017 cleaning, AB 19066.

109 Agreed Bundle S/N 2762 – Petrotech's Inspection Report of MT 'Prosper 9', AB 16950

110 Statement of Claim for Suit 1048 (Amendment No 1) at paras 15 and 16. See also, AEIC of Captain Thana Vol. 1 at para 11 and TB-4

111 Agreed Bundle S/N 2881 – Intertek Tax Invoice dated 1 June 2017, AB 18689.

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facilitate its removal from the cargo tanks.[112] It transpired that this solidified sludge was particularly difficult to remove. Attempts to liquefy it using Prosper 9's boiler and heating coils were to no avail.[113] Petrotech opined that the removal of the solidified sludge would require "a supply of at least the equivalent amount of clean gas oil or similar product to enable the product to be pumped after localised heating with portable heating coils at the top of the tank and using heavy duty specialist pumps".[114] Eventually, hot oil from Cleanseas had to be blended with the sludge in order to liquefy it for pumping.[115] It was then discharged at the Cleanseas facility.

42 Finally, on 14 October 2016, Bureau Veritas carried out another survey of Prosper 9 and certified her fit for use.[116]

The parties' cases

The 2014 Contract suits

43 As mentioned earlier, Suit 1062 relates to invoices issued between June 2015 and October 2016 under the 2014 Contracts. Prosper Marine also filed its own suit ("Suit 1073"), claiming damages for alleged breaches of contract. Suit 1073 was eventually consolidated with Suit 1062 and I have referred to them collectively as the 2014 Contract suits. NOWM's claim for unpaid invoices

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112 Agreed Bundle S/N 17007 – Email chain between Intertek & NOWM, AB 17006 – 17008.

113 Thanabalasingam's AEIC Vol. 1 at para 36.

114 Thanabalasingam's AEIC Vol. 1 at para 48.

115 Thanabalasingam's AEIC Vol. 1 at para 67.

116 Thanabalasingam's AEIC Vol. 1 – TB-17 at p 283.

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under the 2014 Contracts amount to $6,429,105.74 before interest and $7,629,613.70 with interest (calculated up to 23 February 2017).[117]

44 Prosper Marine's primary defence is that the invoices on which NOWM bases its claim have already been paid.[118] This is because payments that were made to NOWM after 1 April 2015 were applied to invoices issued by NOWM from that date. Prosper Marine claims that this was pursuant to a mutual understanding between the parties (the "Allocation Agreement") which is evidenced by email correspondence and NOWM's conduct.[119] In addition, Prosper Marine claims that it never agreed to pay late payment interest on the relevant invoices.

45 NOWM squarely rejects the existence of the Allocation Agreement. The clear understanding between the parties was that outstanding invoices would be settled on a "first in, first out" ("FIFO") basis, in line with general accounting practice.[120] Besides the fact that Prosper Marine's case is wholly unsupported by evidence,[121] there is no commercial reason for why NOWM would have wanted to enter into the Allocation Agreement.[122] Further, Prosper Marine's own payment vouchers expressly instructed NOWM to apply Proper Marine's payments to older invoices, on a FIFO basis.[123]

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117 Consolidated Statement of Claim for Suit 1062 Annex A, p 17.

118 Consolidated Defence & Counterclaim (Amendment No 2) at paras 26-27.

119 Prosper Marine's Closing Submissions dated 20 March 2020, at para 27.

120 NOWM's Closing Submissions dated 20 March 2020 at paras 625 - 630.

121 NOWM's Closing Submissions dated 20 March 2020 at paras 631 – 636 and para 644.

122 NOWM's Closing Submissions dated 20 March 2020 at paras 637 – 643.

123 NOWM's Closing Submissions dated 20 March 2020 at paras 652 – 661.

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46 In the alternative, the Prosper Marine argues that it has a right of set off against NOWM for damages sustained as a result of breaches of the 2014 Contracts.[124] According to Prosper Marine, NOWM was subject to three express contractual obligations. Firstly, it had an obligation to receive a minimum volume of 18,000 cubic metres of waste slops per month.[125] Secondly, NOWM was to ensure a loading rate between 50 m^3 and 100 m^3 per hour.[126] Prosper Marine pleads that, even if such obligations were not borne out by express contractual terms, these were also implied terms of the 2014 Contracts.[127] Thirdly, Prosper Marine argues that NOWM was contractually obliged to sell at least 3,200 mt of RFO to Prosper Marine every month.[128] Moreover, the RFO offered for sale was of insufficient quality.[129]

47 To this, NOWM argues that the terms under the 2014 Contracts which constitute Prosper Marine's counterclaim are "hopelessly flawed" because:[130]

(a) the terms were not within the parties' intentions and did not exist;

(b) in any event, NOWM did not breach these terms;

(c) even if there were, the losses claimed by Prosper Marine have been contractually barred, excluded or subject to an indemnity; and

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124 Prosper Marine's Closing Submissions dated 20 March 2020 at para 46.

125 Prosper Marine's Closing Submissions dated 20 March 2020 at para 48(1).

126 Prosper Marine's Closing Submissions dated 20 March 2020 at para 48(2).

127 Prosper Marine's Closing Submissions dated 20 March 2020 at para 68.

128 Prosper Marine's Closing Submissions dated 20 March 2020 at para 134 – 135.

129 Prosper Marine's Closing Submissions dated 20 March 2020 at para 130(6).

130 NOWM's Closing Submissions dated 20 March 2020 at para 5.

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(d) Prosper Marine has failed to adduce adequate evidence to prove its supposed losses, which are grossly inflated.

The Directors' Guarantee suit

48 Pursuant to cl 1 of the Directors' Guarantee (see [33] above), NOWM seeks to hold the Prosper Directors *personally liable* for the same debt which is the subject of the 2014 Contract suits.

49 Prosper Marine does not contest the enforceability of the Directors' Guarantee but submits there are no moneys owing to NOWM under the same. Its reasons are threefold: (i) Prosper Marine's counterclaims in the 2014 Contracts suits extinguish and/or exceed NOWM's claim; (ii) the Directors' Guarantee does not apply to moneys or liabilities incurred before 1 April 2015; and (iii) pursuant to the Allocation Agreement, the payments made by Prosper Marine after 1 April 2015 exceed the total value of NOWM's issued invoices.[131]

50 On the first point, NOWM repeats its contentions with Prosper Marine's counterclaims in the 2014 Contracts suits. As for the latter arguments, although NOWM agrees that the Directors' Guarantee only applies to invoices issued after 1 April 2015,[132] it reiterates that these invoices have not been settled. There was no Allocation Agreement[133] and Prosper Marine's monthly repayments were applied on a FIFO basis.[134] NOWM's invoices therefore remain

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131 Prosper Marine's Closing Submissions dated 20 March 2020, at para 235.

132 NOWM's Reply Closing Submissions dated 13 April 2020 at para 309.

133 NOWM's Closing Submissions dated 20 March 2020, at paras 631 – 632.

134 NOWM's Closing Submissions dated 20 March 2020, at paras 632 – 636.

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outstanding and the Prosper Directors, having failed to make good on their guarantee to pay these invoices, must be held liable for their breach.

The Charterparty suit

51 Lastly, the Charterparty suit concerns NOM's claim for its outstanding charter hire for the period between 27 May and 16 September 2016, this being $261,290.32, as well as damages in respect of Prosper Marine's breaches of the Charterparty, with interest on these amounts.[135]

52 Prosper Marine alleges that it was induced by NOWM and NOM to enter into the Deed and Charterparty by way of false representations made in an email dated 31 July 2015 (the "31 July 2015 email").[136] It submits that having relied on these misrepresentations, Prosper Marine has accordingly suffered loss and damages which must be set off against NOM's claim for the outstanding charter hire.[137] As for the claim for various breaches under the Charterparty, Prosper Marine argued, among other things, that (i) NOM has not proven that Prosper Marine was responsible for the damage caused to and/or the condition of Prosper 9 as at its repossession;[138] and (ii) NOM has failed to mitigate its losses for its claim for loss of hire.[139]

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135 Statement of Claim for Suit 1048 (Amendment No 1) at para 12; NOWM's Closing Submissions dated 20 March 2020 at para 9.

136 Agreed Bundle S/N 1437 – Low Chin Nam's email dated 31 July 2015, AB 10213.

137 Prosper Marine's Closing Submissions dated 20 March 2020 at paras 247 – 263.

138 Prosper Marine's Closing Submissions dated 20 March 2020 at paras 266 – 275.

139 Prosper Marine's Closing Submissions dated 20 March 2020 at para 276 – 280.

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53 NOM says that Prosper Marine's counterclaim for misrepresentation lacks any merit; the 31 July email does not contain any kind of actionable representation or language intended to have any legally binding effect. In any event it is clear that Prosper Marine did not rely on the 31 July email to its detriment.[140] Secondly, it is submitted that Prosper Marine has no genuine defence to the claimed breaches of the Charterparty, which are substantiated through multiple survey reports and documentation of the rectification works performed on the vessel.[141] NOM adds that Prosper Marine had not pleaded any failure (on NOWM's part) to mitigate the costs of repair or damages arising from loss of hire.[142]

54 I turn now to my decision proper.

The 2014 Contract suits

55 The issues for my consideration in these suits are as follows:

(a) What are the parties' obligations to each other under the 2014 Contracts?

(i) Was a "Minimum Volume Term" (see [58] below) and "Loading Rate Term" (see [63] below) part of the Disposal Contract?

(ii) Was a "Minimum RFO Term" (see [69] below) part of the RFO Contract?

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140 NOWM's Closing Submissions dated 20 March 2020 at para 9.

141 NOWM's Closing Submissions dated 20 March 2020 at para 10.

142 NOWM's Closing Submissions dated 20 March 2020 at paras 715 and 818.

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(iii) Did the 2014 Contracts entitle NOWM to late payment interest (see [74] below)?

(b) Was there a breach of the aforementioned obligations (see [95] below)?

(c) Was liability under the 2014 Contracts excluded by a contractually incorporated exemption clause (see [148] below)?

The Parties' obligations to each other under the 2014 Contracts

56 The principles of contractual interpretation are well established. Briefly, the purpose of interpretation is to give effect to the objectively ascertained intentions of the contracting parties as it emerges from the contextual meaning of the relevant contractual language: *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [30]. To that end, while both the text and context must be considered, the written agreement remains of first and primary importance. Extrinsic evidence is admissible where it is "relevant", "reasonably available to all the contracting parties" and relates to a "clear or obvious context" (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128]–[129]). With these principles in mind, I shall first consider the tenability of Prosper Marine's counterclaims, which are founded on its own particular construction of the 2014 Contracts. It is argued that, on a proper reading of these contracts, NOWM was:

(a) by cl 2.6 read with cl 1.5 of Schedule 1 of the Disposal Contract, obliged to receive or accept a minimum volume of 18,000 cbm of marine slops from Prosper Marine per month (the "Minimum Volume Term");

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(b) by cl 6.5 of the Disposal Contract, obliged to ensure a minimum loading rate not below 50 cbm per hour and not exceeding 100 cbm per hour when receiving marine slops from Prosper Marine's vessels (the "Loading Rate Term"); and

(c) by cl 2.2 read with cll 1.1 and 1.2 of Schedule 1 to the RFO Contract, obliged to supply Prosper Marine with a minimum volume of 3,200 mt of RFO per month (the "Minimum RFO Term").

57 I find that none of these are terms of the 2014 Contracts, expressly or impliedly.

(1) The Disposal Contract

58 I first discuss the Minimum Volume Term. Prosper Marine argues that if it had been obliged to *provide* at least 18,000 cbm of marine slop a month, NOWM must have agreed to *receive* at least 18,000 cbm of marine slop every month as well. This reciprocal arrangement, according to Prosper Marine, is detailed in the Preamble of the Disposal Contract which reads: "[Prosper Marine] wishes to engage [NOWM] for the provision of, waste slops and sludge disposal services and [NOWM] is *willing to provide such services*…" [emphasis added].[143] This implies an undertaking on NOWM's part to ensure that it would have capacity for Prosper Marine's slops on delivery. This, Prosper Marine avers, was a necessary part of their business arrangement.

59 As discussed at [6] above, their business arrangement depended on capacity management. A backlog of slop or RFO would have a knock-on effect

143 Agreed Bundle S/N 157 – Disposal Contract, AB 3779.

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on every other part of the arrangement, from discharge of slop, receipt and treatment of said slop to ultimate sale and handover of RFO. Such terminal congestion, known as "tank top situation", can only be prevented with the cooperation of the parties. Prosper Marine accordingly submits that cl 2.6, read with cl 1.5 of Schedule 1, captures a two-way obligation. Not only was Prosper Marine required to supply at least 18,000 cbm of slop per month but NOWM had to be prepared or able to receive and treat this minimum quantity of slop. Otherwise, the entire objective of the Disposal Contract would have been nullified.[144]

60 I disagree. The contract was never about guaranteeing 18,000 cbm of slop every month. It was to ensure that $54,000 was regularly paid on a monthly basis from Prosper Marine to NOWM. Whether this sum was in the form of liquidated damages or payment for slop treatment was entirely irrelevant. The contract was agnostic in that regard. In fact there was no expectation that Prosper Marine would ever be able to deliver 18,000 cbm of slop a month – it only ever achieved this once[145] in the three years of the contract (2014 – 2016). The intention of the parties was to ensure a monthly cash flow of $54,000 to NOWM and references to 18,000 cbm per month were in truth, reasoned backwards (at a rate of $3 per cbm) from the desired $54,000/month.

61 NOWM sought $54,000/month for two reasons. First, it wished to cover the cost of refurbishing its plant.[146] Prosper Marine, having suggested the refurbishment and supported the move, was expected to play its part in helping

144 Prosper Marine's Closing Submissions dated 20 March 2020 at para 62.

145 Bernard Tay's AEIC, p 15 see December 2014 slop collection.

146 Robert Lim's AEIC at para 51.

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to recoup the cost of these works. Second, NOWM had operating expenses. $54,000/month would go towards covering those expenses.[147] Prosper Marine stood to benefit too. It would continue to receive the preferential rate of $3 per cbm for any slop discharge at NOWM's facilities.[148] This was a huge boon, especially considering that the only other alternative, Cleanseas, was a direct competitor which prioritized its own slop discharges and charged more than four times the amount ($13 per cbm) at its facility (see [8] above). I therefore find that the main purpose of the Disposal Contract had been to formalise the favourable discharge arrangement concluded between the parties in 2010. My findings in this regard are further fortified when considering that Prosper Marine had been in deep arrears with NOWM, its AR balance being in excess of $9m (see [12] above). It would not have made any sense for NOWM to take on an obligation (such as the Minimum Volume Term) for the benefit of a bad debtor.

62 But more importantly, I agree with NOWM that the express wording of cl 2.6 and cl 1.5 to Schedule 1 speaks of only one obligation – *Prosper Marine's* obligation to discharge a specified minimum volume of slop or, failing which, to pay liquidated damages of $3 for every cbm of shortfall. This reading is bolstered by cl 2.13 of the Disposal Contract, which draws a distinction between the *discharge* of slop and NOWM's *acceptance* of the same.[149] Under cl 2.13, NOWM reserved its right to "refuse to take delivery of the waste slops and/or sludge and perform the Services" in certain circumstances. More significantly, "in no circumstances [was Prosper Marine's] discharge of waste slops and/or

147 Robert Lim's AEIC at para 53.

148 NEs 13 August 2019, p 144 at lines 17 – 25; p 148 at lines 11 – 17.

149 Agreed Bundle S/N 157 – Disposal Contract, AB 3781 to 3782.

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sludge at [NOWM's plant] [to] constitute unconditional acceptance of delivery of the same by [NOWM]." Thus, it is not open to Prosper Marine to extrapolate an obligation of *acceptance* from the wording of cl 2.6.

63 I turn now to the Loading Rate Term. Prosper Marine avers that the stipulation that its vessels had to discharge waste slops and/or sludge at specified minimum and maximum volume rates (per cl 6.5 of the Disposal Contract) should apply with equal force to NOWM.[150] While the pumps to discharge slop and/or sludge were located on Prosper Marine's vessels and were controlled by Prosper Marine's crew, it was actually NOWM who gave instructions as to the rate of discharge depending on the storage availability in its tanks.[151] Thus, both the parties had to work together to ensure compliance with cl 6.5. Clause 6.5 is therefore a dual obligation, made up of Prosper Marine's undertaking as well as the Loading Rate Term.

64 I reject this for two reasons. First, the express words of the Disposal Contract specifically lays the responsibility for the rate of discharge of slop with Prosper Marine and not NOWM (see cl 6.5).[152]

65 Second, the parties intended for Prosper Marine to hold sole responsibility for the rate of discharge, since it had control over the discharge process. I acknowledge that NOWM was involved but ultimately find that its role was limited. While connecting the hose between Prosper Marine's vessels

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150 Prosper Marine's Closing Submissions dated 20 March 2020 at para 67.

151 Prosper Marine's Reply Closing Submissions dated 13 April 2020 at para 133.

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and NOWM's plant was a joint effort, [153] it was Prosper Marine who would initiate the slop discharge process. It was also Prosper Marine who maintained primary control over when the pumping of slops started and stopped[154] as well as the specific pumping rate. Although NOWM's ground operators participated in the discharge process, this participation was limited and they would only issue instructions when the discharge rate had to be reduced for safety reasons.[155] Even then, it was Prosper Marine who determined the proper, *ie*, safe discharge rate to be adopted since this depended on the quality of the slops brought in by Prosper Marine. [156]

66 It was therefore intuitive for Prosper Marine, as opposed to NOWM, to take on the risk of maintaining the rate of slop discharge within an appropriate range. If there was any foul play by NOWM, Prosper Marine was fully entitled to disclaim liability, provided that it "prove[d] that [the failure to adhere to clause 6.5] was due to the acts or omissions of [NOWM] or its servants, agents and/or employees".[157] There is no need to conjure a new Loading Rate Term.

67 For completeness, I also consider whether the Minimum Volume Term and Loading Rate Term should be implied into the Disposal Contract. The Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 characterised the implication of terms into a contract as an exercise in giving effect to the parties' presumed intentions by

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153 Ngiam Tee Leng's AEIC at para 12.

154 NEs 14 August 2019, p 41 at line 18 to p 42 at line 11.

155 Ngiam Lee Teng's AEIC at para 14.

156 Ngiam Lee Teng's AEIC at para 15.

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filling the gaps in their contract (at [93]). Terms are not to be implied into contracts lightly and should only be done where necessary (at [100]). To that end, the Court laid out a three-stage process to determine whether the implication of a term is necessary (at [101]):

> (a) First, the court should consider whether there is a "true gap" in the contract. A gap is only remediable by implication where the parties did not contemplate gap. This is to be contrasted against situations where the parties contemplated the gap but chose not to provide for it because (i) they mistakenly believed it would be addressed by the express terms of the contract; or (ii) they were unable to agree on a term to fill the gap.
>
> (b) Second, the court must consider "whether it is necessary in the business or commercial sense to imply the term to in order to give the contract efficacy", *ie*, the business efficacy test.
>
> (c) Third, the court must apply the official bystander test. In other words, the proposed term must have been so obvious to the parties that had it been suggested at the time of contracting, the parties would have responded "[o]h, of course!"

68 Prosper Marine's case fails at the first hurdle. As I have already said, the parties never envisaged that NOWM would have to receive 18,000 cbm of slops per month and saw no need to include a term to that effect. Separately, the parties made a conscious decision to assign Prosper Marine sole responsibility over the rate of slop and/or sludge discharge because it was in a better position to ensure these specified rates would be adhered to. As such, there are no "true gaps" in the Disposal Contract which require remedying. Indeed, implying the

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Minimum Volume Term or the Loading Rate Term would directly *contradict* the express terms and the parties' objectively ascertained intentions.

(2) The RFO Contract

69 Prosper Marine's case is that NOWM had an obligation under the RFO Contract to sell a minimum volume of 3,200 mt of RFO per month, an obligation which it failed to meet from May 2014 to September 2016.[158] This requirement (the Minimum RFO Term) is supposedly found in clauses 1.1 and 1.2 of Schedule 1 of the RFO Contract. I reproduce them here again for convenience:[159]

> 1.1 [NOWM] hereby agrees to sell, *at [NOWM's] option*, and [Prosper Marine] agrees to buy 4,000-4,500 metric tonnes of recycled fuel oil per month for the duration of this Agreement.
>
> 1.2 [NOWM] shall be entitled to deliver twenty (20) per cent (%) more or less of the quantity specified in Clause 1.1 of Schedule 1 above and [Prosper Marine] shall be liable to take delivery of the same and pay Charges for the quantity actually delivered.
>
> [emphasis added]

70 According to Prosper Marine, cl 1.1 obliged NOWM to sell at least 4000 mt of RFO to Proper Marine every month. Clause 1.2 qualified this, allowing NOWM to deliver 20% less every month. This flexibility in quantum was to give NOWM some leeway in case it was unable to meet the required levels of RFO production.[160] NOWM's nett obligations therefore, according to Prosper Marine, were to sell at least 3,200 mt of RFO to Prosper Marine every month.

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158 Prosper Marine's Closing Submissions dated 20 March 2020 at para 132.

159 Agreed Bundle S/N 156 – RFO Contract, AB 3776

160 Prosper Marine's Closing Submissions dated 20 March 2020 at para 135.

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71 I do not accept this argument. Clause 1.1 of Schedule 1 to the RFO Contract plainly provided that the sale of RFO was "at [NOWM's] *option*" [emphasis added]; there was never an *obligation* to sell Prosper Marine RFO. Prosper Marine has misconstrued clause 1.2 of Schedule 1 as well. The range of 3,200 to 5,400 mt of RFO therein merely afforded NOWM the option of selling less or more RFO as required, rather than a fixed quantum. Crucially, this remained an option rather than an obligation. As such, I find that that the express words of the contract do not support Prosper Marine's interpretation.

72 Additionally, I find that it could not have been the parties' intentions to incorporate the Minimum RFO Term into the RFO Contract. NOWM's ability to produce RFO depended, at least in part, on the quantity and quality of slop which Prosper Marine delivered.[161] I find it difficult to accept that NOWM would guarantee a quantity of RFO every month, when its supply of feedstock was not assured. In answer, Prosper Marine argues that on the contrary, NOWM had two commercial interests in imposing this positive obligation on itself. First, NOWM needed a reliable way to free up its reactor tanks and prevent tank top situations from developing. Second a large part of NOWM's revenue stream came from the sale of RFO. Guaranteed RFO sales would be in line with these interests.[162]

73 This was simply wrong. Guaranteed *purchases* of RFO (by Prosper Marine) would have ensured these benefits. But NOWM could have enjoyed these benefits without locking itself into a commitment to *sell* a minimum quantity of RFO. It could have simply gotten Prosper Marine to agree to buy

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161 NEs 14 August 2019, p 46 at lines 5 – 9; Jeffrey Fung's AEIC Vol. 1 at [124]

162 Prosper Marine's Reply Closing Submissions dated 13 April 2020 at para 130.

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whatever NOWM had to sell, generating cash and ridding itself of RFO in the process. That is, in fact, exactly what occurred here. Clause 1.1 of Schedule 1 makes that clear. NOWM's "agree[ment] to sell" was *at its option*, while Prosper Marine's "agree[ment] to buy" was unconditional. Moreover, there was no commercial sense in the suggested Minimum RFO Term. At the material time, Prosper Marine's AR balance was significantly in excess of its credit limit. Prosper Marine was in no position to make upfront payments. Mandatory monthly sales to such a bad debtor would have been a serious risk. The Minimum RFO Term, with its attendant risks and drawbacks, could not have been within the intention of the parties.

(3) The Late Payment Interest Obligation

74 I now turn to consider NOWM's claim that it is entitled under both the Disposal Contract and RFO Contract to 18% per annum late payment interest on its unpaid invoices. I find that such an obligation arises in both contracts.

75 In respect of the RFO Contract, cl 1.4 thereof specifically incorporates the "Seller's Standard Terms and Conditions of Sale", these being "NOWM's Standard Terms for Sales":[163]

> The terms and conditions and provisions of [NOWM's] Standard Terms and Conditions of Sale ("[NOWM's Standard Terms for Sales]") and a copy of which has been given to [Prosper Marine] before [NOWM's Standard Terms for Sales] come into effect, shall be incorporated in addition and without prejudice to the terms and conditions of this Agreement and shall apply to this Agreement as if each of them were expressly repeated herein … [Prosper Marine] hereby confirms and acknowledges that it shall be deemed to have full knowledge and notice of the contents and effect of [NOWM's Standard Terms for Sales], as

163 Agreed Bundle S/N 156 – RFO Contract, AB 3769.

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> long as a copy of [NOWM's Standard Terms for Sales] (and all updates and prevailing from time to time (with all amendments thereto)) has been made available to [Prosper Marine].

76 It follows that, cl 5.5 of NOWM's Standard Terms is incorporated into the RFO Contract. These terms specify that any late payment would entitle NOWM to interest of 18% per annum:[164]

> [i]f the Customer fails to make payment on the due date (or where the sum is payable on demand, on the Contractor's demand therefor) then, without prejudice to any other right or remedy available to the Contractor, the Contractor shall be entitled at any time:-
>
> …
>
> (c) charge the Customer interest (both before and after any judgment) on the amount unpaid, *at the rate of eighteen percent (18%) per annum until payment in full is made* (a part of a month being treated as a full month for the purpose of calculating interest).
>
> [emphasis added]

77 The obligation to pay late payment interest is again, reproduced in cl 5.5 of the RFO Contract[165]:

> If [Prosper Marine] fails to make any payment on the due date, then, without prejudice to any other right or remedy, [NOWM] shall be entitled to charge [Prosper Marine] interest (both before and after any judgment) on any amount unpaid, at such rate as agreed in Schedule 1 until payment in full is made.
>
> …

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164 Jeffrey Fung's AEIC Vol. 3 – JF-25 at p 1544 (helpfully reproduced in Annex 2 of NOWM's Closing Submissions dated 20 March 2020).

165 Agreed Bundle S/N 156 – RFO Contract, AB 3771.

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78 The precise amount of interest to be paid, as set out in Schedule 1 of the RFO contract, refers back to NOWM's Standard Terms for Sales (see [76] above):[166]

> 3.1 [NOWM] and [Prosper Marine] agree that [Proper Marine] shall be liable to pay late-payment interest on such amounts outstanding at the expiry of [Prosper Marine's] credit period *in accordance with [NOWM's Standard Terms for Sales].*
>
> [emphasis added]

79 As such, I find that the RFO Contract amply incorporates an obligation to pay late payment interest in accordance with NOWM's Standard Terms, *ie*, at a rate of 18% per annum.

80 Like its sister contract, the Disposal Contract speaks of an entitlement to late payment interest, "at the rate set out in [the Disposal Contract's] Schedule 1" (see cl 4.2 of the Disposal Contract).[167] But unlike the RFO Contract, it fails to reference any of NOWM's standard terms (which contained the precise interest rate) or explicitly specify, in Schedule 1 of the contract, what that interest rate is.

81 To this, NOWM argues that the parties intended the 2014 Contracts to be supplemented by standard terms with which they had already been trading.[168] A reference to these terms can be found in job service orders ("JSOs"), which NOWM issued for its slop disposal services prior to, as well as after, the

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166 Agreed Bundle S/N 156 – RFO Contract, AB 3776.

167 Agreed Bundle S/N 157 - Disposal Contract, AB 3783.

168 NOWM's Reply Closing Submissions dated 13 April 2020 at para 239.

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Disposal Contract came into existence.[169] The cover page of each JSO stipulated that the supply, performance and/or provision of services was subject to NOWM's standard terms. These standard terms, it will be remembered, specified the interest rate at 18% per annum.

82 Following the Disposal Contract's execution, NOWM began issuing its monthly invoices under the description of "Wharfage Services". Similar to the JSOs, these invoices incorporated a set of standard terms from NOWM as well ("NOWM's Standard Terms for Services"). These were, for all intents and purposes, identical to NOWM's Standard Terms for Sales. The only difference was that one addressed "Sales" while the other addressed "Provision of Services". NOWM argued that over time, this consistent course of dealing incorporated NOWM's Standard Terms for Services into the parties' business relationship.[170] Thus, even in the absence of an express reference thereto, there must have been an intention to incorporate these terms, including the 18% interest rate, into the Disposal Contract.

83 I accept this argument. The Court of Appeal in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar"*) set out the test for incorporating terms by a course of dealing. The test is "whether, *at the time of contracting*, each party as a reasonable person was ***entitled to infer from the past dealings and the actions and the words of the other in the instant case***, that the term was to be a part of the contract"

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169 Jeffrey Fung' AEIC at paras 84 to 85; an example of a JSO is found at Jeffrey Fung's AEIC Vol. 3 – JF-25.

170 NOWM's Closing Submissions dated 20 March 2020 at paras 218 – 222, applied to the Disposal Contracts context via para 239 ("the grounds set out above at paragraphs 218 to 222 would therefore equally apply").

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[emphasis in original]: *Vinmar* at [53]–[54]. NOWM's Standard Terms for Services had long been adopted by the parties in their course of dealings. They had long been a feature of their business documentation, and subsequently their commercial relationship.

84 Moreover, Prosper Marine was amply aware of NOWM's entitlement to charge interest. That is why it sought waivers of the late payment interests.[171] On the occasions that NOWM waived the interest payable, it would issue a credit note to Prosper Marine.[172] Appended would be a form entitled "LATE INTEREST WAIVE-OFF APPROVAL FORM", as well as a table titled "Computation of later interest charge" for the month in question. This table would set out the invoices for which interest was being waived, the date of the invoice, invoiced amount and due date of payment.[173] The fourth column from the right of each table also set out the interest rate of 18% per annum. Prosper Marine was accordingly well aware of NOWM's entitlement to charge interest at this rate. In that regard, Ms Ong accepted that the credit notes and the tables appended thereto would have been seen by Prosper Marine's book-keepers.[174]

85 This acknowledgement, to my mind, was the keystone in satisfying the *Vinmar* test. NOWM was entitled to infer that the term had been incorporated into the contract – Prosper Marine had unambiguously acknowledged its obligations to pay interest in all the previous dealings. Prosper Marine could not

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171 *e.g.* Lim Teck Kee's AEIC Vol. 1, LTK-7; Agreed Bundle S/N 65 – Eileen's email dated 23 May 2013, AB 1390

172 Lim Teck Kee's AEIC Vol. 1, at para 24.

173 Agreed Bundle S/N 2392 – NSL Credit Note No. NCR000228, AB 15195 to 15196, 15198, 15200.

174 NEs 28 August 2019, p 50 at line 12 – p 51 line 10

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have forgotten about these dealings either – they were recent and numerous. There was nothing special that distinguished the previous dealings from those contemplated in the 2014 Contracts. In fact, they concerned exactly the same type of subject matter, handled in consistently the same manner. There was no reason to expect that the 2014 Contracts, which simply formalized a longstanding commercial relationship between the parties, would depart from the earlier dealings. Accordingly, I accept that an obligation to pay late payment interest was incorporated into the Disposal Contract as well.

86 To this, Prosper Marine argued that the Standard Terms for Service could not have been incorporated into the Disposal contract. An entire agreement clause (clause 13.6) would have barred that:[175]

> This [Disposal Contract] (together with all agreements and documents executed contemporaneously with it or referred to it) constitutes the entire agreement between the parties in relation to its subject matter and supersedes all prior agreements and understandings whether oral or written with respect to such subject matter and no ***variation*** of this [Disposal Contract] shall be effective unless reduced to writing and signed by or on behalf of a duly authorised representative of each of the parties to this Agreement. No terms and conditions contained in the documents referred to herein, save Schedule 1, shall have any contractual force or effect to modify the contractual obligations of the parties herein. This [Disposal Contract] shall govern the disposal of waste slops and sludge between [NOWM] and Prosper Marine to the ***exclusion of any terms and/or conditions made or purported to be made by [Prosper Marine]***.
>
> (emphasis added in bold and italics)

87 I rejected this argument. First, the entire agreement clause was intended to pre-empt and prevent *variations* to the Disposal Contract. Here, late-payment

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interest was contemplated in clause 4.2 (see [80] above). The only question was the *quantum* of that late payment interest, on which the contract remained silent. Identifying the relevant rate for late payment interest was not so much a variation inserting new clauses in the Disposal Contract as an interpretation of an existing clause.

88 Second, it seems to me that this entire agreement clause was only intended to exclude "terms and/or conditions made or purported to be made by [***Prosper Marine***]" (emphasis mine).[176] This is clear from the last line of clause 13.6 – a line which, I should mention, was glaringly omitted from Prosper Marine's closing submissions.[177] This suggests that the overall tenor of the entire agreement clause was directed to any attempts by Prosper Marine to introduce errant terms or conditions.

89 Prosper Marine's better argument was that NOWM had waived any entitlement to late payment interest through its conduct (the issuance of credit notes waiving late payment interest and its internal correspondences) and express written agreements (the preamble of the Prosper 9 Deed).[178] I rejected this argument as well.

90 In my opinion, the practice of issuing credit notes showed a consistent and deliberate attempt by NOWM to preserve its right to claim late payment interest. The indulgences it granted to Prosper Marine were purposeful and clearly demarcated – each credit note specifically identified the sums that it was

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176 Agreed Bundle S/N 157 - Disposal Contract, AB 3787

177 Prosper Marine's Closing Submissions dated 20 March 2020 at para 136

178 Prosper Marine's Closing Submissions dated 20 March 2020 at paras 143 – 150

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waiving and promised nothing further than that.[179] If anything, the standing arrangement was not to waive all late payment interest due, but to waive them *only* through credit notes issued through the proper processes. Indeed, I note that each credit note required no less than three sets of approvals - one from a "Requestor", another from a "Recommender" and finally the "Approver's" as well.[180] The meticulous (and no doubt, tedious) documentation of precise instances when waiver were granted, leaves little doubt that NOWM sought to guard its entitlement to late payment interest. In that regard, I cannot accept that there had been any implied agreement or promise to waive the late payment interest.

91 NOWM's concern with its entitlement to late payment interest is evident in its internal emails as well.[181] There, NOWM staff were discussing how the Prosper 9 Deed should frame the outstanding debt owed by Prosper Marine to NOWM. On one hand, including the outstanding late payment interest (as part of the debt stated on the deed) would unquestionably preserve their rights and entitlement to the same. On the other, not reflecting the late payment interest as a component of the outstanding debt would lubricate negotiations. It would also avoid "introducing another issue" when other contractual terms had "yet to be resolved" in discussions.[182] However, at no point did NOWM suggest, even

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179 See all credit notes listed in Prosper Marine's Closing Submissions dated 20 March 2020 at para 143

180 See all credit notes listed in Prosper Marine's Closing Submissions dated 20 March 2020 at para 143

181 Agreed Bundle S/N 1438 – Low Chin Nam's emails to Jeffrey Fung dated 29 – 31 July 2015, AB 10218 – 10221

182 Agreed Bundle S/N 1438 – Low Chin Nam's emails to Jeffrey Fung dated 29 – 31 July 2015, AB 10219

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amongst its staff members, that it was willing to concede the late payment interest. If anything, the correspondence suggests the precise opposite – they were keen on getting the deal done (for the sale of Prosper 9) *without* compromising their legal entitlements.

92 Prosper Marine's final argument about late payment interest concerns the Prosper 9 Deed. It argues that the Deed explicitly pegs the "Oustanding Debt" at S$10,988,357.73, such sum excluding the interest hitherto accrued.[183] As such, NOWM had effectively waived its entitlement to late payment interest. I disagreed.

93 "Outstanding Debt", as defined in the Prosper 9 Deed, was really a reference to *principal invoices* for services rendered and goods sold (see Schedule B of the Prosper 9 Deed[184]). It was never about late payment interest in the first place. Therefore, the deed's failure to include or reference late payment interest under "Outstanding Debt" did not change the party's legal positions/entitlements. The parties were simply using the phrase "Outstanding Debt" as a catch-all term for principal invoices that were due, not making any implicit concessions. Even if there had been a waiver of interest for the "Outstanding Debt", this is completely irrelevant to the current suit – "Outstanding Debt" was calculated up to and as at 30 June 2015 only. It would not impact upon the 261 outstanding invoices which make up NOWM's present claim (see [95] below).

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183 Prosper Marine's Closing Submissions dated 20 March 2020 at paras 145 – 150

184 Agreed Bundle S/N 1504 – Prosper 9 Deed, AB 10813

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94 For these reasons, I found that NOWM was entitled to late payment interest for outstanding debts arising from its Disposal Contract as well.

Breaches of obligations under the 2014 Contracts

NOWM's Claim

95 An undisputed issue however, is Prosper Marine's obligation to pay sums due under invoices issued under the 2014 Contracts. NOWM claims that Prosper Marine breached its obligations by failing to make such payment. These invoices, 261 in total, are appended to Mr Fung's affidavit[185] and clearly enumerated at Annex A of its Statement of Claim. The outstanding amount for all the invoices is the amount invoiced. The only exception is the oldest invoice (NPI029298), for which the amount outstanding would be $210,973.13 rather than the invoiced amount of $229,395.37.[186] Prosper Marine raises several grounds of opposition.

96 First, it doubts the accuracy and correctness of the figures in the NOWM invoices. None of NOWM's witnesses have testified to the figures' veracity and there has been no explanation of the methodology behind the figures. In that regard, Prosper Marine offers the alternative calculations of Mr Ong and suggests that NOWM's claim for $7,736,613.70 "appears to be inflated by an unaccounted amount of $513,628.17".[187] Mr Ong also claims that Annex A of the Statement of Claim does not include 39 invoices which had been originally included in the 31 October 2016 Statement of Accounts. He questions how these

185 Jeffrey Fung's AEIC Vol. 5, 6 & 7, JF-127 at pp 2666 to 4229.

186 Agreed Bundle S/N1243 – Invoice NP0I029298, AB 9073.

187 Ong Cheng Ho's AEIC at para 199.

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were settled.[188] These, he contends, ultimately cast doubt on the quantification of NOWM' claim.[189]

97 I do not accept Prosper Marine's objections. I find that NOWM has produced ample evidence of its claim quantum from Mr Fung and Mr Raymond, who were not cross-examined on this point. NOWM has also exhibited these invoices with relevant supporting documents like delivery orders, job service orders, RFO certificates of origin *etc*.[190] The invoice figures can also be verified by reference to NOWM's monthly statement of accounts from 2014 to 2016, which lists invoice numbers alongside the "Credit" and "Accumulative balance" owed by Prosper Marine.[191]

98 Most significantly, Mr Ong accepted at trial that *all* of NOWM's invoices are due and payable by Prosper Marine.[192] Indeed, on Mr Ong's own evidence, Prosper Marine's only defence is that of a set-off:[193]

> A: Whatever that we have counterclaimed would able to contra whatever we due to them.
>
> Q: And this contra argument, to use your word, that's your only response to the outstanding invoices; correct?
>
> A: Mm. All the time we know that if I go and take action against NOWM, that is the end of our relationship and that's why in order to maintain, this was erased, I think in my letter to my email -

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188 Ong Cheng Ho's AEIC at para 200.

189 Ong Cheng Ho's AEIC at para 201.

190 NOWM's Reply Closing Submissions dated 13 April 2020 at para 18(b).

191 Tay Chun Yee's AEIC, TCY-17 at pp 242 to 378.

192 NEs 13 August 2019, p 113 at lines 8 to 19.

193 NEs 13 August 2019, p 114 at lines 4 to 21.

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> Court: Mr Ong, just to shorten the time here. What Mr Bull is asking you to confirm that you don't deny that you owe them the money for the thing.
>
> A: Correct.
>
> Court: What you are saying in your defence is that, because of the breaches of the [2014 Contracts], they owe you in return for all those losses that you suffered?
>
> A: Yes.
>
> Court: Right?
>
> A: Right.

From this, it is clear that Prosper Marine had accepted the accuracy of the figures set out in NOWM's outstanding invoices.

99 Second, Prosper Marine avers that even if NOWM is entitled to payment on its 261 outstanding invoices, full payment has already been made. Pursuant to the Allocation Agreement, Prosper Marine has actually paid NOWM a total amount of $10,323,828.97 since 1 April 2015 and this figure exceeds the total value of invoices issued by NOWM from that date, this being a sum of $8,086,636.62.[194] I find that there was no such agreement at all.

100 As a starting point, standard accounting practice calls for invoices to be paid on a FIFO basis, that is to say, each payment is made towards the bill that is due at the *earliest time*. The rationale behind this practice is to avoid situations of invoices becoming overdue or, where they are already overdue, to minimise the negative consequences (such as interest accumulating) of being overdue.[195] The issue in dispute is whether the FIFO principle was the accounting practice

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194 Prosper Marine's Closing Submissions dated 20 March 2020 at para 10.

195 NEs 28 August 2019, p 65 at line 10 to p 66 at line 3.

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they had agreed upon for settlement NOWM's outstanding invoices. While Mr Lim Teck Kee answers this in the affirmative,[196] Miss Ong claims that the practice was to "us[e] [Prosper Marine's] payments for NOWM's *current invoices first*" [emphasis added].[197] This practice was later (supposedly) formalised by way of the Allocation Agreement.

101 The Allocation Agreement was apparently concluded during the parties' discussion on 20 January 2015 and its terms are allegedly found in the 20 January 2015 Email. I reproduce it here again for convenience:[198]

> As discussed in [Prosper Marine's] office this afternoon, It is agreed that [Prosper Marine] will pay $500k for Jan 2015 and $500k for Feb 2015. From March 2015 onwards [Prosper Marine] will maintain the payment of previous month's sales plus a certain amount to bring down the AR balance to an acceptable amount of $6m based on the latest RFO price by July 2015.

102 The effect of this, according to Prosper Marine, was that NOWM's *latest* invoices would be paid *first* and excess payment would be used to reduce the existing AR. Prosper Marine avers that this was the most commercially sensible way of structuring payments. Some of NOWM's invoices were approaching their MEP and it was concerned about its exposure for future transactions. Earlier transactions were less of a concern since they were covered by trade insurance anyway. The Allocation Agreement therefore protected NOWM from the risk of default on these more recent, uninsured invoices.[199]

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196 Lim Teck Kee's AEIC Vol. 1 at para 55.

197 Eileen Ong's AEIC at para 28.

198 Agreed Bundle S/N 861 – Lim Teck Kee's email dated 20 January 2015, AB 6833.

199 Prosper Marine's Closing Submissions dated 20 March 2020 at para 20.

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Prosper Marine's case largely rests on its interpretation of the 20 January Email. Yet, on a closer reading, it appears to me that the focus of this email was on the *quantum* of payments due from Prosper Marine and *when* those payments would be made. Nothing therein expressly directed *how* those payments were to be applied, *ie*, that they should be allocated towards settling the most recent invoices. In fact, there was an earlier email which *did* address how payments would be applied. In an email dated 16 January 2015 (the "16 January Email"), NOWM's Mr Lim Teck Kee set out a proposed payment schedule for the next six months:[200]

	January-15	February-15	March-15	April-15	May-15	June-15
AR Balance (due for payment)						
July 2014 invoices	740,393					
Aug 2014 invoices		2,344,522				
Sept 2014 invoices			1,935,455.14			
Oct 2014 invoices				2,033,445.47		
Nov + Dec 2014 invoices					1,726,807	
Add: Net Sales to PM due to payment						1,235,417
Less: Net oil rebate		(270,270)	(270,270)	(270,270)	(270,270)	(270,270)
Payment due for payment	**740,393**	**2,074,252**	**1,935,455**	**2,033,445**	**1,726,807**	**1,235,417**

This schedule indicates that Prosper Marine's payment for January 2015 was to be applied towards its earliest outstanding invoices, *ie*, for July 2014. Thereafter NOWM would continue to apply follow up monthly payments on a FIFO basis. There was nothing in the 16 January Email which suggested that the parties

200 Agreed Bundle S/N 862 – Lim Teck Kee's email dated 20 January 2015, AB pp 6837 to 6839.

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were looking to deviate from the FIFO method of applying payments. There was nothing in the 20 January Email (4 days later) which suggested that this proposed order of payment had been superseded. I cannot accept that there was ever a deviation from the original FIFO understanding between the parties.

103 Indeed, NOWM's statement of accounts clearly show that payments made were always channelled towards the oldest invoices. Payments made in March 2015 paid for invoices from January 2014 to August 2014; April 2015, for other invoices from August 2014; May 2015, for invoices from August 2014 to September 2014; and so on.[201] This went on, even as the latest invoices accumulated in the AR balance, remaining unpaid. With the exception of only one invoice that was settled on cash on delivery terms[202], Mr Ong continued to approve payment vouchers that instructed the application of Prosper Marine's payments on a FIFO basis. By way of example, Mr Ong accepted at trial that he had signed two payment vouchers dated 25 February 2015 which were later applied to invoices issued some six to seven months earlier.[203] These were hardly isolated incidents but Prosper Marine's longstanding practice, as NOWM's Statement of Accounts demonstrate.[204] In a similar vein, Miss Ong conceded that Prosper Marine had accepted the application of its payment vouchers to NOWM's invoices on a FIFO basis even as late as January 2016.[205]

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201 Agreed Bundle S/N 800 – NOWM's Statement of Accounts, AB 6325 – 6440.

202 NOWM's Closing Submissions dated 20 March 2020 at para 646.

203 Agreed Bundle S/N 2876 – Payment Voucher for NPI022428, AB pp 18193 to 18194; NEs 15 August 2019, p 129 at line 22 to p 130 at line 20.

204 Agreed Bundle S/N 800 – NOWM's Statement of Accounts, AB 6325 – 6440.

205 NEs 28 August 2019, p 82 at lines 9 to 20.

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104 Prosper Marine suggests that this was done without the approval of its management and that its staff mechanically applied the accounting method of FIFO because they were not privy to the Allocation Agreement.[206] I could not accept this. After all, Prosper Marine's payment vouchers were marked "Approved By: Albert Ong" and some were apparently signed by him.[207] He must be taken to have noted the invoice numbers on the vouchers and endorsed payment on this basis. Mr Ong's evidence is that he only made sure the amounts on the vouchers were accurate and did not check the dates of the invoices that the vouchers would be applied to.[208] I am not at all persuaded that Mr Ong would have overlooked such a detail, especially when the parties had apparently come to an agreement that payments had to be made in a particular order.

105 Even if I accept that Mr Ong only selectively checked Prosper Marine's payment vouchers, Miss Ong was, from March 2015 onwards, copied on *all* of the emails from Prosper Marine's accounts staff to NOWM which attached the relevant vouchers.[209] She accordingly maintained oversight of these vouchers as well as the invoices to which they were being applied. This is illustrated by an email from Miss Ong to NOWM's Christy Song on 6 January 2016 to verify whether Prosper Marine's payment of $106,911.84 had been used to clear an invoice dated 7 March 2015. Tellingly, the invoice in question was issued ten months before her email.[210] Moreover, when Christy Song replied affirmatively,

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206 Prosper Marine's Closing Submissions dated 20 March 2020 at paras 33, 36.

207 Agreed Bundle S/N 983 – Payment Voucher for NPI022431, NPI022432, NPI022429 NPI022436 (Part), AB pp 7375 to 7376.

208 Ong Cheng Ho's AEIC at para 256.

209 NOWM's Closing Submissions dated 20 March 2020 at paras 658.

210 Agreed Bundle S/N 1894 – Christy Song's email dated 6 January 2016, AB 12908; NEs 28 August 2019, p 80 at lines 12 to 23.

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Miss Ong raised no objections to such an arrangement.[211] Miss Ong's conduct demonstrates that she was not only aware but sought to ensure that NOWM's invoices were settled on a FIFO basis. In the circumstances, it is disingenuous of Prosper Marine to now suggest the arrangement was otherwise.

106 There was of course, a stipulation in the 20 January Email that Prosper Marine would "maintain the payment of previous month's sales". But this says absolutely nothing about how the payments would be applied. The reference simply affirms that Prosper Marine would pay for the RFO which NOWM sold to it in the preceding month. It affirms Prosper Marine's obligation to pay for this RFO. It is not a reference to any particular invoice, much less an indication of which invoice would be settled first. I find support for my interpretation by situating the 20 January Email in its rightful context.

107 The 20 January Email was part of a series of correspondences between NOWM's Mr. Lim Teck Kee and Prosper Marine's Ms Ong. They were finalising a repayment schedule with the aim of bringing down Prosper Marine's AR balance to a satisfactory amount. "[P]revious month's sales" was simply a reference to the sales described in the 16 January Email, namely the ongoing RFO sales (see the table below, which was appended to the 16 January Email). "[M]aintaining the payment" of these sales simply meant that Prosper Marine would continue to pay for the RFO it purchased from Prosper Marine.

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211 NEs 28 August 2019, p 82 at line 9 to p 83 at line 18.

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	January-15	February-15	March-15	April-15	May-15	June-15
Sales Volume	4,800	3,000	5,000	4,100	4,100	5,000
Average Price (PX:0.7*IFO180)	246	246	246	246	246	246
Sales Revenue	1,179,417	731,199	1,228,500	1,007,370	1,007,370	1,228,500
Wharfage charges	56,000	56,000	56,000	56,000	56,000	56,000
Sales Revenue	1,235,417	793,100	1,284,500	1,063,370	1,063,370	1,284,500
Less:						
Net oil quantity	2,200	2,200	2,200	2,200	2,200	2,200
AverageCost (PX"0.35*US$270)	123	123	123	123	123	123
Net oil rebate	270,270	270,270	270,270	270,270	270,270	270,270
Net Sales to PM	**965,147**	**522,830**	**1,014,230**	**793,100**	**793,100**	**1,014,230**

108 When considered holistically, it becomes apparent that the 20 January Email holds no real connection to the Allocation Agreement but simply sets out an agreement that from January 2015, Prosper Marine would make timely and consistent payments in amounts exceeding the total amount of its monthly new sales so as to facilitate the reduction of the AR balance.

109 Leaving aside the 20 January Email, Prosper Marine contends that the Allocation Agreement is still evidenced by subsequent email correspondence. In particular, it places weight on an internal NOWM email dated 12 June 2015 wherein Mr Lim Teck Kee confirmed to Mr Fung that the parties' agreement in January 2015 was for Prosper Marine "to pay more than the net amount to clear the lapsed payments towards the end of the year 2014 *and beginning of 2015*" (emphasis added).[212] In my judgment, this reference to the settlement of invoices

212 Agreed Bundle S/N 1242 – Lim Teck Kee's email dated 12 June 2015, AB 9071.

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due at the beginning of 2015 is, in itself, equivocal because there is no indication that the early-2015 invoices were to take precedence over the 2014 invoices.

110 A separate email from NOWM's insurance broker, Mr Chan Hon Kian ("Mr Chan"), dated 18 November 2015 in respect of ongoing discussions with Atradius to reinstate NOWM's trade credit insurance, does not take Prosper Marine's case any further.[213] In this email Mr Chan wrote that:

> … Atraius needs to have [the] cashflow projection of Prosper Marine to see how can Prosper Marine meet the **proposed monthly payment of at least S$1.25m starting end Jan 2016** (i.e. in terms of breakdown S$1m in ***settling the preceding month sale*** and at least $250k in settling the S$1.8m overdue insured receivable).
>
> (emphasis in bold in original; my emphasis in bold italics)

Prosper Marine appears to rely on Mr Chan's suggestion that $1m of its monthly payment of $1.25m be used to settle "the preceding month sale". This is not evidence of the Allocation Agreement. Mr Chan was merely putting forward a *proposal* of how Prosper Marine's payments for each month could be computed, as a possible point of negotiation with Atradius.[214] Further, Mr Chan testified at trial that this proposal had been his own suggestion[215] and he was unaware of whether there was an allocation agreement (if any) already in existence.[216] In a similar vein, Mr Raymond maintained that he had not been told, upon assuming the position of NOWM's finance manager, of a payment arrangement concluded

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213 Agreed Bundle S/N 1767 – Chan Hon Kian's email dated 18 November 2015, AB 12210.

214 NEs 2 August 2019, p 107 at lines 4 to 6.

215 NEs 2 August 2019, p 103 at line 19 to p 104 at line 1.

216 NEs 2 August 2019, p 104 at lines 8 to 12.

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with Prosper Marine in January 2015.[217] Returning to the wording of the 20 January Email, I consider it unlikely that such an arrangement ever existed.

111 Even if NOWM *had* wanted to enter into the Allocation Agreement, this would have contravened an express requirement under its trade insurance policy that all payments given before the "Date of Loss" were to be applied to receivables due from Prosper Marine in chronological order of due dates (per Condition 21300.00 of NOWM's Atradius Modular Policy ("Insurance Policy")):[218]

> All amounts received by you, by any person acting on your behalf or by us before the Date of Loss shall for the purposes of the policy be allocated to all receivables due from the same Buyer *in chronological order of due dates*.
>
> All amounts received by you, by any person acting on your behalf or by us after the Date of Loss shall be divided between you and us in the proportion in which the loss is borne by each of us…
>
> (emphasis added)

112 The Date of Loss was calculated as 240 days from the date that the invoice was issued, 240 days comprising a 180 day waiting period,[219] which in turn commences 60 days after the invoice is first issued.[220] To illustrate, invoices issued in August 2014 would have a Date of Loss pegged at April 2015 (*i.e.* 240 days from August 2014), and any payments up till April 2015 had to be applied on a FIFO basis. Here, there was at all times, an invoice that had yet to reach its

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217 NEs 2 August 2019, p 20 at lines 22 to p 21 at line 10; p 22 at lines 19 to 24.

218 Agreed Bundle S/N 80 – Atradiu Modula Policy dated 29 July 2013, AB 1473.

219 NEs 2 August 2019, p 91 at lines 12 to 18; Agreed Bundle S/N 80 – Atradiu Modula Policy dated 29 July 2013, AB 1473, see Condition 00500.00 of the Insurance Policy.

220 Agreed Bundle S/N 80 – Atradiu Modula Policy dated 29 July 2013, AB 1463.

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Date of Loss. When a Date of Loss was declared for one set of invoices (say, the August 2014 invoices as April 2015 came around), other sets of invoices continued to stay active without being declared "lost" since their Date of Loss had not come yet. There was therefore a constant and live obligation for NOWM to apply Prosper Marine's payments to the earliest receivables in the AR Balance. Under these circumstances, I cannot accept that NOWM would have contracted for the Allocation Agreement when it would have so clearly contravened NOWM's obligations to its trade insurer.

113 For the above reasons, I find that the Allocation Agreement did not exist. It is insufficient for Prosper Marine to simply claim that it has paid more than the total value of invoices issued by NOWM since 1 April 2015 because those payments were clearly not made for the purpose of settling the invoices which are the subject of the 2014 Contracts suit. It follows that NOWM is *prima facie* entitled to the outstanding sums on its 261 invoices, this being $6,429,105.74. It follows that Prosper Marine is in breach of its obligations under the 2014 Contracts as it has failed to pay the sums in these invoices.

Prosper Marine's Counterclaim

114 I turn now to consider Prosper Marine's counterclaim that NOWM has breached the 2014 Contracts. Of course, having found that the Minimum Volume Term, the Loading Rate Term and the Minimum RFO Term were not part of the contracts, it is not necessary to make any findings about NOWM's alleged breaches of these terms. That said, I find that NOWM may only have breached the Minimum RFO Term.

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115 The Minimum Volume Term, it will be remembered, requires NOWM to accept a minimum of 18,000 cbm of marine slops every month.[221] Prosper Marine alleges that NOWM has breached this term. To this end, Prosper Marine mounts its case on the existence of tank-top issues.[222] NOWM was experiencing severe tank-top issues and therefore couldn't have been in a position to accept fresh slop, much less 18,000 cbm of slop, so the theory goes.

116 As a significant amount of trial time was devoted to tank-top issues, it would be useful to elaborate on its meaning. NOWM points out that Prosper Marine has never offered a precise definition for the term "tank top" nor has it identified specific instances of when the plant was in a "tank top" situation.[223] In my view, there is no need for such specificity. From the evidence before me, "tank-top" simply refers to situations where the build-up of marine slops in NOWM's reactor tanks compromised its ability to receive fresh slop at the plant. Hence the expression "tank top", meaning that the tank was full and unable to take in any more slop. The measure of how much NOWM's ability was compromised is with reference to the tanks' maximum capacity but I do not rely on any particular instance of overflowing or maximum capacity being reached as evidence of tank-top issues. Tank-top issues, as I understand it, refers to a state of affairs rather than any identifiable episode. This is the basis on which most of the trial was conducted on and is the basis that I proceeded on.

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221 Prosper Marine's Closing Submissions dated 20 March 2020 at para 48(1).

222 Prosper Marine's Closing Submissions dated 20 March 2020 at para 130.

223 NOWM's Closing Submissions dated 20 March 2020 at para 401.

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117 Ultimately, I find that there *were* tank-top issues at the plant. Surveying the Daily Tank Level Reports, it is hard to come to any other conclusion.[224] This is confirmed by NOWM's own expert, Mr Anthony Goh ("Mr Goh"), who helpfully produced a chart detailing "Daily Marine Tank Levels" in his expert report.[225] As is apparent from the chart, marine tank levels generally rose from May 2014 to October 2016. The quantity of marine slop reached or exceeded the tank capacity levels regularly and by September 2015 at least, this had become a daily phenomenon. Even after NOWM's reactor tank capacity was increased in November 2015,[226] the levels of marine slop continued to rise and again, regularly reached or exceeded tank capacity.

118 That said, the existence of tank top issues, by itself, does not amount to a breach of the Minimum Volume Term. For NOWM to have breached the Minimum Volume Term (an obligation to *receive* 18,000 cbm of slop per month), Prosper Marine had to have *delivered* such an amount in the first place. This makes eminent sense. Otherwise, Prosper Marine could very well have delivered no slop at all and claimed damages for a breach that it itself was responsible for. As such, to prove a breach of the Minimum Volume Term, Prosper Marine must show that it had at least 18,000 cbm of slop on hand to deliver, that it had attempted to deliver said slop and that NOWM had failed to receive this slop.

119 The evidence, however, was seriously lacking. The only documentary evidence produced by Prosper Marine was an internal document entitled "Total

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224 Agreed Bundle S/N 145 – Daily Tank Level Reports, AB 2723 – 3626.

225 Anthony Goh's AEIC, Appendix F at p 198.

226 Anthony Goh's AEIC, Appendix F at p 221.

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Slop Quantity & Number of Jobs Done on a Monthly & Yearly Basis from 2003 to Current".[227] This document purportedly set out the quantity of slop that Prosper Marine had collected from its customers.[228] This would have shown whether Prosper Marine had 18,000 cbm of slop to deliver at all. But I had serious doubts as to the reliability of this document. For starters, there was no mention of any primary sources that these "internal records" relied on – no contemporaneous logs, no worksite diaries and no attestation by anybody as to its veracity. Moreover, Mr. Ong himself admitted that the jobs table was generated for the purpose of litigation, raising doubts as to its veracity.[229]

120 Even on a highly charitable reading of the evidence, Prosper Marine's own tabulation suggested that they rarely had 18,000 cbm of slop to deliver. The only occasions where they had collected such an amount were in December 2014 (18,659.536 cbm) and September 2015 (20,633.630 cbm).[230] But for those occasions, NOWM had either received at least 18,000 cbm of slop (thus fulfilling its contractual obligation) or there was no proof that Prosper Marine had even tried to deliver 18,000 cbm of slop in the first place. In December 2014 for example, Prosper Marine's own expert recorded that NOWM had received 18,144.709 cbm of slop.[231] On that evidence, NOWM would certainly not have been in breach of the Minimum Loading Rate Term. As for September 2015, there was no evidence that Prosper Marine had even attempted to deliver 18,000 cbm of slop. In coming to this conclusion, I examined the most reliable primary

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227 Daniel Lee's AEIC, Tab 5 at p 570; Ong Cheng Ho's AEIC, Tab 4 at p 112.

228 Ong Cheng Ho's AEIC at [42].

229 NEs 13 August 2019, p 156 at lines 2 – 7.

230 Daniel Lee's AEIC, Tab 5 at p 570; Ong Cheng Ho's AEIC, Tab 4 at p 112.

231 Bernard Tay's AEIC, Tab 9 at page 1232, 1242

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evidence of how much slop had been delivered, received and/or rejected – the Discharge Forms of Prosper Marine's slop vessels. From the 8 Discharge Forms issued in September 2015,[232] a clear picture emerged: Prosper Marine delivered far below 18,000 cbm of slop. I tabulate my findings below:

S/N	Date (DD/MM/YY)	Slop Originally Onboard	Slop Discharged	Slop left onboard, if any
1	01/09/15	342.215	266.261	75.954
2	04/09/15	435.239	26.393	408.846
3	05/09/15	340.029	229.158	110.871
4	07/09/15	213.013	213.013	-
5	07/09/15	261.647	40.496	221.151
6	18/09/15	354.991	354.991	-
7	21/09/15	322.211	322.211	-

[232] Agreed Bundle S/N 1580 – Prosper One Discharge Form (1 Sept 2015), AB 11319;
Agreed Bundle S/N 1588 – NGOS One Discharge Form (4 Sept 2015), AB 11361
Agreed Bundle S/N 1593 – Prosper One Discharge Form (5 Sept 2015), AB 11403
Agreed Bundle S/N 1597 – NGOS One Discharge Form (7 Sept 2015), AB 11319
Agreed Bundle S/N 1598 – Prosper One Discharge Form (7 Sept 2015), AB 11422
Agreed Bundle S/N 1622 – Prosper One Discharge Form (18 Sept 2015), AB 11502
Agreed Bundle S/N 1630 – Prosper One Discharge Form (21 Sept 2015), AB 11555
Agreed Bundle S/N 1647 – Prosper One Discharge Form (29 Sept 2015), AB 11422

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8	29/09/15	256.971	256.971	-
Total:		2526.316	1709.494	221.151

121 Evidently, Prosper Marine had not even delivered 18,000 cbm of slop, much less been turned away from delivering the same. There was no breach of the Minimum Volume Term.

122 Having found in NOWM's favour, it is no longer strictly necessary to identify who was responsible for the plant's tank top issues. Identifying the culprit is only relevant in so far as it offers a defence to NOWM in the event of a breach of a Minimum Volume Term. NOWM's argument would have been that tank-top issues may have prevented it from receiving the contractually stipulated quantity of slop, but the tank-top issues themselves were caused by Prosper Marine. In other words, NOWM would have needed to prove that Prosper Marine was the author of the very breach it complains of. This need has now fallen away.

123 Nonetheless, I am prepared to find that Prosper Marine was indeed responsible for the tank-top situation. It was undisputed that Prosper Marine's RFO collection dipped over the course of the dispute's time period.[233] And I was satisfied that there was a causal relationship between the failure to extract RFO and a tank-top situation on the basis of logic and empirical evidence. It is logical that if the RFO were not removed from the RFO tank, the oil from the

[233] Agreed Bundle S/N 112 – RFO Sold Jan 2014 to Dec 204, AB 1611 to 1622
Agreed Bundle S/N 799 – RFO Sold Jan 2015 to Dec 2015, AB 6312 to 6324
Agreed Bundle S/N 1880 – RFO Sold Jan 2016 to Sept 2016, AB 12830 to 12838

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reactor tanks could not be piped to the RFO tank and this in turn would mean that the reactor tanks could not be emptied to receive slop. As for evidence, this came from Mr Anthony Goh's ("Mr Goh") AEIC,[234] which shows a clear correlation between RFO extraction and tank utilisation: when RFO was taken out, the tank-top situation eased. This correlation was strong enough to raise the inference of a causal relationship between the two factors.

124 Indeed, I found Mr Goh's analysis, based on primary sources of data and contemporaneous records, [235] to be professional and lucid. Not only did he convey the general relationship between RFO extractions and the tank-top issue in an effective bar chart, he was also able to point to specific incidents or episodes which best illustrated the relationship between RFO extraction and tank utilisation.[236] In contrast, Mr Bernard Tay's ("Mr Tay") evidence was a flippant one-liner: "I am of the view that the cause of the tank-top issues was [not] due to [Prosper Marine's] failure to purchase RFO… I am instructed that there were tank-top issues even when [Prosper Marine] had purchased RFO". There is no reference to any data or empirical evidence that backs this claim and certainly no analysis of the same. This much is clear from Mr Tay's cross-examination:[237]

> Q: […] you were instructed that there were tank top issues even when Prosper Marine purchased RFO. That's the first reason.
>
> A: Yes.

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234 Anthony Goh's AEIC, Appendix F at p 198

235 Anthony Goh's AEIC, Appendix F at p 198

236 NEs 10 January 2020, p 68 lines 6 – 11 and lines 17 – 25

237 NEs 10 January 2020, p 143 lines 6 – 12, lines 24 -25; p 144 lines 1 - 3

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> Q: That's what you were instructed to assume as a fact, right?
>
> A: Yes.
>
> Q: You did no analysis of this, correct?
>
> A: Yes.
>
> Q: You yourself did no analysis of when there was tank top versus instances of removal of RFO. You did no such analysis?
>
> A: I did not do that.
>
> […]
>
> Q: So, Mr Tay, you don't actually analyse whether or not the removal of the – the failure to remove RFO regularly causes tank top or not. You didn't analyse that?
>
> A: I didn't analyse.

It would appear that Mr Tay did no more than recite the same instructions that he was given.

125 In fact, problems with Mr Tay's testimony plagued every part of Prosper Marine's case. Prosper Marine argued that the tank-top issues were, in truth, the result of multiple factors. A non-functioning centrifugal system at the Plant; the failure to maintain the heating coils in the tanks; the lack of an effective waste water treatment system; the excessive build-up of supposedly untreatable "black-water"; and NOWM's excessive intake of land-based slops – these were all claimed by Prosper Marine to be factors contributing to the tank-top situation. But Mr Tay could not speak to any of these.

126 His opinion on the centrifugal system at the Plant was, by his own admission, based on incomplete information ("I am not given information as to

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whether or not the Guinard centrifugal system faced issues"[238]). Comments on the supposedly poorly maintained heating coils were either based on pure conjecture ("it is possible that NOWM is cost-sensitive and would not have changed the heating coils frequently"[239]) or entirely without basis ("no information [was] provided as to the maintenance of heating coils"[240]). Opinions about the Plant's supposedly ineffective waste water treatment were based solely on a newspaper cutting from 2018 (long after the dispute time period)[241], an evidential basis which he later conceded was erroneous.[242] In fact, it became apparent at trial that he had not even *seen* the wastewater treatment records that he claimed to have referred to in drafting his expert report.[243] As for "black water" building up in the tanks and causing tank-top problems, his report makes no mention of this at all.

127 The only time Mr Tay seriously considered some primary evidence was in evaluating whether the addition of land-based slop into designated marine slop tanks contributed to the tank-top situation. There, relying on a "Supervisor's Log Book",[244] he noted that some land-based slop had indeed been transferred in September 2014. He was also "instructed"[245] that there were tank-top issues in September 2014. He concluded from this and "many" other

238 Bernard Tay's AEIC, p 21 at para 14.

239 Bernard Tay's AEIC, p 22 at para 18.

240 Bernard Tay's AEIC, p 22 at para 17.

241 Bernard Tay's AEIC, p 25 at para 36.

242 NEs 10 January 2020, p 174 lines 1 – 9.

243 NEs 10 January 2020, p 178 lines 3 – 20.

244 Bernard Tay's AEIC, Tab 4 at p 122.

245 Bernard Tay's AEIC, p 22 at para 22.

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unnamed instances that NOWM's intake of land-based slop contributed to the tank-top problem.[246] None of these "many" other instances were enclosed in his expert report. There was of course, no need to tediously list every instance where there was a coincidence of land slop intake and tank-top problems. But Mr Tay's report did not even attach the evidence that he relied on in coming to that conclusion. The only primary evidence attached was a snippet from the Supervisor's Log Book showing only September 2014 land slop transfers.[247]

128 For these reasons, I rejected Mr Tay's evidence. But beyond this, I was not convinced by any of Prosper Marine's other arguments either. In particular, I rejected its suggestions that (a) lack of maintenance had created sludge and "black water" that clogged up the tanks; (b) that addition of land slops had caused the tank-top problems and (c) that the Plant's design had caused the tank-top problem.

129 According to Prosper Marine, NOWM had failed to maintain the tanks properly. Consequently, sludge built up and took up tank capacity, contributing to the tank-top problems.[248] Sludge also covered the heating coils, reducing the Plant's ability to generate RFO expeditiously. Accordingly, slop spent a longer time in the tank being treated, thus contributing to the tank-top problems.[249] I rejected this completely. First, there was no evidence of excessive sludge build-up. Prosper Marine's only evidence is the fact that 250 mt of sludge were

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246 Bernard Tay's AEIC, p 23 at para 25.

247 Bernard Tay's AEIC, Tab 4 at p 122.

248 Prosper Marine's Closing Submissions dated 20 March 2020, at para 99.

249 Prosper Marine's Closing Submissions dated 20 March 2020, at para 103.

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demucked from "Tank 101" on 1 October 2016.[250] But this sludge was not necessarily the result of poor maintenance of the tanks. This 250 mt of sludge was in fact a combination of sludge, emulsifiers and sawdust, which are normally used in such cleaning operations.[251] The sheer volume of sludge, in other words, was not clearly traceable to sludge build-up arising from poor maintenance. Second, sludge was a perfectly natural by-product of slop treatment. And when it did form, sedimentation usually occurred at the *sides* of the processing tank.[252] The heating coils (in the centre of the tank) would not be lathered and paralyzed by sludge as Prosper Marine claimed, unless the build-up was extremely high (a situation for which there was no evidence).

130 Prosper Marine pointed to other evidence of NOWM's failure to maintain its tanks. Specifically, it points to the build-up of "black water" in NOWM's tanks.[253] "Black water" refers to the situation where the heating process in the reactor tank is unable to achieve separation of oil from water after a prolonged period of time. It is undisputed between the parties that the tanks contained 4,400 cbm of "black water" as of August 2016.[254] This would, of course, have taken up tank capacity. But that does not say much at all. Simply taking up tank capacity may well lead to, but does not necessarily equate to tank-top problems. Indeed, the significance of "black water" remained deeply unclear. It could be a consequence of poor maintenance practices, as Prosper

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250 Agreed Bundle S/N 2747 – Prosper Tank Cleaning & Logistics Pte Ltd Tax Invoice No. PT TC1610 033, AB 16734.

251 NOWM's Reply Closing Submissions dated 13 April 2020.

252 NEs 28 January 2020, p 50 lines 1 – 21.

253 Prosper Marine's Closing Submissions dated 20 March 2020, at para 104.

254 NEs 10 January 2020, p 112 lines 13 – 18; see also Agreed Bundle S/N 1880 – Invoices for RFO Loads in August & September 2016, AB 12837 – 12838.

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Marine suggests,[255] or it could be a *symptom* of pre-existing tank top problems, as Mr Goh suggested.[256] There was even suggestion that the "black water" would have been fully treated given time[257] and that it was only a "problem for treatment",[258] not "untreatable". The evidence was ultimately murky and did not sway me in any particular direction. I found that this factor - "black water" and its supposed contribution to the tank top problems – was neutral at best.

131 Prosper Marine also suggested that NOWM's land slop intake had contributed to the tank top problems. This made no sense either. NOWM had always processed both land slops and marine slops in the same Cat 1 slop processing tanks. It was an operational norm. The Cat 1 slop processing tanks used by NOWM were dual use tanks, designed to cater to both marine and land based slops.[259] Prosper Marine knew that NOWM collected and treated both land and marine based slops.[260] So Prosper Marine's grievance cannot be that NOWM had process land based slops together with its marine based ones.

132 Its real complaint, as I understood it, was that NOWM continued to accept land-based slops even though the tanks were already facing tank-top issues.[261] But there was no credible evidence of such recklessness. If anything, NOWM had *expanded* its slop processing tank capacity from 4,800 cbm to

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255 Prosper Marine's Closing Submissions dated 20 March 2020, at para 108.

256 NEs 10 January 2020, p 108 lines 13 – 16.

257 NEs 7 August 2019, p 60 lines 8 – 15.

258 NEs 10 January 2020, p 138, lines 17 – 18.

259 NEs 10 January 2020, p 93 line 24 – p 94 line 6.

260 NEs 13 August 2019, p 70 lines 16 – 23.

261 Prosper Marine's Closing Submissions dated 20 March 2020, at para 121.

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7,092 cbm in November 2015,[262] such an expansion being amply sufficient to make up for any additional land slop intake. Indeed, though NOWM's witnesses had acknowledged that land slop intake had increased, these increases (8% annual increase in 2014;[263] 5% in 2015;[264] and 3% in 2016[265]) were marginal compared to the 48% increase in capacity.

133 Finally, I address the supposed design flaws that were responsible for the tank top problems. I find these allegations – allegations which surfaced for the first time in closing submissions – completely incredible. If the Plant's design had been fundamentally flawed, there would have been a gradual decline in performance over time and not the sudden appearance of operational problems in 2014. Indeed, the Plant was designed and operated in a manner that is entirely consistent with the industry practice for plants of this type and purpose.[266] Prosper Marine's contentions that (a) NOWM should have had more RFO storage tanks,[267] and that (b) NOWM should have turned off the steam to reduce the convection current[268] are no more than a collection of un-pleaded assertions, made with the benefit of hindsight and seeking to pin the blame on NOWM. I reject them all.

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262 Anthony Goh's AEIC, Appendix F at p 221.

263 NEs 22 July 2019, p 57 lines 4 – 8.

264 NEs 22 July 2019, p 58 lines 15 – 17.

265 NEs 22 July 2019, p 59 lines 14 – 16.

266 Anthony Goh's AEIC, p 26 at para 72(a).

267 Prosper Marine's Closing Submissions dated 20 March 2020, at para 128.

268 Prosper Marine's Closing Submissions dated 20 March 2020, at para 129.

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134 I turn now to the Loading Rate Term. Assuming that it was part of the 2014 Contracts, this term obliged NOWM to ensure that slops were discharged at a rate between 50 m^3 per hour and 100 m^3 per hour. Prosper Marine, however, has misinterpreted this term. It has taken this term to import an obligation to receive slop at a rate of 100 m^3 per hour. Pointing to instances where NOWM has failed to receive 100 m^3 of slop per hour, Prosper Marine asserts that there was a breach of the Loading Rate Term.[269]

135 This is patently wrong. Accordingly, the examples Prosper Marine offers of an alleged breach, are entirely misplaced. Although Mr Ong was given an opportunity to explain himself on the stand, his answers were neither helpful nor coherent:[270]

> Court: Why are you claiming – you are unable to pump at 100 for some reason? Why are you claiming on the basis of 100?
>
> A: I think the basis is that we base on the claim, part of it, base on the claimed we think that it's 100. Even my Prosper 1, my maximum is 70, I will do at 70. I never say I want to do at 100 for Prosper 1.
>
> Q: Mr Ong, you have no good reason for pitching your case at 100 cubic metres per hour; isn't that right?
>
> A: I mean I reserve my answer for that unless, your Honour, you ask me a question, for me I feel that I claim 100 to the maximum, I think it's reasonable because my vessel able to pump 100.
>
> Q: Mr. Ong, my first point is if that maximum loading rate is there as a contractually agreed safety limit, isn't it unreasonable to make your claim at that level?
>
> […]

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269 Consolidated Defence & Counterclaim (Amendment No 2) at para 46.

270 NEs 14 August 2019, p 31 line 25 – p 33 line 9.

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> A: To me I say it's not unreasonable.
>
> Q: Mr. Ong, now I've got a different question to ask you. If the contract allows pumping to be between 50 and 100, would it be in breach of the contract if pumping was done at 51 cubic metres an hour? […] Isn't it correct that the contract allows slop to be delivered by Prosper Marine to my client at the rate of 51 cubic metres an hour?
>
> A: Yes.
>
> Q: So you've inflated your claim by putting it at 100 cubic metres; isn't that right?
>
> A: That's not right. If I can pump at 100, I put 100.

136 I am mindful of not making a strawman out of Prosper Marine's case. And indeed, in its reply closing submissions, Prosper Marine laments that its case has been mischaracterised.[271] It asserts that it had always interpreted the Loading Rate Term as requiring NOWM to "receive slops from PM's vessels at a loading rate corresponding to the rate the [Prosper Marine's] vessels required to discharge slops". I reject this. This was a bare assertion. Prosper Marine could not point me to any affidavit or submission where it had put its case as such. Its Defence and Consolidated Counterclaim itself (at [46]) [272] has pleaded its case in precisely that absurd fashion:

> In breach of the Loading Rate Term under the Disposal Contract and/or the implied term pleaded at paragraph 14 above, [NOWM] failed, neglected and/or refused to receive marine slops from Prosper Marine's vessels at the corresponding *rate of 100 cubic metres per hour.*
>
> [emphasis added]

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271 Prosper Marine's Reply Closing Submissions dated 13 April 2020, at para 127.

272 Consolidated Defence & Counterclaim (Amendment No 2) at para 46.

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137 Accordingly, I find that there was no breach of the Loading Rate Term. I acknowledge that there were other issues raised in relation to the Loading Rate Term. These relate to (a) how the discharge rate was measured/quantified,[273] and (b) whether NOWM was solely responsible for discharge delays (if any).[274] But given that Prosper Marine's case for the Loading Rate Term was built on a fundamentally illogical bed of pleadings, I see no need to explore those issues further.

138 Finally, I turn to the Minimum RFO Term. Prosper Marine's case is simply that "NOWM did not sell 3,200 MT of RFO per month to [Prosper Marine] for at least 19 months from the period of May 2014 to September 2016."[275] This is true, at least from a plain reading of the RFO sales figures which both parties have agreed on (see [140] below).[276] On that basis, a prima facie case of breach was established. To this, NOWM contends that it was, at all times, ready and willing to sell its RFO. It was Prosper Marine who failed to collect the RFO. The lack of RFO sales was, in other words, entirely attributable to Prosper Marine's failure to collect RFO ("the refusal-to-cooperate defence").[277]

139 In my judgment, it is not enough for NOWM to have shown that it had RFO on hand which Prosper Marine failed to collect. To avail itself of the

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273 NOWM's Closing Submissions dated 20 March 2020, at para 540 and 543.

274 NOWM's Closing Submissions dated 20 March 2020, at para 539 and 544.

275 Prosper Marine's Closing Submissions dated 20 March 2020 at para 132.

276 Agreed Bundle S/N 112 – RFO Sold Jan 2014 to Dec 204, AB 1611 to 1622
Agreed Bundle S/N 799 – RFO Sold Jan 2015 to Dec 2015, AB 6312 to 6324
Agreed Bundle S/N 1880 – RFO Sold Jan 2016 to Sept 2016, AB 12830 to 12838

277 NOWM's Closing Submissions dated 20 March 2020 at para 592 – 594.

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refusal-to-cooperate defence, it must also show that it reached out to Prosper Marine and had requested for RFO collection. This would be consistent with the contractual obligations in the RFO Contract (clauses 2.7 and 2.8 of the RFO Contract require *NOWM* to issue directions for collection of the RFO[278]) as well as ordinary commercial expectations – NOWM, being the operator of the plant, would be in the best position to determine when RFO collection would be needed.

140 Accordingly (and assuming that the Minimum RFO Term was established), NOWM would have breached the term in the following months:

Month	Whether breach of Minimum RFO Term was established
May 2014	Yes
Nov 2014	Yes
Dec 2014	Yes
Feb 2015	**No**
Jun 2015	**No**
Jul 2015	Yes

278 Agreed Bundle S/N 156 – RFO Contract, AB 3770.

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Aug 2015	Yes
Sep 2015	Yes
Oct 2015	**No**
Nov 2015	**No**
Dec 2015	**No**
Jan 2016	Yes
Feb 2016	**No**
Mar 2016	**No**
Apr 2016	Yes
May 2016	Yes
Jun 2016	No
Jul 2016	Yes
Aug 2016	Yes
Sep 2016	Yes

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141 For my analysis, I relied primarily on Anthony Goh's Daily Marine Tank level graphs [279] but also the correspondence between Prosper Marine and NOWM.[280] I considered the following factors:

(a) the frequency of Prosper Marine's RFO collection;

(b) the quantity of RFO collected by Prosper Marine on each occasion ;

(c) the amount of RFO produced by NOWM in between Prosper Marine's collections;

(d) whether NOWM had requested for RFO collection from Prosper Marine in a timely manner (as evinced from the chat logs);

(e) any RFO sale by NOWM to third parties; and

(f) any explanations that NOWM may offer for it selling RFO to third parties rather than Prosper Marine.

142 Broadly speaking, there were three situations where a *prima facie* breach of the Minimum RFO Term was established.

143 The first involved situations where the breach could be explained by Prosper Marine's failure to collect RFO in a timely and expeditious manner. In such cases, I do not find that NOWM had breached the Minimum Volume Term. The clearest example of this is in June 2016. There, NOWM made no RFO sales

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279 Anthony Goh's AEIC, Appendix F at p 198.

280 Agreed Bundle S/N 118 – "OilChem & Prosper Ops" Whatsapp Group Chatlog, AB 1779 – 1786.

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to Prosper Marine at all. But its product tanks (the tanks storing RFO ready for sale) were also filled with RFO. In fact, they were at maximum capacity throughout June. It was Prosper Marine which failed to receive the RFO from NOWM. In other situations, NOWM requested for RFO collection early on when its tanks were filling up.[281] However, Prosper Marine did not collect the RFO until much later. For example, Mr Ngiam Tee Leng (NOWM's Assistant Manager of Operations) requested for Mr Royston Sim (Prosper Marine's representative) to arrange for RFO loading on 4 February 2015 and 5 June 2015.[282] Collection, however, was only made on 9 February 2015 and 12 June 2015.[283] In the interim, it was clear that the tanks were either filling up or filled up with product that could not be offloaded. In that regard, it was Prosper Marine's failure to cooperate that led to the breach complained of. In these situations, I determined that NOWM could not be held responsible for the breach of the Minimum Volume Term. The months that fell into this category were:

(a) February 2015

(b) June 2015

(c) June 2016

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281 Agreed Bundle S/N 118 – "OilChem & Prosper Ops" Whatsapp Group Chatlog, AB 1785 (see Ngiam's request for Royston to arrange for RFO Loading on 4th February 2015 and 11th March 2015. Collection was only made on 9th February and 18th March, respectively).

282 Agreed Bundle S/N 118 – "OilChem & Prosper Ops" Whatsapp Group Chatlog, AB 1785 (see Ngiam's request for Royston to arrange for RFO Loading on 4th February 2015 and 11th March 2015. Collection was only made on 9th February and 18th March, respectively).

283 Anthony Goh's AEIC, Appendix F at p 198.

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144 The second category of cases involved situations where NOWM made sales of RFO to third parties *instead of Prosper Marine*. This happened in November 2014 and April 2016. For these months, I find that NOWM could be held liable for breach of the Minimum Volume Term. Admittedly, October 2015 involved multiple sales to third parties as well. However, I noted that Prosper Marine's RFO vessel, "Star III", was converted into a slop-pickup vessel during that month.[284] This would explain why NOWM would have had to seek alternative measures to relieve itself of RFO that was taking up tank capacity.

145 Finally, the third category of cases involved situations where it was unclear if and when NOWM had requested for Prosper Marine to come collect RFO. Without sight of such evidence, I cannot accept NOWM's refusal-to-cooperate defence. NOWM urges me to consider that the Star III, Prosper Marine's only RFO vessel, was used for slop collection instead.[285] It also urges me to consider the fact that Prosper Marine was purchasing RFO from Cleanseas instead of from NOWM.[286] However, I was not persuaded by these arguments. For one, Prosper Marine only converted the Star III into a slop vessel periodically. Indeed, there was only evidence of Prosper Marine disabling its RFO collection capabilities in five instances: October 2015 (as discussed above at [144]), November 2015,[287] December 2015,[288] February 2016[289] and March

284 NEs 14 August 2019, p 156 line 14 – p 157 line 11.

285 NOWM's Closing Submissions dated 20 March 2020, para 595 and 411.

286 NOWM's Closing Submissions dated 20 March 2020, para 595 and 410.

287 Jeffrey Fung's AEIC Vol. 8, JF-154 at p 4862.

288 Jeffrey Fung's AEIC Vol. 8, JF-154 at p 4864.

289 Jeffrey Fung's AEIC Vol. 8, JF-154 at p 4868.

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2016.[290] For those occasions, I was prepared to accept that NOWM could not be held liable for breach of the Minimum RFO Term since Prosper Marine had handicapped itself, effectively preventing NOWM from fulfilling the contractual obligations that relied on Prosper Marine's cooperation. But I could not accept that this would extend to a blanket exoneration of all other breaches. Additionally, I found that Prosper Marine's purchases of RFO from Cleanseas were not relevant to the question at hand. The RFO Contract was never meant to be an exclusive one.

146 As such, I find that if the Minimum RFO Term was established, NOWM would have breached the term in the months that I've stated above at [140].

147 As for complaints about the quality of the RFO, I found them to be entirely baseless. NOWM gave no assurance as to the quality of the product which it sold to Prosper Marine. Such an obligation was not part of the RFO Contract. This does not mean that NOWM was free to provide shoddy product. Rather, it was an acknowledgement of the fact that the quality of the RFO produced by NOWM directly depended on the quality of the slop brought in by Proper Marine (see [69] above). This also aligns with NOWM's undertaking under cl 3.1 of the RFO Contract that the quality of its RFO would *correspond* with the samples taken from Prosper Marine's vessels. NOWM, in other words, had no control over the quality of the RFO it produced.[291] Accordingly, I found that there was no assurance as to quality of the RFO produced by NOWM, and dismissed Prosper Marine's arguments to the contrary.

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290 Jeffrey Fung's AEIC Vol. 8, JF-154 at p 4870.

291 Jeffrey Fung's AEIC Vol. 1 at para 124.

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Exclusion of liability under the 2014 Contracts

148 There is one other related matter for my determination. Prosper Marine argues that NOWM's claim for late payment interest under the 2014 Contracts should also be excluded. This is because NOWM's claimed rate of interest of 18% is "unconscionable and/or extravagant and/or not a genuine pre-estimate of loss", therefore amounting to an unenforceable penalty clause.[292] As affirmed by the Court of Appeal in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*") at [78], the law on penalty clauses is embodied within the following principles laid down in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ("*Dunlop*") at 86-88 (the "*Dunlop Principles*"):

> 1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found *passim* in nearly every case.
>
> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* [[1905] AC 6]).
>
> 3. The question whether a sum stipulated is [a] penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner* v. *Hills* [[1906] AC 368] and *Webster* v. *Bosanquet* [[1912] AC 394]).
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> (*a*) It will be held to be [a] penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison

292 Consolidated Defence and Counterclaim (Amendment No 2) at para 16.

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> with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in [the] *Clydebank Case* [[1905] AC 6])
>
> (*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble* v. *Farren* [(1829) 6 Bing 141]). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable,—a subject which much exercised Jessel M.R. in *Wallis* v. *Smith* [(1879) 21 Ch D 243]—is probably more interesting than material.
>
> (*c*) There is a presumption (but no more) that it is [a] penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage' (Lord Watson in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* [(1886) 11 App Cas 332]).
>
> On the other hand:
>
> (*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case*, Lord Halsbury [[1905] AC 6 at 11]; *Webster* v. *Bosanquet*, Lord Mersey [[1912] AC 394] at 398).

149 Since *Xia Zhengyan*, the UK Supreme Court has modified the test for ascertaining whether a clause is, in fact, a penalty clause. This revised test now requires a court to determine "whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation" (*Cavendish Square Holding BV v Makdessi* [2016] AC 1172 ("*Cavendish*") at [32]). While the *Cavendish* test has been positively cited

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in a number of Singapore High Court decisions,[293] the Court of Appeal has yet to decisively rule on its applicability against the *Dunlop* principles (see *Leiman, Ricardo and another v Noble Resources Ltd and another* [2020] SGCA 52 at [98], [107]).

150 In any case, NOWM states that an annual interest rate of 18% is neither unconscionable, extravagant nor out of proportion to its legitimate interests. The parties were business partners with comparable bargaining power who not only transacted with high frequency but also periodically reviewed their commercial terms.[294] It must therefore be presumed that they themselves were the best judges of what would be a legitimate rate of interest, *ie*, an annual rate of 18%. Indeed, the reasonableness of this interest rate is bolstered by the fact that Cleanseas, NOWM's direct competitor, also charged an interest rate of 18% per annum up until the last quarter of 2016.[295] Thereafter, Cleanseas *raised* its interest rate to 24% per annum – far in excess of NOWM's rate.[296]

151 NOWM's rate of interest also does meet the criteria for a penalty clause as a matter of contractual construction. The interest issued on each of NOWM's outstanding invoices only represents a fraction of the sum that is due and owing from Prosper Marine and cannot be seen as extravagant. Such interest also does

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293 NOWM's Closing Submissions dated 20 March 2020 at para 296.

294 NOWM's Closing Submissions dated 20 March 2020 at para 300.

295 NE, 13 August 2019, p 64 at lines 19 to 22.

296 See for *eg*, Agree Bundle S/N 2701 – Prosper Marine's Invoice for Slop Disposal at Cleanseas dated 22 September 2016, AB 16512 (see bottom right corner "Interest charge at 2% *per month* will be levied on overdue invoice")

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not represent a single lump sum payment and is only triggered by a single event, *ie*, Prosper Marine's failure to pay, rather than multiple possible occurrences.[297]

152 The burden of showing whether a contractual interest rate amounts to a penalty lies with the party who is being sued on the agreed sum (*CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at [63]). In my judgment, Prosper Marine has not put forward sufficient evidence to satisfy this requirement under either the *Dunlop* principles or the *Cavendish* test. Prosper Marine's main argument is that, contrary to NOWM's submissions, the parties were not really of equal bargaining power and NOWM dictated the terms of the 2014 Contracts.[298] In the absence of proper negotiations, a rate of 18% late payment interest is clearly not in line with Prosper Marine's legitimate interests. This fact was apparently conceded by Mr Fung in an internal NOWM email dated 31 July 2015, where he accepted that "[Prosper Marine] ha[d] not agreed/acknowledged this interest charge all along … [and NOWM] ha[d] not insisted that they pay".[299]

153 Problematically, however, Prosper Marine has not put forward evidence which actually indicates that the negotiation process of the 2014 Contracts was imbalanced, resulting in onerous terms being imposed on it by NOWM. It is not open to the court to speculate as to the parties' commercial dealings without any basis on which to do so. Mr Fung's email does not advance Prosper Marine's case because it was sent in the context of negotiations for the sale of Prosper 9

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297 NOWM's Closing Submissions dated 20 March 2020 at para 307.

298 Prosper Marine's Reply Closing Submissions dated 13 April 2020 at paras 61 to 62.

299 Agreed Bundle S/N 1438 – Low Chin Nam's emails to Jeffrey Fung dated 29 – 31 July 2015, AB 10218 – 10221.

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(see above at [91]).[300] Mr Fung was informing NOWM's management that they had simply never insisted on interest payment after Prosper Marine had repaid earlier, principal debts. His comments cannot be taken as a blanket statement that there had never been a practice of interest payment at all.

154 Prosper Marine laments that "NOWM had asserted its dominance over PM".[301] But NOWM's internal email correspondence – an email chain that Prosper Marine itself relies on – suggests that NOWM was concerned about ensuring that the ultimate deal was agreeable to Prosper Marine. It was wary of raising new issues[302] or jeopardizing negotiations with someone that it evidently saw as an equal business partner, not a party to be strong-armed. There was no reason for NOWM to have treated negotiations so delicately if they were as dominant as Prosper Marine claimed them to be.

155 Prosper Marine's final and weakest argument was that since NOWM was "making profits from their dealings with [Prosper Marine]",[303] there were no losses to address. Any late payment interest, by extension, could not have been a genuine pre-estimate of any losses.[304] This is dangerously faulty logic. It suggests that only unprofitable companies may seek interest payments or liquidated damages. Any other company, having no "losses" to speak of, would enforce such clauses at their own risk and risk them being cut down as penal

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300 Agreed Bundle S/N 1438 – Low Chin Nam's emails to Jeffrey Fung dated 29 – 31 July 2015, AB 10218 – 10221.

301 Prosper Marine's Reply Closing Submissions dated 13 April 2020 at para 62.

302 Agreed Bundle S/N 1438 – Low Chin Nam's emails to Jeffrey Fung dated 29 – 31 July 2015, AB 10219.

303 Prosper Marine's Reply Closing Submissions dated 13 April 2020 at para 63.

304 Prosper Marine's Reply Closing Submissions dated 13 April 2020 at para 63.

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clauses. I rejected this argument. The "loss" referred to when one describes "genuine pre-estimates of loss" refers to loss arising from the failed transaction or unmet contractual expectations. It does not refer to "loss" in a general sense (as Prosper Marine seems to suggest). The question therefore is whether an 18% late payment interest is a genuine pre-estimate of the loss *arising from invoices not paid in a timely manner*. Prosper Marine has failed to answer that question at all.

156 I am accordingly satisfied that NOWM's late payment interest rate does not amount to a penalty clause and it should therefore be entitled to such interest on its unpaid invoices.

The Directors' Guarantee suit

157 The sole issue here is whether the Prosper Directors are liable in their personal capacity for NOWM's outstanding invoices. Prosper Marine advanced three defences. Firstly, its counterclaims in the 2014 Contracts suits extinguish and/or exceed the sums due under NOWM's invoices. Secondly, under cl 1 of the Directors' Guarantee, the Prosper Directors are not liable for debts incurred before 1 April 2015. Thirdly, in accordance with the Allocation Agreement, the debts for which the Prosper Directors would have been liable have already been fully paid. It follows that there are no remaining liabilities which entitle NOWM to call upon the Directors' Guarantee.

158 I have already found that the debts in the 2014 Contract suits (which are the same debts in the Directors' Guarantee suit) have not been extinguished by Prosper Marine's counterclaim (see [56]–[73]). I have also found that there was no Allocation Agreement between the parties (see [99]–[112]). The debts were

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therefore, not paid off by post-April 2015 payments. The nett result is that the debts are due and payable.

159 My finding on the Allocation Agreement is bolstered by the fact that the parties agreed that the Directors' Guarantee would apply to invoices issued from 1 April 2015. The Directors' Guarantee was signed on 12 November 2015, some ten months after the Allocation Agreement was apparently concluded. If Prosper Marine's repayments were really being applied on a "last in, first out" basis, it is unclear why NOWM required a formalised guarantee to specifically ensure payment on its *latest invoices* (*i.e.* the invoices starting from 1 April 2015, which the Directors' Guarantee covered). This conduct suggests that Prosper Marine was really settling invoices on a FIFO basis and NOWM, being without insurance for invoices issued after 1 April 2015, needed an assurance that Prosper Marine would pay the sums due on the same. The Directors' Guarantee aptly fulfilled this objective.

160 I accordingly find the Prosper Directors jointly and severally liable for NOWM's unpaid invoices, including 18% late payment interest thereon (in line with cl 2(b) of the Directors' Guarantee). I allow the Directors' Guarantee suit.

The Charterparty suit

161 There are two main issues that arise for my consideration in this suit:

(a) whether NOM is entitled unpaid monthly hire fees under the Charterparty; and

(b) whether Prosper Marine is liable for the loss, damage and expenses incurred by NOM as a result of breaches of the Charterparty and if so, what consequences should flow thereon.

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I shall examine these issues in turn.

Outstanding charter hire fees

162 Prosper Marine candidly accepts that it did not make *any* charter hire payments from 27 May 2016 until Prosper 9's repossession on 16 September 2016.[305] Its sole defence against this is that it was induced, by way of fraudulent misrepresentation, to enter into the Deed and Charterparty. This allegation forms the substance of its counterclaim in the Charterparty Suit as well.[306]

163 The elements of fraudulent misrepresentation are well established (see *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]):

(a) there must be a representation of fact made by words or conduct;

(b) this representation must be made with the intention that it should be acted upon by the representee or by a class of persons which includes the representee;

(c) the representee must have acted on the false statement;

(d) the representee must have suffered damage by doing so; and

(e) the representation must be made with knowledge that it is false.

164 Prosper Marine argues that these elements have been satisfied by

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305 HC/S 1048/2016 - Defence and Counterclaim (Amendment No. 1) at para 23

306 Prosper Marine's Closing Submissions dated 20 March 2020 at paras 244 to 245.

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representations made in the 31 July 2015 email:[307]

> Dear Albert,
>
> We have been very supportive of [Prosper Marine]. Hence, leading to the current crisis which [NOWM's] management has been severely reprimanded by our Exco and Board.
>
> I hope you appreciate that we have a very restrictive mandate from our Exco. We have been accommodative in accepting your charter rate which we had to justify quite hard.
>
> I sincerely urge and hope that you would follow and meet our expectation this time too so that we can *revert back to business as usual*.
>
> Please be assured that [Prosper Marine] will *continue to have the support of [NOWM] so that our partnership will grow from strength to strength after this gust of headwind…*
>
> (emphasis added]

165 According to Prosper Marine. the two italicised phrases (the "Representations") promised the normalisation of operations at NOWM's plant, *ie*, the resolution of its tank top issues. Prosper Marine was thus led to believe that it would eventually be able to (i) utilise Prosper 9 for marine slops collection, this having been the vessel's purpose before its sale to NOWM; (ii) generate sufficient revenue to pay for monthly fees under the Charterparty; and (iii) generate sufficient revenue to pay down the AR.[308] On this basis, Prosper Marine entered into the Deed and Charterparty. It thereby incurred an ongoing liability of monthly charter fees and was unable to reserve any proceeds from the sale of Prosper 9, resulting in loss and damage. Lastly, the Representations were made with the knowledge that they were false.[309]

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307 Agreed Bundle S/N 1437 - Low Chin Nam's Email dated 31 July 2015, AB 10213.

308 Prosper Marine's Closing Submissions dated 20 March 2020 at para 242.

309 Prosper Marine's Closing Submissions dated 20 March 2020 at paras 249, 252, to 254, 257 to 258.

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166 As against this, NOM contends that the Representations were worded in the future tense: for *eg*, "*so that* we can revert" and "our partnership *will grow*" (emphasis added). These were, at best, statements about the future, which are not actionable misrepresentations. Indeed, a "representation is a statement which relates to a matter of fact, which may be a *past or present fact*" (emphasis added) (*Tan Chin Seng and others v Raffles Town Club Pte Ltd* ("*Tan Chin Seng*") at [12]; *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract*") at para 11.029). Projections about the future are not actionable representations.

167 Moreover, these Representations were simply aspirational pleasantries. They were nothing more than polite niceties imploring Mr Ong to appreciate the difficult position that the NOM management had been placed in, and urging him to accept the bareboat charter rate that he himself had suggested in late May 2015 ("I am confused […] $120,000 per month [for the bareboat charter rate] is proposed by you through Jeffrey in late May [2015]").[310] They were certainly not promises to normalize operations or to resolve tank top issues. In fact, Mr Ong, having written similarly worded emails in his capacity as a managing director, conceded during cross-examination that he would not have expected the kind of language used in the 31 July email to have held any legal significance.[311]

168 Even if the Representations contained promises about NOM's future course of action, they would have referred to the anticipated resumption of

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310 Agreed Bundle S/N 1437 – Email chain between Albert Ong, Low Chin Nam and Law Choon Ming dated 30 July 2015 – 31 July 2015, AB 10215

311 NEs 15 August 2019, p 153 at line 1 to p 155 at line 13.

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trading on credit terms, *not* the resolution of tank-top problems at NOWM's plant as Prosper Marine suggests. This much is apparent from the context of the emails. In the lead up to the sale of Prosper 9, the parties exchanged various emails to work out the terms of this sale and eventual lease-back. In an email dated 30 July 2015, Mr Fung made clear that the purpose of these transactions was to facilitate the resumption of trading on credit terms, which had been put on hold by NOWM because of its suspended insurance coverage. He explained that the use of the sale proceeds of Prosper 9 to offset the large AR balance would allow NOWM to "lift the credit hold currently in place and start trading with Prosper"[312], thereby restoring the parties' long-standing commercial arrangements. With this background in mind, the promises of "business as usual" and "grow[ing] from strength to strength" in the 31 July 2015 email would only have referred to an eventual return to trading on credit terms.[313]

169 If the Representations were made in relation to something unconnected with what Prosper Marine says were its motivations for entering into the Deed and Charterparty, it follows that the Representations *did not* induce or prompt Prosper Marine to enter into the same. For the sake of completeness, I further find that there is no evidence which suggests that these Representations were made with the knowledge that they were false. While Prosper Marine points to the fact that NOWM had been under pressure from its "Exco and Board" to reduce Prosper Marine's debts[314], it has not shown that this pressure led to the wilful or reckless making of false representations.

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312 Agreed Bundle S/N 1437 - – Email chain between Albert Ong, Low Chin Nam and Law Choon Ming dated 30 July 2015 – 31 July 2015. AB pp 10215 to 10216.

313 Low Chin Nam's AEIC at para 63.

314 Prosper Marine's Closing Submissions dated 20 March 2020 at para 257.

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170 For these reasons, Prosper Marine's counterclaim in misrepresentation must be dismissed. As I have found that there was no reliance by Prosper Marine on the Representations, there is no basis for an alternative claim under s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed). Prosper Marine is accordingly liable for outstanding charter hire fees due under the Charterparty. This includes late payment interest of 1% per month[315] on the outstanding sum pursuant to cl 11(f) of the Charterparty.[316]

Breaches of the Charterparty

171 This leaves NOM's claim in respect of Prosper Marine's breaches of the Charterparty. These breaches concern Prosper Marine's failure to:[317]

(a) ensure that Prosper 9, her machinery, boilers, appurtenances and spare parts were maintained in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice pursuant to cl 10(a)(i) of the Charterparty;

(b) keep Prosper 9's vessel classification fully up to date with Bureau Veritas pursuant to cl 10(a)(i) of the Charterparty;

(c) man, victual, navigate, operate, supply, fuel and repair Prosper 9 during the charter period pursuant to cl 10(b) of the Charterparty;

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315 Agreed Bundle S/N 1504 – Prosper 9 Deed, AB 10796 (see Box 24).

316 Agreed Bundle S/N 1504 – Prosper 9 Deed, AB 10783.

317 HC/S 1048/2016 - Statement of Claim (Amendment No 1) at para 20.

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(d) re-deliver Prosper 9, her outfit, machinery and appliances in the same good order and condition as received pursuant to cl 10(f) of the Charterparty;

(e) return Prosper 9's outfit, machinery and appliances in the same good order as received pursuant to cl 10(f) of the Charterparty;

(f) ensure that Prosper 9 was properly cleaned of all barnacles and other marine growth pursuant to cl 38 of the Charterparty; and

(g) ensure that Prosper 9 was re-delivered to NOM with her hull and underwater parts clean and free of any barnacles and/or other marine growth pursuant to cl 38 of the Charterparty.

172 NOM avers that it has suffered loss and damage and incurred significant expenses as a result of the foregoing breaches, namely:[318]

(a) $134,540.69 for repair and replacement costs before interest;[319]

(b) $8,800 for hull cleaning costs before interest;[320] and

(c) $2,834 for incidental ferry expenses before interest.[321]

173 NOM further submits that it was unable to charter or even use Prosper 9 until the issues with the vessel had been rectified. It therefore claims for the loss

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318 NOWM's Closing Submissions dated 20 March 2020 at paras 688 to 690, 693, 696.

319 NOWM's Closing Submissions dated 20 March 2020 at paras 688 – 690.

320 NOWM's Closing Submissions dated 20 March 2020 at para 693.

321 NOWM's Closing Submissions dated 20 March 2020 at para 696.

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of use/hire as well as Prosper 9's operational expenses like bunker fuel, harbour craft dues and ship management fees:[322]

(a) $110,193.55 for loss of use/hire fees between 17 September and 14 October 2016;[323]

(b) between $896,000 and $1,344,000 for loss of hire fees between 15 October 2016 and 26 August 2018 inclusive;[324] and

(c) $91,185.57 for operational expenses.[325]

174 Prosper Marine's first and primary defence is that NOM has not proven that Prosper Marine is responsible for its loss, damages or expenses. In any case, NOM is precluded from seeking relief for loss of use/hire of Prosper 9 because (i) it has failed to mitigate this loss; and (ii) this claim actually overlaps with the claim for operational expenses. Before dealing with these arguments, it is first necessary for me to set out some relevant facts.

175 NOM's pleaded repair and replacement costs, hull cleaning costs and incidental ferry expenses were incurred to remedy various defects that were first identified by OHC Shipmanagement Pte Ltd ("OHC"), who attended on-board Prosper 9 on 16 September 2016 together with Captain Thana. OHC proceeded to examine the hull, main deck and fittings, superstructure and accommodation quarters, bridge and navigation equipment and machinery space and safety

322 NOWM's Closing Submissions dated 20 March 2020 at paras 703, 716 to 717.

323 NOWM's Closing Submissions dated 20 March 2020 at para 717.

324 NOWM's Closing Submissions dated 20 March 2020 at para 716.

325 NOWM's Closing Submissions dated 20 March 2020 at para 703

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equipment. 75 defects were observed, which were classed as either low, medium or high priority.[326] OHC's assessment of Prosper 9 was soon followed by several other inspections (the "post-repossession surveys"), which were commissioned by NOM. For the avoidance of doubt, NOM is also seeking to recover the costs of the post-repossession surveys, which are listed below:[327]

(a) $5,800.60 for Bureau Veritas' survey on 19 September 2016;

(b) $3,200 for Underwater Contractors' inspection on 20 September 2016;

(c) $1,535 for Petrotech's inspection on 4 October 2016.

(d) $108 for Intertek's pour point and density tests and its report dated 6 October 2016; and

(e) $2,549.60 for Bureau Veritas' survey on 14 October 2016.

176 The first Bureau Veritas (class condition) survey was conducted on 19 September 2016. Prosper Marine's operations manager Mr Ng Choon Wah ("Mr Ng"), was present for this inspection along with Captain Thana.[328] By this time, Captain Thana had been appointed as the head of marine operations at NOM and was in charge of ensuring Prosper 9 was shipshape. Bureau Veritas issued its attestation on 21 September 2016 (the 19 September Report) identifying 37 issues with Prosper 9 under three heads: class item (immediate

326 Thanabalasingam's AEIC Vol. 1 at para 21; TB-9 at page 111.

327 NOWM's Closing Submissions dated 20 March 2020 at para 679.

328 Thanabalasingam's AEIC Vol. 1 at paras 14, 22; TB-3 at page 91.

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action), class item (recommendation) and non-class items.[329] The first category was made up of issues that offended MPA statutory requirements and thus had to be rectified urgently. The second category of issues pertained to damage affecting Prosper 9's classification. As for the third category, these comprised parts of Prosper 9 that were non-functional upon inspection but did not affect her classification.

177 The next survey, an inspection of Prosper 9's hull, was conducted on 20 September 2016. Underwater Contractors' resulting report[330] notes that while the underside of the ship was generally free of visible damage, there was about 90% marine growth on the port and starboard vertical sides made up of "acorn barnacle, tubeworm, algae, slime, mussels and other soft marine vegetation growth." There was similarly 100% marine growth on Prosper 9's flat bottom, 80-90% on her sea chest gratings and 90% on her propeller.

178 On 4 October 2016, Captain Nigel J Snowden of Petrotech attended on-board Prosper 9 to conduct an additional inspection to verify the damage that had been reported. Petrotech's report was issued the following day in which it confirmed that there were "several major problems with equipment which are important… [and] [s]ome of these [problems] are sufficiently serious that the vessel operation is severely effected [*sic*] and may in fact prevent her from trading until such time as they are addressed".[331] Besides the issues identified by Bureau Veritas and OHC, Petrotech found four further issues: (i) the layout of

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329 Agreed Bundle S/N 2697 – Bureau Veritas Attestation of Inspection Carried Out on 19 September 2016, AB 16498 - 16499.

330 Thanabalasingam's AEIC Vol. 1 - TB-12 at pp 132 to 198.

331 Agreed Bundle S/N 2762 – Petrotech's Inspection Report of MT 'Prosper 9', AB 16938.

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the forward anchor winshes was incorrect; (ii) the limit switch bracket on the vessel's steering gear was deformed; (iii) the radar screen gave a completely indecipherable picture; and (iv) the bridge wing had been distorted.[332]

179 It should also be noted that attached to Petrotech's report is a condition survey report of Prosper 9 by Encee Marine Consultants dated August 2015 (the "Encee Report").[333] The Encee Report details a survey that was carried out on 6 August 2015 for "internal monitoring purposes". Save for minor indentations that were noted on Prosper 9's hull, she was found to be in good condition. According to Captain Thana, the Encee Report had significantly informed NOM's decision to purchase Prosper 9.[334] Prosper 9 was surveyed by Bureau Veritas for a second time on 14 October 2016. Upon this inspection, Bureau Veritas certified that a number of the statutory and class items in the 19 September Report had been dealt with. NOM was therefore able to operate Prosper 9 from this date.[335]

180 In respect of solidified sludge that was found in Prosper 9's cargo tanks, namely tanks 1 to 4, NOM attempted to liquefy this material between 23 and 27 September 2016 using Prosper 9's boiler and heating coils but to no avail.[336] In a bid to find solutions for this problem, NOM procured Intertek's assistance in identifying the respective pour points and densities of the sludge in the various

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332 Agreed Bundle S/N 2762 – Petrotech's Inspection Report of MT 'Prosper 9', AB 16951 – 16952.

333 Agreed Bundle S/N 2762 – Petrotech's Inspection Report of MT 'Prosper 9', AB 16984 – 16993.

334 Thanabalasingam's AEIC Vol. 1 at paras 29 to 30.

335 Thanabalasingam's AEIC Vol. 1 – TB-17 at p 283.

336 Thanabalasingam's AEIC Vol. 1 at para 36.

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tanks.[337] Eventually, hot oil from Cleanseas had to be blended with the sludge in order to liquefy it for pumping.[338] The sludge in tanks 1, 3 and 4 was discharged at Cleanseas on 17 October 2016 while tank 2 was cleared between 11 and 13 November 2016.

Repair and replacement costs

181 With this background in mind, I turn to Prosper Marine's first argument, which is itself made up of three limbs. First, it is argued that NOM has failed to show that the damage to Prosper 9 was the fault of Prosper Marine because there is no accurate comparison between the state of the vessel at the time it was chartered and at its repossession. The Encee Report (NOM's primary evidence of Prosper 9's pre-charter condition) cannot be compared against the post-repossession surveys because it is comparatively vague as to the details of Prosper 9's inspection. It is thus unclear what was the condition of the items on-board Prosper 9 in August 2015. Captain Thana acknowledged that NOM would not have known *for a fact* if certain items would already have been worn out due to fair wear and tear.[339] The Encee Report also lacks an exhaustive list of the items on-board Prosper 9, making it difficult to determine whether the items missing from Prosper 9 upon repossession were present at the time it was chartered.[340]

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337 Thanabalasingam's AEIC Vol. 1 – TB-27 at p 512.

338 Thanabalasingam's AEIC Vol. 1 at para 67.

339 NEs, 13 August 2019, p 19 at lines 4 to 12.

340 Prosper Marine's Closing Submissions dated 20 March 2020 at para 269.

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182 That said, I find that the Encee Report remains useful in ascertaining the condition of Prosper 9 in August 2015. The report identifies minimal issues with Prosper 9. On-board equipment was found to be operational and free of defects and no mention was made of missing or worn out items. Prosper 9 had been in good condition.[341] While not conclusive, this suggests the vessel had no significant damage before the commencement of the Charterparty. This finding is corroborated by Prosper 9's Bureau Veritas class certificate at the time, which was free from any conditions.[342] However, by the time of the 19 September Report, Bureau Veritas had imposed conditions for Prosper 9 to maintain her class certification. Quite obviously, Prosper 9's condition had deteriorated in the intervening period. The 19 September Report shows that this situation only worsened thereafter, with even more issues, of which some required immediate attention, being identified upon vessel repossession. Comparing these reports with the Encee Report, it is fair to conclude that most of the damage and/or defects observed on Prosper 9 must have been sustained during her charter period and are therefore attributable to Prosper Marine.

183 Of course, as Captain Thana conceded, there remains the possibility that certain pre-existing issues, such as missing items from Prosper 9, were omitted from the Encee Report. However, it must be borne in mind that while Prosper 9 itself only had to be returned in the same "structure, state, condition and class" as received,[343] Prosper Marine was also under an obligation to maintain her in accordance with good commercial practice[344] and to keep her class fully up to

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341 NOWM's Closing Submissions dated 20 March 2020 at para 803.

342 NEs 13 August 2019, p 29 lines 12 - 25.

343 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11231 (see clause 15)

344 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11228.

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date with Bureau Veritas: cl 10(a)(i) of the Charterparty.[345] Thus, it would have been Prosper Marine's responsibility to replace any missing items on-board the vessel, especially if these items affected class certification. Having failed to do so, I find that Prosper Marine is liable for *all* the damage set out in the post-repossession surveys. I further find that it should also pay for the costs of the post-repossession surveys as these were necessary to establish the damage in question.

184 The second limb of Prosper Marine's argument relates to the lack of a joint inspection of Prosper 9 during its handover on 16 September 2016. The first survey at which Prosper Marine's representative was present was the Bureau Veritas survey on 19 September 2016, three days later. Thus, Prosper Marine was in no position to record the state and condition of Prosper 9 upon repossession. Further, it was unable to assess whether the damage alleged by NOM had in fact taken place or if the repairs subsequently conducted by NOM were necessary.

185 NOM argues that it was not obliged under the Charterparty to carry out a joint survey at the point of handover and, in any case, Mr Ng had attended the Bureau Veritas survey just one working day after repossession. Prosper Marine cannot suggest that it was not given an opportunity to ascertain the condition of Prosper 9. NOM's first point is a rebuttal of the evidence of Mr Ng, who noted that Captain Thana "should [have been] aware that he had to conduct an 'on and off hire' survey to avoid any dispute … in the future".[346] At first blush, this appears to be consistent with the wording of cl 7 of the Charterparty. Under cl

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345 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11228.

346 Ng Choon Wah's AEIC at para 31.

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7, the parties were obliged to "each appoint surveyors for the purpose of determining and agreeing in writing the condition of [Prosper 9] at the time of delivery and *redelivery* hereunder" (emphasis added).[347] However, the wording of cl 15 of the Charterparty associates the term "redelivery" with "the *expiration* of the Charter Period" (emphasis added),[348] rather than its premature *termination*. This suggests cl 7 was not intended to apply to situations of vessel repossession. There was therefore no need for the parties to conduct a joint survey of Prosper 9 on 16 September 2016.

186 In any case, Prosper Marine was still given the chance to assess the state of Prosper 9 because both the parties' representatives attended a joint survey of the vessel three days after. I do not regard this negligible delay as having caused Prosper Marine prejudice. Prosper Marine's position is that it is "very likely" that the defects identified by Bureau Veritas only occurred during the weekend between repossession and the condition survey.[349] Mr Ng, Prosper Marine's sole witness on this issue, speculated that Prosper 9 could have suffered wear and tear during this period, which was later wrongly classified as damage.[350] In my judgment, it is quite implausible that Prosper 9 could have suffered the damage as reflected in the post-repossession surveys during this duration, where it had remained in port at all times. It is far more likely that the damage was sustained in the vessel's preceding months of use by Prosper Marine.

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347 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11227

348 Agreed Bundle S/N 1560 – Prosper 9 Charterparty, AB 11231

349 Ns, 29 August 2019, p 173 at line 14 to p 174 at line 13; Ng Choon Wah's AEIC at para 40.

350 See for *eg*, NEs, 29 August 2019, p 153 at line 12 to p 154 at line 19.

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187 The third limb of Prosper Marine's argument is that even if it is liable for the expenses incurred to repair Prosper 9, the quotations for these repairs are neither fair nor reasonable. Under cl 10(f) of the Charterparty, Prosper Marine was to return Prosper 9 in the "same good order and condition as received, *ordinary wear and tear accepted*" [emphasis added]. However in conducting repairs, NOM took the opportunity to restore/refurbish Prosper 9 completely and is now unfairly charging those fees to Prosper Marine; it has failed to mitigate its costs.[351] This problem is compounded by the fact that some of NOM's claimed invoices are for repairs conducted more than one year after Prosper 9's repossession and so may not even relate to damage attributable to Prosper Marine.[352]

188 Preliminarily, I find that Prosper Marine is foreclosed from advancing the argument of NOM having failed to mitigate its costs because it has not been pleaded.[353] In any event, I accept Captain Thana's evidence that NOM obtained "three or four" quotations from potential vendors and negotiated repair prices before choosing the "cheapest and [most] reliable contractors".[354] NOM did not intentionally inflate its costs. It is also not open to Prosper Marine to suggest that these costs are outside the scope of its responsibility. In making this point, Prosper Marine relies on an invoice that was issued for the calibration and certification of Prosper 9's equipment on or about 2 March 2018, more than a

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351 Prosper Marine's Reply Closing Submissions dated 13 April 2020 at para 181.

352 Prosper Marine's Closing Submissions dated 20 March 2020 at para 274.

353 HC/S 1048/2016 - Defence and Counterclaim (Amendment No 1) at para 25.

354 NEs 13 August 2019, p 30 at line 17 to p 31 at line 3; See for *eg*, Agreed Bundle S/N 2900 – Email Chain discussing best vendor to award contract to, AB 19217 to 19218.

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year after Prosper 9's repossession.[355] Yet, this was actually listed as an item for action under the BV Attestation. Thus, while several of NOM's invoices are dated quite sometime after repossession, they concern damage sustained *before* 16 September 2016. I accordingly find that Prosper Marine should be liable for the full set of NOM's repair expenses.

Lost use fees and operational costs

189 As I have mentioned above, there are two other types of expenses being claimed by NOM. These are lost use/hire fees and Prosper 9's operational costs. I pause to elaborate on these expenses in greater detail. The parties agreed that Prosper 9 would be chartered to Prosper Marine for a duration of 36 months, *ie*, until 26 August 2018. Having failed to make timely payment of its charter fees, Prosper Marine breached the Charterparty and NOM was entitled to terminate the same. The claim for loss of use/hire is a claim for damages in substitution of Prosper Marine's primary obligations. NOM subdivides this claim into two time periods. The first is for fees lost for the period between 17 September and 14 October 2016 where Prosper 9 could not be used pending the satisfaction of conditions in the BV Attestation. NOM accordingly seeks the full sum of charter hire that Prosper Marine would have paid for this period. The second time period is from 15 October 2016 to 26 August 2018. NOM's claim here considers what it could have earned had it re-chartered Prosper 9.

190 As for NOM's claim for operational expenses, this concerns the amount that NOM had to pay out of pocket for Prosper 9's running expenses, especially

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[355] Agreed Bundle S/N 2900 – Invoice from OHC Shipment dated 9 April 2018, AB 19207 to 19209.

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for the period between 17 September and 14 October 2016 where she was completely unusable. Beyond this, NOM also had to pay for MPA harbour craft charges, which should have otherwise been borne by Prosper Marine under cl 10(b) of the Charterparty.[356]

191 In my judgment, NOM has clearly proven its damage in respect of these two categories of expenses because they directly arise out of Prosper Marine's repudiatory breach of the Charterparty.

192 Staying with the claim for loss of use/hire, Prosper Marine contends that NOM is, in any case, foreclosed from pursuing this claim for the period between 16 October 2016 and 26 August 2018 because it has not provided any evidence of the steps taken to mitigate its loss (citing *The "Asia Star"* [2010] 2 SLR 1154 ("*Asia Star*") at [24]). Besides the fact that NOM allowed Prosper 9 to be used by NOWM during this period for its own slop collection,[357] there was seemingly no effort made to charter Prosper 9 out to third parties for a reasonable fee. As against this, NOM avers that Prosper Marine's reliance on the dicta in *Asia Star* is misconstrued and it is entitled to recover at least part of its lost hire fees.

193 I am minded to agree. The law relating to mitigation is well settled. As summarised by the Court of Appeal in *Asia Star* at [24]:

> [an] aggrieved party must take all reasonable steps to mitigate the loss consequent on the defaulting party's breach, and cannot recover damages for any loss which it could have avoided but failed to avoid due to its own unreasonable action or inaction…

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356 NOWM's Closing Submissions dated 20 March 2020 at paras 697 to 698, 700.

357 NEs, 13 August 2019, pp 33 to 35.

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However, this does not mean that where there is a failure to mitigate, a plaintiff should be altogether denied from obtaining relief. It is simply disentitled "from claiming that *part of its loss* which, in the court's view, could have been avoided if reasonable mitigation measures had been taken" [emphasis added] (*Asia Star* at [23]). In the same vein, NOM remains entitled to seek relief against Prosper Marine for loss of hire fees, to the extent that this loss was not of its own making.

194 Indeed, this is precisely what NOM is doing. Its claim for lost hire fees for 15 October 2016 to 26 August 2018, quantified at $896,000 to $1,344,000, *excludes* the amount that NOM could have earned had Prosper 9 been chartered out for a reasonable charter fee.[358] In quantifying this fee, NOM relies on the evidence of Captain Thana, who determined from his consultation of a market source that the prevailing monthly charter rate in 2016 for tankers of Prosper 9's tonnage was between $60,000 and $80,000.[359] Prosper Marine rejects this quantification on the basis that Captain Thana has failed to disclose his "market source".[360] Addressing this point in cross-examination, Captain Thana explained that he had spoken to a broker who did not wish to be identified.[361]

195 Having been a candid and forthcoming witness, I see no reason to doubt the veracity of Captain Thana's evidence on the applicable rates for charter hire. This is especially since Prosper Marine, in spite of its issues with these figures, has failed to put forward alternative rates for consideration. I accordingly accept that NOM could have chartered Proper 9 at $60,000 to $80,000 per month and

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358 NOWM's Reply Closing Submissions dated 13 April 2020 at para 345.

359 Thanabalasingam's AEIC Vol. 1 at para 135.

360 Prosper Marine's Reply Closing Submissions dated 13 April 2020 at para 185.

361 NEs 13 August 2019, p 41 at lines 1 to 13.

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this quantum should be set off against NOM's overall loss for charter hire. For the purpose of quantifying NOM's recoverable loss, I adopt the high end of this range of $80,000, in Prosper Marine's favour. Prosper Marine is therefore liable to pay NOM $896,000 in lost hire fees for the period between 15 October 2016 and 26 August 2018.

196 For the sake of completeness, Prosper Marine's submissions also assert, without any elaboration, that NOM's claim for its loss of use for 17 September to 16 October 2016 overlaps with its claim for operational costs and is therefore an attempt at double recovery.[362] I disagree. NOM's claims concern two distinct types of loss. The first was its inability to generate revenue from Prosper 9 after the termination of the Charterparty whilst the second was its absorption of operational costs that would otherwise have been borne by Prosper Marine. NOM is therefore entitled to loss of use fees for the abovementioned duration.

Costs

197 I award costs to NOWM on an indemnity basis. However, I found certain items in their costs schedule to be unreasonable. As such, I order that those be either removed, resolved by agreement or taxed. I detail my decision on costs below:

Basis of Costs

198 The general rule is that costs are awarded on an indemnity basis only in exceptional circumstances: *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274. That said, the position differs when there is a contractual

362 Prosper Marine's Closing Submissions dated 20 March 2020 at para 264(2).

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agreement on costs. In such situations, the question turns to whether the party seeking indemnity costs relies on the court's *statutory discretion to award costs* (*e.g. Abani Trading Pte Ltd v BNP Paribas* [2014] 3 SLR 909) or directly sues on the basis of its *contractual entitlement* (*e.g. Mansfield v Robinson* [1928] 2 KB 353, cited and adopted in *United Overseas Bank Ltd v Sin Leong Ironbed & Furtniture Manufacturing Co (Pte) Ltd* [1988] 1 SLR(R) 76 at [16] ("*UOB v Sin Leong*")). If the court's discretion is relied on, the contractual arrangement between the parties would be a relevant factor in the court's exercise of its discretion. The court will tend to exercise such discretion to uphold the contractual bargain entered into by both parties unless it would be manifestly unjust to do so: *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA (Yeh Mao-Yuan, third party)* [2015] 4 SLR 1019 at [29] (*"Telemedia*"). If a party relies on its contractual entitlement, such an agreement will generally be upheld: *UOB v Sin Leong* at [16]. Indeed, it has been said that such an agreement would oust the statutory discretion of a tribunal in awarding costs: *UOB v Sin Leong* at [16].

199 I do not think that the rule need go so far as to say that contractual agreements on costs oust the court's discretion for the same. Costs are ultimately in the discretion of the courts, after all: O 59 r 2(2), Rules of Court. Indeed, that *dicta* in *UOB v Sin Leong* was really a reference to *Mansfield v Robinson* [1928] 2 KB 353, which in turn concerned an arbitration. If the parties in an arbitration had specifically delineated how costs would be fixed, that was a party-led prerogative which had its own unique significance in the arbitration setting. In any case, nothing turned on this specific point of law (*i.e.* whether contractual agreements on costs ousted the court's discretion in awarding costs).

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200 Here, NOWM had both contractual entitlements to indemnity costs and pleaded them specifically, at least in relation to the 2014 Contract Suits. Its contractual entitlements were found in (i) cl 11 of the Standard Terms for Services, (ii) cl 13.1 of the Standard Terms for Sales, (iii) cl 2(*a*) of the Directors' Guarantee and (iv) s 12.1(*a*) of the Deed. I reproduce them here for convenience.

201 Clause 11 of the Standard Terms for Services reads:

> The Customer shall indemnify the Contractor against any claims, losses, costs (including costs as between Solicitor and Client), damages, liabilities, dines, penalties and expenses incurred or sustained arising out of or in connection with this Contract except to the extent that such claims, losses, costs, damages, liabilities and expenses arise as a direct result of the wilful act or wilful default of the Contractor.

202 Clause 13.1 of the Standard Terms for Sales reads:[363]

> The Buyer will indemnify the Seller against any claims, losses, costs (including costs as between Solicitor and Client), damages, liabilities, fines, penalties and expenses incurred or sustained arising out of or in connection with this Contract except to the extent that such claims, losses, costs, damages, liabilities and expenses arise through the gross negligence of the Seller.

203 Clause 2(*a)* of the Directors' Guarantee provides that:[364]

> 2. The [Prosper Directors] **FURTHER UNDERTAKE AND AGREE** to pay to [NOWM]:-
>
> (a) all legal and other costs, charges and expenses (on a full indemnity basis) incurred by [NOWM] in the preservation and enforcement of its rights under this

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363 Jeffrey Fung's AEIC Vol. 3 – JF-25 at p 1544 (helpfully reproduced in Annex 2 of NOWM's Closing Submissions dated 20 March 2020).

364 Agreed Bundle S/N 1754 – Director's Guarantee & Indemnity, AB pp 12132.

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> Guarantee and under any security giver therefor (including but not limited to costs and expenses incurred by [NOWM] in engaging solicitors in issuing letters of demand and the like)

204 Section 12.1(*a*) of the Deed states:[365]

> **12. <u>Seller's Indemnities</u>**
>
> 12.1 Without prejudice and in addition to any other indemnity given or made by the Seller (whether under this Deed and/or the Bareboat Charter or otherwise), the Seller hereby undertakes to indemnify the Purchaser and its nominee and keep the Purchaser and its nominee fully indemnified against any and all claims, liabilities, expenses, costs, losses and/or damages of any nature whatsoever (including but not limited to consequential losses, loss of profit, loss of use and legal costs on a full indemnity basis) and howsoever arising from, which the Purchaser and/or its nominee may suffer as a result of and/or in connection with: -
>
> > (a) any breach of any of the terms, conditions, covenants, undertakings or other provisions of this Deed and/or the Bareboat Charter by the Seller (including but not limited to legal costs on a full indemnity basis and other costs and disbursement incurred in connection with demanding and enforcing or attempting to enforce payment of any and all moneys owing by the Seller or otherwise howsoever in enforcing or attempting to enforce this Deed and/or the Bareboat Charter and/or any of the covenants undertakings stipulations terms conditions or provisions of this Deed and/or the Bareboat Charter);
> >
> > (b) any and all claims and/or actions incurred in respect of the Vessel after delivery of the Vessel to the Seller pursuant to the Bareboat Charter

205 NOWM specifically pleaded and relied on its contractual entitlement when seeking indemnity costs for the 2014 Contract Suits. Prayer (*e*) of the Consolidated Statement of Claim specifically relied on cl 11 of the Standard

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Terms of Provision of Service and cl 13.1 of the Standard Terms and Conditions of Sale in seeking indemnity costs. Applying *UOB v Sin Leong*, I find that indemnity costs, as stipulated by the parties' agreement, is appropriate here. I find no reason to invoke my discretion and deviate from the bargain struck between two commercial parties dealing at arm's length.

206 In relation to the Charterparty Suit, and the Directors' Guarantee Suit, prayers (*h*) and (*iii*) of the respective statements of claim simply claimed for costs on an indemnity basis. In the absence of any reference to their contractual entitlements, NOWM therefore must be taken to be relying on my discretion to award costs.

207 As stated earlier, the court will tend to exercise such discretion to uphold the contractual bargain entered into by both parties unless it would be manifestly unjust to do so: *Telemedia* at [29]. The question, therefore, is whether there is anything manifestly unjust in the circumstances. Nothing suggests that to be the case. Prosper Marine argued that NOM had raised "plainly unsustainable, unmeritorious or unreasonable issues" which were "wholly unrealistic or exaggerated".[366] I rejected this entirely. Such contentions were simply recycled arguments related the dispute itself. Prosper Marine simply repeated its questions about the veracity of NOM's figures in its Consolidated Statement of Claim[367] (something I dealt with above at [97] – [98]), re-asserted the existence of the Allocation Agreement[368] (again, something I rejected at [99]-[112] above) and blandly stated that the sums claimed in the Charterparty Suit were grossly

366 Prosper Marine's Submissions on Costs dated 23 March 2020 at para 18

367 Prosper Marine's Submissions on Costs dated 23 March 2020 at para 17.1

368 Prosper Marine's Submissions on Costs dated 23 March 2020 at para 17.2

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exaggerated.[369] The Directors' Guarantee Suit was simply not addressed at all.[370] In these circumstances, there is no evidence that an award of indemnity costs would be manifestly unfair.

208 As such, I found it appropriate to award indemnity costs to NOWM for all three suits.

Reasonableness of certain items listed in NOWM's costs schedule

209 That said, I do not allow three items listed in NOWM's costs schedule. First, with regard to SUM 540 of 2018,[371] I note that the learned AR had directed that there be no order as to costs. I am not inclined to deviate from that direction. Second, I noted that SUM 1455 of 2019,[372] was a simple pre-trial conference seeking directions. I rejected the sum quoted in NOWM's costs schedule (S$10,000) which would have been exorbitant and disproportionate to the nature of the hearing. Finally, I noted that NOWM had already been awarded costs in SUM 430 of 2019,[373] SUM 596 of 2019,[374] SUM 2648 of 2019,[375] and RA 75 of 2019.[376] The costs awarded in those applications were inclusive of

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369 Prosper Marine's Submissions on Costs dated 23 March 2020 at para 20

370 Prosper Marine's Submissions on Costs dated 23 March 2020 at paras 15 – 20

371 NOWM's Costs Schedule dated 20 March 2020, p 12 under "Completed Interlocutory Applications with Costs Contingent on Outcome of Proceedings" ("NOWM's Costs Schedule – Completed Interlocutory with Costs Contingent")

372 NOWM's Costs Schedule dated 20 March 2020 – Completed Interlocutory with Costs Contingent, p 12

373 NOWM's Costs Schedule dated 20 March 2020, p 13

374 NOWM's Costs Schedule dated 20 March 2020, p 13 – 14

375 NOWM's Costs Schedule dated 20 March 2020, p 14

376 NOWM's Costs Schedule dated 20 March 2020, p 14 – 15

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disbursements. Therefore, further costs for these disbursements should not be awarded, contrary to what the costs schedule seems to suggest.

Conclusion

210 As such, I allowed NOWM's claim in all three suits and dismissed Prosper Marine's counterclaims in the 2014 Suits and the Charterparty Suit.

Lee Seiu Kin
Judge

Cavinder Bull *SC*, Woo Shu Yan, Jonathan Yap, Wesley Chan and Daryl Ho (Drew & N
Low Chai Chong, Chua Hua Yi, Ng Sook Zhen and Sean Chen
(Dentons Rodyk & Davidson LLP) for the defendants.

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