IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 98

Civil Appeal No 2 of 2021

Between

Nambu PVD Pte Ltd

… *Appellant*

And

UBTS Pte Ltd

… *Respondent*

Civil Appeal No 16 of 2021

Between

UBTS Pte Ltd

… *Appellant*

And

Nambu PVD Pte Ltd

… *Respondent*

In the matter of Suit No 889 of 2019

Between

Nambu PVD Pte Ltd

… *Plaintiff*

And

UBTS Pte Ltd

… *Defendant*

JUDGMENT

[Contract] — [Contractual terms] — [Exclusion clauses]

TABLE OF CONTENTS

Nambu PVD Pte Ltd
v
UBTS Pte Ltd and another appeal

[2021] SGCA 98

Court of Appeal — Civil Appeals Nos 2 and 16 of 2021
Andrew Phang Boon Leong JCA, Judith Prakash JCA and Tay Yong Kwang JCA
6 September 2021

20 October 2021 Judgment reserved

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

Introduction

1 Nambu PVD Pte Ltd ("Nambu") and UBTS Pte Ltd ("UBTS") entered into a contract ("the Contract") for UBTS to transport a Prefabricated Vertical Drain machine ("the Machine"). The vehicle from UBTS which carried the Machine caught fire during the course of the carriage, and the Machine was damaged.

2 Nambu then sued UBTS for fire damage to the Machine. The High Court judge ("the Judge") found, *inter alia*, that the fire was due to negligence on UBTS's part (see *Nambu PVD Pte Ltd v UBTS Pte Ltd* [2021] SGHC 20 ("the GD")). He held further that UBTS could not rely on its own standard terms and conditions ("UBTS T&Cs") or the Singapore Logistics Association's

standard terms and conditions ("SLA T&Cs") to limit its liability, since neither set of terms was, in his view, incorporated into the Contract. Further, while Nambu had made claims totalling $1,226,807.20 on the basis of replacing the Machine and alternatively, $1,279,537.20 on the basis of repairing it, the Judge only awarded Nambu $248,240.00, together with interest and costs of $160,000.00 (excluding disbursements).

3 CA/CA 2/2021 ("CA 2") is Nambu's appeal in respect of the quantum of damages and costs awarded to it. CA 16/2021 ("CA 16") is UBTS's appeal in respect of the Judge's finding that the SLA T&Cs were not incorporated into the Contract. There was no appeal, though, against the finding that the UBTS T&Cs were not incorporated into the Contract.

4 We heard both appeals on 6 September 2021. Having considered the parties' written as well as oral arguments, we dismiss both appeals. In summary, and beginning with Nambu's appeal in CA 2, Nambu's arguments constituted essentially a rehash of what had been argued before the Judge in the court below. They turned essentially on factual issues which the Judge dealt with in meticulous detail. We thus see nothing which warrants the intervention of this court. As we elaborate upon below, we agree wholly with the Judge's reasoning and findings in relation to quantum, and therefore dismiss Nambu's appeal.

5 Turning to UBTS's appeal in CA 16, UBTS makes the argument that the SLA T&Cs had been incorporated in the subject contract by virtue of a previous course of dealing, based on the invoices and delivery orders issued by UBTS for past contracts. The central, albeit simple, point is that a course of dealing generally assumes that the terms concerned have ***contractual*** effect. In this regard, the Judge's finding that the invoices and delivery orders were *not* intended to have *contractual* effect for the past contracts for which they were

issued, suffices, in our view, to dispose of UBTS's appeal in CA 16. That being said, UBTS's arguments present an appropriate occasion to provide a few clarifications with regard to the law on the incorporation of terms.

6 We now turn to consider both appeals in more detail.

Nambu's appeal

7 We begin with Nambu's appeal in CA 2. To recap, in respect of Nambu's claims totalling $1,226,807.20 on the basis of replacement costs, and alternatively, $1,279,537.20 on the basis of repair costs, the Judge only awarded Nambu $248,240.00. The Judge decided that the Machine could have been repaired for less than its replacement cost, and that this ought to have been done within six months of the accident, *ie*, by March 2017. Accordingly, the Judge allowed Nambu's claims for loss of use, and for storage and relocation charges, for only that six-month period (between September 2016 and March 2017). The Judge also reduced the amount of repair costs claimed, relying on the opinion of UBTS's expert witness, Mr Melvin Lum ("Mr Lum"). The Judge further declined to award Nambu loss of profits from a contract which Nambu had given up in March 2017 because the Machine was not operational.

8 On appeal, Nambu raises a whole host of arguments against the Judge's findings of fact in relation to UBTS's liability in conversion and detinue, as well as in relation to the quantum of damages and costs awarded. Over the course of the oral hearing, we noted that all the arguments raised by UBTS on appeal had already been considered by the Judge, and this was (correctly, in our view) accepted by counsel for UBTS, Mr S Magintharan ("Mr Magintharan"). This court observed in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41] that appellate intervention in relation to a trial

judge's findings of fact is generally only warranted when the trial judge's assessment is plainly wrong or manifestly against the weight of the evidence. In this regard, we do not agree with Nambu that the Judge's assessment was either plainly wrong or manifestly against the weight of the evidence. The Judge considered Nambu's arguments in detail and closely examined the evidence before arriving at his decision.

9 That the high threshold before appellate intervention is warranted had not been satisfied here is, in our view, best exemplified by examining what, in our view, were Nambu's two strongest arguments. These arguments were raised by Mr Magintharan on appeal and were: (a) first, that the Judge had erred in accepting the evidence of UBTS's expert, Mr Lum, in making deductions from the repairs cost, and (b) second, that the Judge had erred in finding that Nambu could have retrieved the Machine from the custody of UBTS with effect from 3 January 2017. Let us elaborate.

Whether the Judge should have relied on Mr Lum's evidence to make deductions from the repair costs

10 By way of background, the manufacturer of the Machine, FM Electro-Hydraulic ("FM"), provided a quotation for the repair of the Machine at $197,460 ("FM Quotation"). In assessing repair costs, the Judge used the FM Quotation as a starting point, before removing several of the items listed on the FM Quotation. The Judge accepted Mr Lum's expert opinion that such items were not justified, as certain parts of the Machine were not so damaged as to warrant repair (see the GD at [101]).

11 On appeal, Mr Magintharan argued that the Judge was wrong to accept Mr Lum's expert opinion, on the basis that Mr Lum did not cite any evidence to support his opinion. We queried Mr Magintharan as to whether any

corroborative evidence was necessary to begin with. Mr Lum had physically inspected the Machine. To that extent, Mr Lum's expertise would, in and of itself, have been a sufficient basis on which the Judge was entitled to accept his assessment of the Machine.

12 In light of our queries, Mr Magintharan argued that Mr Lum was not sufficiently qualified to make his own assessment of the Machine. In Mr Magintharan's words, Mr Lum was only an "accident reconstructionist" with a degree in "mechatronics". We note also that, before the Judge, Mr Magintharan relied on a brochure containing the syllabus of the mechatronics course from Nanyang Polytechnic, Mr Lum's *alma mater*, to argue that the mechatronics degree would not have trained Mr Lum sufficiently to properly value equipment. Mr Magintharan also emphasised the point that Mr Lum had no diploma in valuation, nor was Mr Lum a member of any accredited professional body dealing with valuation. Further, Mr Lum's specialty appeared to be not valuation, but rather accident reconstruction, which was a quite different domain.

13 In response to Mr Magintharan's arguments, counsel for UBTS, Mr Jonathan Lim ("Mr Lim"), pointed out that expertise may be acquired either through study or through *experience*, relying on the High Court decision of *Tan Mui Teck v Public Prosecutor* [2003] 3 SLR(R) 139 at [11]. In this regard, while Mr Lum's academic credentials may not have been ideal, he had gained the necessary expertise in assessing vehicular damage through his *experience* working with assessors, as he had stated during cross-examination.

14 In our view, Mr Magintharan's misgivings about Mr Lum's qualifications are, while not entirely baseless, somewhat overstated. While accident reconstruction appears to be Mr Lum's bread-and-butter work, his

curriculum vitae does indicate that he has in fact undertaken work relating to assessment of damage to vehicles. Further, Mr Lum had had over twenty years' experience in the field. Given his long working experience, his explanation that he had worked "hand-in-hand" with assessors and had picked up the relevant experience in assessment is a reasonable one. On that basis, the Judge was, in our view, entitled not to take issue with Mr Lum's qualifications.

15 Further, the assessment of expert evidence does not rest on the expert's qualifications alone. It is also important to look at the *reasons* offered by the expert in giving his or her opinion. In this case, Mr Lum did explain why he took the view that some parts of the Machine were not completely destroyed and could be reused. In fairness to Nambu, Mr Lum's opinion may be contrasted with that of Nambu's expert, Mr Robert Khan ("Mr Khan"), in that Mr Khan opined that the Machine could not be repaired. Mr Lum's opinion also differed from the FM Quotation, in that Mr Lum found several items listed in the FM Quotation to be unjustified. However, Mr Khan's opinion (that the Machine was damaged beyond repair) was *directly contradicted by* the FM Quotation (and other quotations from another manufacturer, Dream Heavy, stating that the Machine could be repaired in Singapore). To that extent, we find that the Judge was entitled to prefer Mr Lum's opinion over Mr Khan's. In so far as the FM Quotation was concerned, we note that no one from FM was called to give evidence. Coupling this point with our discussion in the preceding paragraph on how Mr Lum's qualifications cannot be said to be unacceptable, we see no reason to disturb the Judge's findings in this regard.

16 For completeness, we note that Mr Magintharan also sought to undermine Mr Lum's credibility as an expert in relation to two further and related questions, which were (a) whether the Machine could be repaired at all and (b) if so, whether the Machine could be repaired in Singapore. We are of

the view that these two questions are easily addressed by the FM Quotation and the quotations from Dream Heavy. The former expressly contemplated that the Machine could be repaired, while the latter expressly outlined that the Machine could be repaired in Singapore. Mr Magintharan's attack on Mr Lum's credibility was thus strongest in relation to the question as to whether the Judge was entitled to deduct items from the FM Quotations on the basis of *Mr Lum's expert opinion* only, but did not go much further than that.

Whether Nambu could have retrieved the Machine with effect from 3 January 2017 onwards

17 By way of furnishing the requisite context with regard to this particular issue, the Judge found that Nambu could have retrieved the Machine (which had been towed to UBTS's yard immediately after the fire for storage) from UBTS as early as 3 January 2017, when UBTS sent Nambu an email asking it to take back the Machine ("the 3 January Email").

18 On appeal, Mr Magintharan argued that the Judge was wrong to have relied on the 3 January Email. He pointed out that UBTS's insurer's investigations only ended on 20 October 2017, when the loss insurer contacted the parties to reject Nambu's claim. Up until that time, the investigations required the Machine to be with UBTS, as evidenced by the fact that examinations of the Machine at UBTS's yard were conducted in February 2017, *after* the 3 January Email had been sent out. In response, Mr Lim argued that there was no reason why the Machine needed to be with UBTS for the purposes of insurance investigations. Investigations were conducted at UBTS's yard after the 3 January Email was sent out simply because Nambu refused to take the Machine back.

19 We agree with Mr Lim. Mr Magintharan did not point us to any evidence showing that the Machine *needed* to be with UBTS for the purpose of the insurance investigations. There was an email from Nambu to UBTS dated 23 January 2017, in which Nambu expressed its unhappiness that UBTS was asking it to take back the Machine, and demanded that UBTS repair the same ("the 23 January Email"). Mr Magintharan reasoned that since UBTS did not follow-up with its demand that Nambu take back the Machine after the 23 January Email, this must mean that UBTS had accepted that it needed the Machine for the purpose of insurance investigations. We do not agree. Silence in this context was merely equivocal, and UBTS's failure to follow up with its demand could have been explained by other reasons. For instance, UBTS might not have been keen on taking the risk of Nambu making good on its threat of a suit should UBTS insist that Nambu take back the Machine, especially since at that point, the loss insurer's verdict had not been issued. We thus consider that the Judge was entitled to not give any weight to the 23 January Email.

20 Being unable to show that UBTS needed possession of the Machine for the purposes of the insurance investigations, Mr Magintharan's case collapsed. That the Machine was subsequently examined at UBTS's yard in February 2017 was, as Mr Lim argued and as the Judge found (see the GD at [141]), simply because it was convenient to do so. In summary, the Judge was entitled to rely on the 3 January Email to find that Nambu could, and should, have retrieved the Machine thereafter.

Conclusion

21 In conclusion, we see nothing which warrants the intervention of this court. The Judge had examined the evidence below, as well as the parties'

arguments, in meticulous detail in arriving at his decision. We therefore dismiss the appeal in CA 2.

UBTS's appeal

22 We now turn to UBTS's appeal in CA 16. UBTS argued that the SLA T&Cs were incorporated into the Contract by virtue of *either* reasonable notice *or* a previous course of dealing (we emphasise that reasonable notice and previous course of dealing are *distinct* grounds of incorporation (see the High Court decision of *Wartsila Singapore Pte Ltd v Lau Yew Chong and another suit* [2017] 5 SLR 268 at [105])). In both situations, UBTS relied on the invoices and Delivery Orders ("DOs") that had been issued by Nambu to UBTS for the various contracts entered into between them, and which contained express references to the SLA T&Cs. These invoices and DOs were always issued *after* a contract between Nambu and UBTS had been orally concluded (*ie*, the invoices and DOs would be issued *post-contract formation*). This was the case for other contracts concluded prior to the Contract, as well as for the Contract itself.

23 In our view, UBTS's arguments did not, with respect, take them very far. The argument based on reasonable notice, as we pointed out during the oral hearing and as was rightly conceded by Mr Lim, is a non-starter since the invoices and DOs were issued only *after* the relevant contracts were entered into (see also [24] and [29] below). The argument on course of dealing, in turn, requires this court to undertake an *extension* of the present law, which we do not think is justified as a matter of principle.

An important general point

24 An important general point ought to be noted at the outset: if, generally speaking, it can be proven that the document containing the particular term sought to be incorporated into the contract is intended merely as a receipt and not as a contractual document as such, that term will *not* be incorporated into the contract. Its contents will be irrelevant simply because, *ex hypothesi*, they have no contractual force. This particular issue is usually linked to the more specific issue as to the *time* at which the contract is entered into. If it can be demonstrated that the term concerned is contained in a document that has been brought to the notice of the party seeking to rely upon it only *after* the contract has been concluded, then that term would clearly *not* be incorporated into the contract as it is contained in a *non*-contractual document (see, for example, the oft-cited English Court of Appeal decisions of *Chapelton v Barry Urban District Council* [1940] 1 KB 532 and *Olley v Marlborough Court Limited* [1949] 1 KB 532; see also *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2019) ("*Chitty*") at para 13-010 and A J C Hoggett, "Changing a Bargain by Confirming It" (1970) 33 MLR 518 ("*Hoggett*") at 521).

25 It should also be noted, however, that timing may not be crucial in at least two specific situations. This is where there has been a previous course of dealing between the contracting parties and also where the contracting parties intend to supplement an otherwise bare agreement with more detailed terms subsequently. However, even in these situations, a point of the first importance ought to be noted: the terms sought to be incorporated via these methods *must* possess the requisite *contractual* force to begin with.

26 In so far as a previous course of dealing is concerned, a particular term can be incorporated in a particular contract if it can be shown that there has been a previous course of dealing in which the term has figured. It must follow, as a matter of first principles as well as general logic, that the term has figured during those previous occasions as *part of the contracts concerned* (see *Chitty* at para 13-011). Put simply, the term can be incorporated in the present contract because it had been *a* ***contractual*** *term* on those previous occasions. This is also only logical, for it would be both senseless and unprincipled to permit a term that had *no* contractual force during those *previous* occasions to be incorporated as a term *with* contractual force in the *present* contract. In other words, the court would be prepared to incorporate that term in the present contract (thus conferring upon that term ***contractual*** *effect*) *despite* the fact that it was not otherwise incorporated (for example, by way of signature or reasonable notice) *precisely because* the contracting parties had *consistently* ***contracted*** with reference to that term on previous occasions in the past. While there is at least one decision that suggests otherwise, that decision is (as we shall explain below at [55]) not supported by either principle or precedent. More generally, whether or not there has been a consistent course of dealing is, of course, a fact-sensitive exercise – for example, how many dealings would be required before there could be said to have been a course of dealing as well as whether or not a particular course of dealing has indeed been consistent.

27 We also note, at this juncture, that it has been argued in a leading textbook that "a course of dealing is simply an alternative basis upon which a party may meet the requirement of having given reasonable *notice* and for that it is not necessary that the other party should have discovered or read the term in question" [emphasis in original] (see Edwin Peel, Treitel on the Law of Contract (Sweet & Maxwell, 15th Ed, 2020) ("*Treitel*") at para 6-014)). Whilst

the doctrine of reasonable notice may overlap (especially from a factual perspective) with that of a course of dealing, the two doctrines are conceptually distinct (see also [22] above). Nevertheless, *even if* we were to accept that these doctrines are coterminous with each other, the argument from contractual effect referred to in the preceding paragraph would apply in an *a fortiori* manner simply because, as already noted (at [24] above), the doctrine of reasonable notice applies, *ex hypothesi*, at or before the time the contract is entered into.

28 More recently (and turning to the second situation), this court has permitted contracting parties to supplement an otherwise bare agreement with more detailed terms subsequently – a process that has been described as incorporation "by reference" (see generally Andrew Phang and Goh Yihan, *International Encylopaedia of Laws: Contracts (Singapore)* (Wolters Kluwer, 2021) at paras 1355–1360). It is important, however, to note that the further documentation must have been *objectively intended* to supplement the otherwise impugned contract, *ie*, that it must be of ***contractual*** *effect*. The leading decision is that of this court in *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*") – to which we shall have occasion to return later in this judgment.

Reasonable notice

The requirement of timing

29 We begin with UBTS's argument on reasonable notice. We pointed out to Mr Lim during oral submissions that the invoice and DO *for the Contract* were issued only ***after*** the Machine had already been damaged (see the GD at [33]). By that particular point in time, the doctrine of reasonable notice no longer applied (see [24] above). Mr Lim then rightly conceded that the argument on reasonable notice could not pass legal muster. While there were other

invoices and DOs issued *before* the Contract was entered into, such invoices and DOs concerned *prior* and *unrelated* contracts. Therefore, while these previous invoices and DOs *may* be relevant for the doctrine of *previous course of dealing*, they *cannot* be relevant in so far as the doctrine of *reasonable notice* is concerned.

An exception to the requirement of timing – incorporation by reference

30 For completeness, and as mentioned above (see [28] above), an exception to the rule on timing concerns situations of incorporation *by reference*, where contracting parties intended to supplement an otherwise bare agreement with more detailed terms subsequently. We note, though, that this mode of incorporation is, by its very nature, conceptually distinct from other modes such as incorporation by way of reasonable notice or by a course of dealing.

31 One example of a case of incorporation by reference is *R1 International*. In *R1 International*, the buyer bought rubber from the seller in five separate transactions. The seller would send email confirmations following completion of negotiations to set out the basic terms agreed, and would subsequently send contract notes containing more detailed terms. While the buyer did not countersign the contract notes, it did accept delivery and paid for the rubber without protest. A dispute eventually occurred in relation to the second transaction. The seller sought to bring the dispute to arbitration by relying on the contract note issued for the second transaction, which referred to industry standard terms, including an arbitration clause. This court agreed that the terms in the contract note, including the arbitration clause, were incorporated in the second transaction. This was because the parties had contemplated that the basic

terms, as contained in the email confirmation, would be *supplemented* by further terms as found in the contract note.

32 Mr Lim rightly conceded during the oral hearing that he was not relying on *R1 International*. In *R1 International*, three factors combined to lead to the inference that the parties must have intended that the basic terms in the email confirmation be supplemented by further *standard* terms. First, there was evidence to show that it was the practice in the international rubber commodities to deal on standard terms, and the buyer was a known player in the rubber trade. Second, the second transaction was too complicated to have been governed by the terms in the email confirmation alone. Third, the buyer sought to impose its own set of standard terms over the terms proposed by the seller, which must have referred to the industry standard terms.

33 These important features are not present in this appeal. First, Nambu is not a known player in the local freight industry. In fact, UBTS accepts that Nambu was only incorporated in 2015, when its parent company decided to expand its operation in Singapore. Mr Park also gave evidence that prior to engaging UBTS, Nambu had not engaged any other freight forwarders in Singapore. Considering Nambu's lack of familiarity with the market, Nambu should not be expected to know that the Contract (or other contracts for freight services) would be governed by standard terms. Second, the subject matter of the Contract cannot be said to be so complicated that Nambu must have known that further standard terms would be needed. Third, there is *no* evidence that the question of standard terms *ever* surfaced in the oral dealings between Nambu and UBTS, which led to the conclusion of the various contracts for freight services.

34 In summary, the argument on reasonable notice fails because notice, if any, was given *after* the Contract was entered into. It also could not be said that UBTS and Nambu intended to supplement their oral Contract with further terms after the conclusion of the same.

Course of dealing

35 We turn to the course of dealing argument, which was UBTS's main legal plank in its case in CA 16. In particular, Mr Lim argued that the invoices and DOs issued for the transactions *prior* and *unrelated* to the Contract amounted to a previous course of dealing from which the SLA T&Cs could be incorporated. Our difficulty with this argument, as we explained to Mr Lim, was that the Judge had found (see the GD at [55] and [58]) that these invoices and DOs were *not* meant to have *contractual* effect. On that basis, as a matter of principle, it is difficult to see how these ***non***-*contractual* documents could ever amount to a course of dealing sufficient to justify the incorporation of the SLA T&Cs (see [26] above).

36 Faced with this hurdle, Mr Lim proffered two responses during oral argument. First, he argued that these past invoices and DOs *did* indeed have contractual effect. Second, and in any event, he argued that it was *not* necessary for the invoices and DOs to have contractual effect in order for a previous course of dealing to be successfully relied upon.

37 The first argument can be summarily dismissed. This was a bare assertion raised by Mr Lim only in the midst of the oral hearing before us *after* the question concerned was put to him. *Prior* to our question, Mr Lim actually accepted the Judge's finding that the invoices and DOs were of no contractual effect. Further, and in any event, UBTS did not challenge the Judge's findings

that these past invoices and DOs had no contractual effect, either in its Appellant's Case or Skeletal Submissions. To that extent, there is simply no basis on which to challenge the Judge's factual findings.

38 The second argument concerns Mr Lim's reliance on the Court of Appeal of Western Australia decision of *La Rosa v Nudrill Pty Ltd* [2013] WASCA 18 ("*La Rosa*") for the proposition that ***non****-contractual* documents are capable of giving rise to a course of dealing sufficient to incorporate contractual terms. We therefore propose to analyse *La Rosa* in some detail.

The position in La Rosa should not be followed

39 In *La Rosa*, the appellant carried on a cartage business and had previously transported equipment for the respondent. The cartage contracts between them were orally concluded. The only documents issued for the transactions were invoices that the appellant would send to the respondent following the completion of the work. The invoices contained an exclusion clause. In August 2001, the parties, again orally, concluded a cartage contract involving a drill rig. An accident occurred during transportation and caused damage to the drill rig; the appellant sought to rely on the exclusion clause.

40 The appellant's argument was rejected by the Court of Appeal of Western Australia. Of interest are the following *obiter* observations of McLure P (at [43]) and of Buss JA (at [71]), which were relied on by Mr Lim in the present appeal:

> [Per McLure P] A review of all the cases reveals that there is no single test for the incorporation of a term into a contract based on prior dealings. However, it is clear that we are not here talking about implied terms in fact … or a term implied as a matter of trade custom or usage. The question is whether an express term is incorporated into a contract as a result of an inference arising from the prior conduct of the parties as a

> whole. Moreover, *it is not essential in a prior dealing case that the term in issue must have been incorporated in a previous contract between the parties, whether by a contractual document or otherwise. …*
>
> …
>
> [*Per* Buss JA] It is not an essential pre-condition to the incorporation of a term by a previous course of dealings that:
>
> > (a) any document containing the relevant term have been sent or given to the party sought to be bound at or prior to the formation of each of the contracts (or one or more of them) constituting the previous course of dealings; or
> >
> > (b) *the relevant term have* [*sic*] *been incorporated in at least one of the contracts constituting the previous course of dealings*.
>
> [emphasis added]

41 McLure P and Buss JA were both of the view that the term sought to be incorporated by way of a previous course of dealing *need **not** have been incorporated in a previous **contract***. Put another way, the document containing such a term need *not* have been of *contractual* effect, even though it was literally part of a process that ultimately resulted in a contract between the parties, *ie*, a ***non**-contractual document **may** give rise to a course of dealing with contractual effect.*

42 We respectfully decline to follow the view of McLure P and Buss JA, for three reasons. First, as a matter of principle, we do not see how *non-contractual* documents can give rise to a course of dealing. In addition to the reasons set out above (at [26]), the common law of contract is based on the reasonable objective expectations of parties (see also Stephen Kapnoullas, "Prior Dealings and the 'Reasonable Objective Expectation' of Contracting Parties" (1996) 10 JCL 173 at 178–179). In this regard, permitting non-contractual documents to give rise to a course of dealing would amount to allowing terms which have been consistently treated by parties as ***non**-binding*

to take on contractual effect. No reasonable parties would, in our view, countenance such a drastic shift in their legal relationship. If anything, the fact that certain terms have been consistently *non-binding* would engender the expectation that such terms would ***remain non**-binding* for the contract in question.

43 Second, as a matter of authority, the position taken by McLure P and Buss JA is *at odds with* other decisions which had been discussed in *La Rosa* itself.

44 The first decision of interest, relied on by both McLure P and Buss JA, is *Rinaldi & Patroni Pty Ltd v Precision Mouldings Pty Ltd* [1986] WAR 131 ("*Rinaldi*"). In *Rinaldi*, the respondent boat builder agreed orally with the first appellant to transport a fishing vessel to Melbourne at an agreed price. The fishing vessel was damaged. On nine or 10 previous occasions, similar contracts had been entered into between the respondent and first appellant. The practice was to agree orally by telephone on the cartage of a boat. The cost was worked out subsequently and entered by the first appellant's driver in a book of cart notes, which was carbonised and prepared in triplicate for signature by the consignee. The third copy of the cart note, after costing, would be stapled to an invoice and sent to the respondent. On the face of each cart note appeared the words "All goods are accepted subject to conditions on reverse", and on the back of each cart note were printed conditions, one of which was an exclusion clause. It was accepted by the parties that the respondent did not have actual knowledge of the exclusion clause.

45 The Supreme Court of Western Australia (Full Court) held that the cart notes were *not* contractual documents and that the terms printed on the back

were not incorporated into the contract by a course of dealing. Burt CJ remarked as follows (at 135 and 138):

> In argument it was conceded that there was no basis upon which the term could be implied in the contract of carriage first entered into which on the facts would appear to be a contract entered into on 30 April 1980 - cart note 13385. The submission is that at some unspecified time thereafter, the oral agreements should be held to have been made upon the terms of the "conditions" and it should be so held by reason of "a course of dealing" between the parties. The proposition expressed in general terms is that if it would appear that the parties had over a period of time been conducting business upon terms excluding liability then it should be held that on the occasion in question they contracted upon that basis.
>
> The difficulty in making good that proposition upon the facts of this case is evident enough. Once it is conceded that the use of the cart notes in the way in which they were used could not sustain a finding that the contract first entered into contained as a term cl 5 of the conditions, how does one then establish the relevant course of business which leads to the conclusion that without the respondent being fixed with actual knowledge of that term it is to be implied in subsequent contracts. …
>
> …
>
> … a course of dealing cannot be established on the facts of the instant case. On the facts of this case, as it seems to me, to contend that the conditions ought to be implied for that reason begs the question to be asked because you must first find an earlier contract or contracts containing that term …

46 Burt CJ also referred, in the course of his reasoning, to the Supreme Court of Victoria (Full Court) decision of *DJ Hill & Co Pty Ltd v Walter H Wright Pty Ltd* [1971] VR 749 ("*Hill*"). In *Hill*, the defendant agreed to carry machinery for the plaintiff. An oral contract was made between the parties. The machinery was damaged in transit as a result of the defendant's negligence. On delivery of the machinery, the defendant's representative gave a document to the plaintiff's representative for signature. The plaintiff's representative signed it. The document was in form a request for the carriage of goods "subject to the terms and conditions endorsed on the back". These

conditions included an exemption clause. Approximately 10 prior transactions had been entered into between the parties during the 10-month period preceding the transaction in question. On each of these prior occasions a similar document had been presented by the defendant's representative to the plaintiff's representative for signature upon delivery of the goods. The documents were signed. Some of the plaintiff's employees knew that there were terms and conditions on the back of the documents, but there was no evidence that any representative of the plaintiff had ever read or knew of the contents of the terms and conditions. It was held that the terms and conditions endorsed on the back of the documents were not incorporated into the contract in question by a previous course of dealing. Burt CJ discussed *Hill* as follows (see *Rinaldi* at 138):

> The reasoning in Hill's case as I understand it is to be found at p 753 of the report. What is there being said is that in every case, as in the instant case, the document containing the exemption clause was presented for signature after the contract had been performed and that it was not a contractual document in that the respondent reasonably regarded it, being presented as it was, as being nothing more than an acknowledgment by it of the delivery of the goods. In that respect, I think that that case is on all fours with the present case. Indeed, that case on its facts would seem to me to be considerably stronger in favour of the importation of the condition. The documents in Hill's case were at least in terms contractual, each taking the form of a request to carry the goods and to provide the crane "subject to the terms and conditions endorsed on the back hereof" and each was after the event signed by an employee of the respondent. In the instant case the cart notes do not take the form of a request to carry the goods. They take the form of a request to accept delivery: "Please receive from Rinaldi & Patroni Pty Ltd." The cart note in its terms is a request by the first appellant to the consignee to accept delivery of the goods. It is not a request to it by the consignor to carry the goods. The reasoning of the Full Court in Hill's case proceeds to point out that as the documents signed on the earlier occasions were not contractual documents there was
>
> > "no evidence of any course of prior dealing in which the parties mutually regarded the terms and conditions

> endorsed on the back of the form as part of the contract between them."
>
> This is the difficulty which I referred to earlier in these reasons.

47 It is clear from Burt CJ's analysis that the cart notes did not give rise to a course of dealing *precisely* because these cart notes were ***non****-contractual documents*. The case discussed by Burt CJ, *Hill*, adopts the *same* reasoning. To that extent, these authorities *support* the proposition that *non*-contractual documents do *not* give rise to a course of dealing, and *not* the proposition advanced by McLure P and Buss JA.

48 In fairness, McLure P and Buss JA's *obiter* observations could be interpreted to mean that non-contractual documents would *generally* not give rise to a course of dealing, unless there are exceptional circumstances. For instance, Buss JA placed heavy emphasis on Burt CJ's references in *Rinaldi* to "the facts of this case" (*ie*, that Burt CJ was not laying down an *absolute* rule that non-contractual documents cannot give rise to a course of dealing). However, neither McLure P nor Buss JA explained what these exceptional circumstances might be that would warrant a departure from the general rule. Further, it remains the case that McLure P and Buss JA's *obiter* observations (*ie*, that non-contractual documents ***can*** give rise to a course of dealing) are ***not*** supported by ***any*** authority (in that they cited *no* cases where *non*-contractual documents ***did*** indeed give rise to a course of dealing).

49 The second decision of interest, relied on by McLure P, is the Supreme Court of Western Australia (Full Court) decision of *Brambles Holdings Ltd v WMC Engineering Services Pty Ltd* [1999] WASCA 1010 ("*Brambles*"). In that case, mining equipment was damaged by the negligence of the appellant in the course of transporting it to the respondent's mining operations at Leinster. The issue was whether the appellant was entitled to the benefit of an exclusion clause

printed on the reverse side of the consignment note for the journey. At no time prior to the loss was the consignment note seen by any person outside the appellant, who relied on a regular course of dealing between it and the freight forwarder engaged by the respondent. Anderson J (with whom Kennedy and Wallwork JJ agreed) stated that what had to be proved was "a consistent course of dealing, the only reasonable inference from which is that the party to be charged was 'evincing an acceptance of, and a readiness to be bound by, the printed conditions …'". The consignment notes in that case were *not* contractual documents but were *post*-contractual in nature, their purpose being to provide proof of performance of the contract of carriage to which they related and to support the invoice rendered in respect of that work. The Full Court in *Brambles* upheld the trial judge's conclusion that the freight forwarder had not by its conduct evinced an acceptance of and a readiness to be bound by the exclusion clause.

50 Again, the position taken in *Brambles* was that ***non**-contractual documents* do ***not*** give rise to a course of dealing. In fact, McLure P also cited *Pondcil Pty Ltd v Tropical Reef Shipyard Pty Ltd* [1994] FCA 1206 and *Remath Investments No 6 Pty Ltd v Chanel (Australia) Pty Ltd* [1992] NSWCA 208. Both these decisions also involved post-contractual (*ie*, ***non**-contractual*) documents which were held ***not*** to have been incorporated into contracts as a result of a previous course of dealing between the parties.

51 In contrast, a case discussed by both McLure P and Buss JA where there *was* a course of dealing concerned ***contractual** documents*. This is the third decision of interest, that of the House of Lords in *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 ("*Kendall*"). In *Kendall*, an issue arose between the defendant ("SAPPA") and a third-party supplier ("Grimsdale") arising out of three oral contracts for the supply of compounded

meal by Grimsdale to SAPPA. There had been frequent prior transactions between the parties involving three to four deals a month over the preceding three years. The practice had been that Grimsdale would send a contract note to SAPPA either later on the day of an oral contract or SAPPA would expect to receive such a contract note on the following day. On the back of the contract notes there were terms and conditions, including an exclusion clause. SAPPA knew that there were terms and conditions on the back of the contract notes though it had not read them. The House of Lords agreed with the English Court of Appeal that the terms and conditions, including the exclusion clause, formed part of the oral agreements.

52 Significantly, Lord Morris and Lord Pearce observed as follows (at 90 and 113, respectively):

> [*Per* Lord Morris] Over the course of a long period prior to the three oral contracts which are now in question SAPPA knew that when Grimsdale sold they did so on the terms that they had continuously made known to SAPPA. In these circumstances it is reasonable to hold that when SAPPA placed an order to buy they did so on the basis and with the knowledge that an acceptance of the order by Grimsdale and their agreement to sell would be on the terms and conditions set out on their contract notes …
>
> …
>
> [*Per* Lord Pearce] The question, therefore, is not what SAPPA themselves thought or knew about the matter but what they should be taken as representing to Grimsdale about it or leading Grimsdale to believe. The only reasonable inference from the regular course of dealing over so long a period is that SAPPA were evincing an acceptance of, and a readiness to be bound by, the printed conditions of whose existence they were well aware although they had not troubled to read them. Thus the general conditions became part of the oral contract. …

Put simply, Lord Morris and Lord Pearce took the view that the contract notes had ***contractual*** *effect*. This much was recognised by McLure P, who remarked (*La Rosa* at [39]) that "Brinsden J noted in *Rinaldi* (at 146) that the evidence in

Kendall established that the contract note was *intended to be contractual* to the knowledge of the purchasing party [*ie*, SAPPA]" [emphasis added].

53 Third, McLure P and Buss JA's observations are directly at odds with their actual decisions in *La Rosa* itself and are, therefore, as already alluded to above, *obiter dicta* at best. In this regard, we refer to the following findings of McLure P and Buss JA (at [47] and [88], respectively, of *La Rosa*):

> [*Per* McLure P] … the facts in this case do not support an inference that the exclusion clause was incorporated in the cartage contract as a result of the prior dealings between the parties. I will assume for present purposes that the dealings between all the various entities can be taken into account. The invoices were not a 'contractual document' within either the narrow or wider meaning of the expression. In each case the invoice was provided to the respondent for services already supplied pursuant to a prior contract. The purpose of the invoices was to secure payment for those services. The receipt of the invoices by the respondent in all the circumstances is not sufficient to justify an inference of an acceptance by the respondent of, and readiness to be bound by, the terms on the reverse of the invoices. Nor is it sufficient notice to the respondent of the terms on which the appellant would do business in the future.
>
> …
>
> [*Per* Buss JA] … each invoice was sent to the respondent after the contract had been performed, and in the circumstances a reasonable person, in the respondent's position, would have been entitled to regard the invoice as merely a request or demand for payment of the contract price, and would not have expected to find contractual terms in relation to the completed work in the invoice.

54 It is clear from the reasoning of both McLure P and Buss JA that the invoices in that case did *not* amount to a course of dealing *precisely* because the invoices were *non-contractual documents*. Again, McLure P and Buss JA could be interpreted as stating that there are exceptions to this general rule (see [48] above). With respect, however, there are no authorities to this effect, nor can we think of any reason in principle why such exceptions should exist. Put simply,

the observations by the learned judges are *obiter dicta* that are, with great respect, not undergirded by either the requisite case law or arguments from first principles.

55 For the aforementioned reasons (see [39]–[54] above), we respectfully decline to follow the position advocated in *obiter* in *La Rosa*. In our view, as a matter of both principle and authority, *non-contractual documents* ***cannot*** give rise to a course of dealing. This categorical rule, in our view, is consistent with principle and authority. This rule also has the benefits of avoiding unnecessary litigation, whilst promoting greater certainty (inasmuch as contracting parties would be dissuaded from arguing that there are *exceptional circumstances* warranting reliance on *non*-contractual documents). It is for this reason that Mr Lim's argument on course of dealing fails. Even assuming that Nambu's representative had notice of the invoices and DOs, there was no reason for the representative to expect these invoices and DOs to be binding, either for the *very contracts for which they were issued*, or for the *Contract* itself.

56 For completeness, we also find unpersuasive Mr Lim's attempt to distinguish the present case from the High Court decision of *Huationg Contractor Pte Ltd v Choon Lai Kuen (trading as Yishun Trading Towing Service)* [2020] SGHC 129 ("*Huationg*"). *Huationg* similarly involved a situation where the defendant transporter damaged a vehicle during transportation. The plaintiff had engaged the defendant for transportation services for some time. After each transaction, work orders would be issued by the defendant to the plaintiff. The defendant argued that the liability clauses in the work orders were incorporated into the contract between the parties. The court dismissed this argument. The work orders were found to be mere "operational documents" evidencing the work done, and not documents which "sought to establish the terms of the contract itself" (at [35]). The court also

found (at [45]) that the dealings between the parties suffered from "ambiguity", in that "it was not clear if [the plaintiff] had accepted the liability clauses as terms of the contract when it had previous received the work orders".

57 In our view, the court in *Huationg* was influenced by the fact that the work orders were ***non****-contractual documents*, leading to the conclusion that the liability clauses therein were clearly of *no* contractual effect. This explains the court's observation that there was "ambiguity" in the dealing between the parties in relation to the liability clauses, which ambiguity was fatal to the defendant's case on incorporation. Again, if the parties never treated the work orders as contractually binding, there was no reason why a reasonable party in the position of the plaintiff would have expected the terms contained in the work orders to suddenly be clothed with contractual effect.

58 Mr Lim sought to distinguish *Huationg* on the basis that the High Court was *not* asked to consider whether it was always necessary for the terms which were being sought to be incorporated to have been referred to in a contractual document. This argument does not take Mr Lim very far. *Huationg* remains a case where ***non****-contractual documents* were found to *not* give rise to a course of dealing. It is true that the High Court did not say that non-contractual documents can ***never*** give rise to a course of dealing, but the onus rested on Mr Lim to locate a case which supported the proposition that it was still possible for a course of dealing to arise from a *non*-contractual document. In this regard, the only case relied located by Mr Lim was *La Rosa*, which, as we have explained above (at [38]–[55]), should not be followed.

59 We note also that the High Court in *Huationg* referred to this court's decision in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar*"), where a course of dealing was found to

have been effective in incorporating an exclusive jurisdiction clause. In *Vinmar*, this court found that an exclusive jurisdiction clause was incorporated in the contract between the parties, on the basis that four prior contracts entered into between the parties all included the exclusive jurisdiction clause. It suffices for the purposes of this appeal to note that in *Vinmar*, the exclusive jurisdiction clause *constituted express* ***terms*** *of the previous contracts, and thus were of* ***contractual*** *effect* (at [10]).

Circle Freight is distinguishable from the present case

60 In the course of oral arguments, Mr Lim also relied on the English Court of Appeal decision of *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427 ("*Circle Freight*"). Mr Lim argued that the facts of *Circle Freight* are analogous to those of the present case. In *Circle Freight*, the course of dealing consisted of eleven contracts in the previous six months. On each occasion the contract had been made orally by telephone, but the invoice for the carriage charges sent at a later date stated that all business was transacted by the carrier under the current conditions of the Institute of Freight Forwarders ("IFF"), a copy of which was available on request. A copy was never requested. The consignor's managing director accepted that he knew that carriers by road often dealt on standard terms which addressed questions of risk of loss or damage, but said that he had not noticed the reference to the IFF conditions in the invoices sent after each of the contracts had been concluded. The English Court of Appeal held that the IFF conditions were incorporated into the contract. Taylor LJ noted (at 433) that the consignor's managing director knew that some terms applied and that forwarding agents might impose terms which would frequently deal with risk, but never asked for a copy of the terms. In addition, he said that the terms were not particularly onerous or unusual.

61 At the outset, we note that it is not entirely clear what the basis of incorporation in *Circle Freight* was. Taylor LJ held (at 433) that the consignor had reasonable notice of the standard terms because of the previous course of conduct between the parties (*ie*, both bases of incorporation appear to have been conflated). Bingham LJ analysed the case through the lens of reasonable notice (at 435). Subsequent cases also appear to have treated *Circle Freight* as a case on reasonable notice (see, for example, *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC) at [42] and *Hamad M Aldrees and another v Rotex Europe Ltd* [2019] EWHC 574 (TCC) at [168]). To that extent, in so far as *Circle Freight* is a case on reasonable notice, Mr Lim would not be able to derive much assistance from it.

62 Even assuming that *Circle Freight* was a case relating to a course of dealing, we are of the view that the facts of *Circle Freight* are distinguishable from those of the current appeal. In *Circle Freight*, contracts between the parties, including the contract in question, were concluded orally. Importantly, the consignor's managing director knew that some terms applied and that forwarding agents might impose terms which would frequently deal with risk. In other words, a reasonable person in the shoes of the consignor's director *would have expected that the oral contract would be supplemented by further terms*. In that context, the invoices served to *supplement* the oral contracts, which explained why they sufficed as a course of dealing between the parties. Put differently, the invoices in *Circle Freight* were treated as supplementing the oral contracts and thus had *contractual effect*, while the invoices and DOs in the present case do *not* have contractual effect.

Trade practice as an alternative to course of dealing

63 For completeness, we note also that the doctrine of previous course of dealing is closely related to the doctrine of trade practice (see Sandra Booysen, "Trade practices, contract doctrine and consumer protection" [2021] LMCLQ 316 ("*Booysen*") at p 317 and *Hoggett* at pp 520–521). Put succinctly, the doctrine of course of dealing is more personal to the contracting parties, while the doctrine of trade practice relates to the industry at large (see *Booysen* at p 317). Significantly, a party may succeed in establishing one but fail on the other. We refer, in particular, to the English Court of Appeal decision of *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] 1 QB 303 ("*British Crane Hire*"), where the parties concerned were plant hirers who were therefore in the trade (of hiring out plants) and who were of equal bargaining power. Lord Denning MR was of the view, in fact, that the case did not involve a course of dealing as such, observing as follows (at 311):

> I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the plaintiffs' usual conditions.

64 In the same decision, Sir Eric Sachs was of the view that (at 312) "[t]he business realities of the situation are plain" and distinguished the situation in that particular case from that which obtained in the English Court of Appeal decision of *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71 inasmuch as in *that* case, the plaintiff and defendants were from "wholly different walks of life" (see *British Crane Hire* at 313). *Treitel* (at para 6-016), in fact, classifies the situation in *British Crane Hire* as one pertaining to "trade custom or usage", a classification which is, in our view, a reasonable inference from the various judgments in the case itself, particularly that of Sir Eric Sachs – although we also note that the learned author's approach was from the perspective of

implication of terms as compared to the more general incorporation of a term along the lines suggested by *Booysen*.

65 During oral submissions, Mr Lim accepted that *British Crane Hire* would not be a case from which he could derive much assistance. We agree. UBTS accepts that Nambu was only incorporated in 2015, when its parent company decided to expand its operation in Singapore. Further, Mr Park also gave evidence that prior to engaging UBTS, Nambu had not engaged any other freight forwarder in Singapore. In the circumstances, it could not be argued that Nambu could be said to be in the same industry, or had roughly the same bargaining power, as UBTS.

Conclusion

66 In conclusion, we dismiss both the appeals in CA 2 and CA 16. In so far as the issue of costs is concerned, we note that Nambu's appeal (in CA 2) is more involved than UBTS's appeal (in CA 16), as Nambu raised more issues in its appeal. Keeping in mind the relative weights of the cross-appeals, we order that Nambu pay UBTS costs of $25,000 (all-in). There will be the usual consequential orders.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

S Magintharan and Liew Boon Kwee James (Essex LLC) for the appellant in CA/CA 2/2021 and respondent in CA/CA 16/2021;
Yee Mun Howe Gerald and Jonathan Lim Shi Cao (Premier Law LLC) for the respondent in CA/CA 2/2021 and appellant in CA/CA 16/2021.
