IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 3

Singapore International Commercial Court Suit No 4 of 2019

Between

Singapore Airlines Ltd

… *Plaintiff*

And

CSDS Aircraft Sales & Leasing Inc

… *Defendant*

And Between

CSDS Aircraft Sales & Leasing Inc

… *Plaintiff in counterclaim*

And

Singapore Airlines Ltd

… *Defendant in counterclaim*

JUDGMENT

[Contract] — [Breach]
[Contract] — [Remedies] — [Specific performance]

[Contract] — [Termination]

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v
CSDS Aircraft Sales & Leasing Inc

[2021] SGHC(I) 3

Singapore International Commercial Court — Suit No 4 of 2019
Jeremy Lionel Cooke IJ
24, 25 May 2021

14 June 2021 Judgment reserved.

Jeremy Lionel Cooke IJ:

Introduction

1 On 19 September 2018, the plaintiff and the defendant ("SIA" and "CSDS" respectively) entered into an Aircraft Purchase Agreement ("the Agreement") for the sale of one Boeing B777-212 aircraft bearing Manufacturer's Serial Number 30875 ("the Aircraft"). By cl 1, SIA was to sell the Aircraft to CSDS "on the Delivery Date (as defined herein)". Delivery was to take place in Singapore. The purchase price was US$6.5m and the Agreement recorded that a deposit had been paid of US$250,000. SIA is, self-evidently, based in Singapore whilst CSDS is based in California. The sale was of the airframe only with the engines to be used to ferry the Aircraft to Sanford Airport

in Florida but for those engines then to be shipped back to Singapore by CSDS at SIA's expense.

2 By cl 11 of the Agreement, the governing law was that of England with a non-exclusive jurisdiction clause in favour of the English Courts but an express term providing that nothing in the Agreement would prevent either party from bringing suit in any other appropriate jurisdiction.

3 In circumstances described more fully later, completion of the Agreement never occurred, with each party blaming the other and the Agreement came to an end. Proceedings were begun by SIA in the High Court of Singapore with a transfer to the Singapore International Commercial Court on 13 August 2019. Claims and counterclaims arise in relation to the way in which the Agreement came to an end, it being the case of each party that the other was in repudiatory breach which had been accepted.

4 By an order of 4 June 2020, the court ordered that all questions of English law be determined on the basis of submissions, either oral or written or both, instead of proof and gave permission for Edmund King QC and Roderick Martin SC to appear, represent and make submissions thereon. By a further order of 12 January 2021, the court gave such permission to Stephen Houseman QC in place of Edmund King QC as a result of the latter's unfortunate illness.

5 On 16 July 2020, the court ordered that the trial be bifurcated, with issues of liability to be heard separately from, and prior to, the hearing of any assessment of damages on SIA' s claim or CSDS' counterclaims, as the case might be. This judgment is therefore limited to the question of liability in

relation to the failure to complete the sale/purchase and the termination of the Agreement.

The history prior to the Agreement

6 Because at the relevant times there was a 15 or 16 hour time difference between Singapore where SIA was based and California where CSDS was based, emails sometimes appear with different dates on them. Save as expressly stated, this judgment has adopted the Singapore time and date, setting out particular times in California where the difference could be thought to matter.

7 On 19 July 2018, responding to a request from SIA for proposals, CSDS made a written offer to purchase the Aircraft subject to the execution of a definitive Aircraft Purchase Agreement in the seller's standard form and subject to a Technical Inspection of the Aircraft and its records, with a right to reject the Aircraft within three days of such inspection. Closing and delivery were to occur on or around 15 August 2018, but no later than 30 September 2018. On 20 July 2018, SIA notified CSDS of its in-principle acceptance of the offer. The price was agreed at US$6.5m and an initial deposit of US$250,000 was paid on 27 July 2018.

8 Inspection took place on 3 August 2018 and on expression of satisfaction by CSDS, SIA recorded the discussion that the parties would work towards "Purchase Agreement and Technical Acceptance on 15 [August] 18" and "[f]erry to Sanford Airport, Florida, USA on week of 20 [August] 18". On 8 August 2018, SIA sent CSDS a draft Aircraft Purchase Agreement for review, saying that the lead time for Flight Operations to prepare a ferry flight from Singapore was 10–14 days.

9 Thereafter there was a history of delay on the part of CSDS in failing to provide any comments on the draft Aircraft Purchase Agreement and Technical Acceptance. On 24 August 2018, the President of CSDS, Mr Benedict Sirimanne ("Mr Sirimanne"), informed SIA that it was impossible to complete the Technical Acceptance before the ferry flight which was then planned for 28 August 2018. He stated that if the schedule could not be delayed, he might have to withdraw CSDS' offer. A telephone conversation took place that day in which it was agreed that the scheduled Technical Acceptance was planned for 15 September 2018, the delivery date would be 15 September 2018 and the ferry flight would take place thereafter for which five working days lead time was then required.

10 By 31 August 2018, the parties had agreed on the draft form of the Agreement, but on 4 September 2018, CSDS informed SIA that it wished to add a "closing mechanism" into the agreement and provided some details the next day. CSDS wanted the agreement to be executed by both parties on or before 10 September 2018, for the ferry date to be fixed for a date on or before 15 September 2018 but before the aircraft set off on the ferry flight, SIA was to send the Original Bill of Sale, undated to AEROtitle, as escrow agents. CSDS was to place the balance of the purchase price in escrow and when the aircraft landed at Sanford Airport, it was to be de-registered by SIA and the balance of the purchase price released by the escrow agent. Discussions continued without any agreement being reached, with CSDS then asking for the Original Bill of Sale to be sent to AEROtitle as soon the Agreement was executed with instructions that it was to be released to CSDS on confirmation of payment to SIA.

11 On 11 September 2018, SIA emailed Ms Meagan Vincent ("Ms Vincent") of AEROtitle to say that SIA and CSDS were on the point of

concluding an aircraft purchase agreement and understood that AEROtitle had been appointed the escrow agent by CSDS. The email went on to say that SIA had been informed by CSDS that, upon execution of the agreement and the Technical Acceptance Certificate the signed but undated Original Bill of Sale should be sent to AEROtitle for it to hold in escrow until confirmation was given by SIA that it could be dated and released to the Federal Aviation Administration for purposes of registering the interests of the buyer. The receipt of the email was acknowledged (and copied to CSDS) with a request for a copy of the executed sale agreement when available, following which AEROtitle would provide a checklist of items required for completion of the closing which would assure the parties of the escrow agent's understanding of the escrow arrangements. SIA informed CSDS that it had begun to engage with the escrow agents and sent CSDS, on 13 September 2018, a scanned copy of SIA's executed Agreement, a draft of the Technical Acceptance Exception Letter, an updated Ferry Flight Agreement and a Certificate of Insurance for the aircraft which, if acceptable to CSDS, would then be processed by SIA's insurance department. The email attached a planned timeline chart which provided for execution of the Agreement on 13 September 2018, the Technical Acceptance Exception Letter on 14 September 2018, the undated Bill of Sale to be sent to the escrow agent on the same day and the invoice for the balance of the purchase price to be issued on 17 September 2018. Confirmation of transfer of funds for the purchase, together with confirmation of arrangements for the ferry date, were to be given between 17 and 19 September 2018, the undated Bill of Sale was to reach the escrow agent by 21 September 2018, the ferry flight to take place on 25/26 September 2018 and the Bill of Sale to be released by the escrow agent to CSDS on 27/28 September 2018.

12 Delay occurred whilst discussions continued with SIA insisting on the same sequence of steps, with confirmation of the payment of the purchase price prior to the undated Bill of Sale reaching the escrow agent and release to the purchaser. In essence, SIA was requiring the confirmation of funds transfer before arranging the ferry flight to Florida.

13 On 19 September 2018, Mr Sirimanne sent the executed Agreement to SIA, expressing gratitude for SIA's understanding of the delay that CSDS had requested for the closing and delivery and proposing a new schedule, saying that it was "[b]ased on your assurance that you will try to make the new schedule work". That new schedule involved a further delay of two weeks which presented logistical problems and the need for a further approval from the Civil Aviation Authority of Singapore ("CAAS"). The email exchanges recorded CSDS' confirmation that the end date for the ferry flight was fixed for 10 October 2018 and would not slide further.

The terms of the Agreement

14 The Agreement provided, so far as material:

> **1. Sale**
>
> Upon and subject to the terms and conditions of this Agreement, Seller will sell and Buyer will buy the Aircraft on the Delivery Date (as defined herein).
>
> **2. Purchase Price**
>
> 2.1 The purchase price for the Aircraft shall be … US$6,500,000 (the "Purchase Price"). Seller acknowledges that Buyer has paid a deposit of US $250,000 on 27 July 2018 ("Deposit"). Having completed the inspection of the Aircraft, and upon the execution of this Agreement, this Deposit shall be non-refundable. This deposit shall be applied to the Purchase Price. The Purchase Price for the Aircraft less the deposit shall be payable on the Delivery Date (as defined herein).

2.2 The Deposit shall be refunded in full, and without interest, to Buyer within five (5) business days of the earliest to occur of: (i) the Termination Date (as defined herein) … and (ii) termination of this Agreement in accordance with Clause 16.2.

…

3. Delivery

3.1 Seller will deliver, sell, transfer and convey with full title guarantee all of their respective rights, title and interests in and to the Aircraft to Buyer (the "Delivery") on 15 September 2018 (the "Delivery Date") or on a mutually agreed date, , [*sic*] at Singapore Changi Airport ("Delivery Location"). If agreed, the Termination Date of this Delivery will be 30 September 2018.

3.2 On the Delivery Date, Seller will deliver to Buyer a Warranty Bill of Sale (the "Bill of Sale") for the Aircraft in the form set forth in Schedule 3 attached hereto …

3.3 On the Delivery Date, Buyer will deliver to Seller the Aircraft Delivery Receipt (the "Delivery Receipt") evidencing its acceptance of the Aircraft in the form set forth in Schedule 4 attached hereto.

…

3.5 Seller will ferry Aircraft to Sanford Airport Florida, USA ("Final Destination") after Buyer has taken title to the Aircraft. … All costs incurred for the ferry flight shall be borne by the Seller in accordance with the Ferry Flight Agreement to be entered into between Seller and Buyer.

…

4. Conditions Precedent

4.1 The obligations of Seller under Section 3 above shall be subject to the prior fulfilment (or waiver or deferral with the agreement in writing of Seller) of the following conditions;

(a) Buyer shall have paid the balance of the Purchase Price or provided evidence that funds in that amount for the Aircraft have been released;

…

(d) Seller shall have received evidence that Buyer has appointed a process agent in England and that such process agent has agreed to act as agent;

…

4.2 The obligations of Buyer under Sections 2 and 3 above shall be subject to the prior fulfilment (or waiver or deferral with the agreement writing of Buyer) of the following conditions:

…

(b) Buyer shall have received copies of all Bills of Sale related to the Aircraft starting with the delivery of the Aircraft from the original manufacturer.

…

15. Further Provisions

…

15.2 Amendments, Modifications and Waivers. No amendments to the Agreement shall be effective unless in writing signed by each of the parties. No term or provision of this Agreement may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against which the enforcement of the change, waiver, discharge or termination is sought.

…

15.5 Time of the Essence. Time shall be of the essence of this Agreement.

…

15.8 Entire Agreement. This Agreement contains the entire understanding of the parties with respect to the purchase and sale of the Aircraft, and no warranties, representations or undertakings have been made by either party except as expressly set forth herein. Any other previous oral or written communications, representations, agreements or understanding between Seller and Buyer are no longer of any force and are superseded and replaced in their entirety by the provisions of this Agreement.

…

16 EVENTS OF DEFAULT

16.1 Each of the following events will constitute an Event of Default and a repudiatory breach of this Agreement by the affected party:

(a) Non-payment: such party fails to make any payment when required to make such payment under the terms and provisions of this agreement and such failure continues for five (5) business days after notice from the aggrieved party; or

> …
>
> (f) Other Breach: it fails to comply with any other provision of this Agreement or any other transaction document and, if such failure is in the opinion of the aggrieved party capable of remedy, such failure continues for five (5) business days after notice from the aggrieved party;
>
> …
>
> 16.2 Remedies of the aggrieved party. If an Event of Default occurs, the aggrieved party may, at its option, (and without prejudice to any of its other rights whether under this Agreement or at law), at any time while such Event of Default is continuing accept such repudiation and by notice to the other party and with immediate effect terminate this Agreement whereupon all rights of the breaching party under this Agreement shall cease, save that the Seller shall refund the Deposit to the Buyer in accordance with Clause 2.2 above.
>
> [emphasis in original]

The effect of the Agreement

15 As will immediately be appreciated, by reason of the delay in execution of the Agreement, the Delivery Date of 15 September 2018 had already passed by the time that CSDS signed it. There is no theoretical reason why parties should not agree to fulfil an obligation by a date that has already expired and it was not contended that the Agreement was void for uncertainty because of the absence of an agreed delivery date. There was such a specified date but in practice, various steps had to be taken as precursors to delivery which meant that delivery would have to take place in the future on a mutually agreed date. CSDS says that no such date was ever agreed. The last sentence of cl 3.1 refers to the "Termination Date of this Delivery (an undefined term) as 30 September 2018, 'if agreed'". There was no such agreement to a Termination Date, as is common ground between the parties, but the parties had agreed that time was to be "of the essence" and with a specified delivery date which had passed it is clear (and borne out by the exchanges between the parties), that it was envisaged that delivery would take place in the near future.

16 What is plain from the terms of the Agreement, and from cl 4.1(a) thereof, is that, notwithstanding the prior discussion on the "closing mechanism", there was no obligation on SIA to deliver the Aircraft in Singapore until CSDS had paid the balance of the purchase price of US$6.25m or had provided evidence that funds in that amount for the purchase of the Aircraft had been released. For practical purposes in the context of the escrow arrangements that both parties anticipated, this meant that the funds had to be available before SIA delivered an Original Bill of Sale to CSDS by authorising its release by the escrow agent, AEROtitle, to CSDS. CSDS was entitled to receive copies of Bills of Sale related to the Aircraft, beginning with the delivery of the Aircraft from the manufacturer but it is not suggested that there was any failure on SIA's part in this respect.

17 On the timelines put forward by SIA immediately prior to the execution of the Agreement by CSDS, SIA would send the signed but undated Bill of Sale to AEROtitle before or when issuing an invoice to CSDS for the balance of the purchase price which would be met by CSDS. The confirmation by CSDS of the transfer of funds and the commencement of arrangements for the Ferry Flight were to coincide in the period 17 to 19 September 2018 before the undated Bill of Sale would reach AEROtitle a few days later. The Ferry Flight would follow, bearing in mind the lead time needed for arrangements to be made following the transfer of funds to AEROtitle and the Bill of Sale would be dated by AEROtitle and released to CSDS only following the arrival of the Aircraft in Florida. This arrangement would give both parties security in relation to the delivery because notification of the sending of the undated Original Bill of Sale to AEROtitle would be given to CSDS with a copy of the air waybill by which it was sent before it transferred funds, whilst the transfer of the funds would take place before delivery and before SIA incurred the expenditure of the Ferry

Flight to Florida. AEROtitle would be in a position to date the Bill of Sale having received confirmation of the transfer of funds.

18 In practice, therefore all depended on the date when CSDS was to produce the funds in accordance with cl 4.1(a) of the Agreement which was a precondition to delivery which would occur with the transmission by the escrow agent of the Bill of Sale. This had to come first whilst cl 2.1 provided for the balance of the price to be payable on the Delivery Date. If the Warranty Bill of Sale was in the hands of the escrow agent, delivery could immediately follow the receipt of funds from CSDS, with the agent dating it appropriately. As events turned out, agreement to the date of transmission and confirmation of release of the funds was to constitute agreement to the date of delivery.

The events following the conclusion of the Agreement

19 At the end of the day, the documentary exchanges between the parties largely speak for themselves. Whilst I had the benefit of a Joint Affidavit of Evidence-in-chief ("AEIC") from Mr Cheong Khin Cheong ("Mr Cheong") and Mr Nokman bin Kamari ("Mr Kamari") of SIA (who held the positions of SIA Senior Manager of Aircraft Sales and SIA Assistant Manager of Aircraft Sales respectively) and affidavits from Mr Sirimanne, the president of the CSDS and Ms Lara Shapiro ("Ms Shapiro"), its external legal attorney, they largely recited the documents and evidenced the arrangements referred to in them. The parties agreed that the matter could proceed on the basis of their affidavit evidence without cross-examination and this was incorporated in a court order of 16 July 2020. A recurrent feature of the exchanges between the parties was the constant chasers sent by SIA to CSDS without response, followed by telephone calls with Mr Sirimanne which are then recorded in further emails sent by Mr Kamari of SIA, referring to arrangements agreed between them. Whilst it is

CSDS' case that no delivery date was ever agreed, the documents reveal CSDS agreeing a series of dates for payment or release of funds and confirmation, with SIA.

20 There were two conditions precedent to SIA's obligation to deliver the Aircraft which were never met, namely: (i) the payment of the balance of the purchase price or confirmation of its release; and (ii) the appointment of a process agent in England. There was also delay in meeting some of the other conditions such as provision of evidence that all corporate actions had been taken which were necessary to authorise the transaction, but these two obligations were the critical contractual requirements that CSDS never met.

21 On 19 September 2018, Mr Sirimanne sought agreement to delay closing and delivery until 10 October 2018 and on confirmation sent the executed Agreement with an assurance that the conditions precedent would be met. On receipt of the executed Agreement from CSDS, SIA said that the conditions precedent were required on an urgent basis, that it would send out the undated Bill of Sale to AEROtitle, would start physical work on the Aircraft itself which would take seven days and asked CSDS to transfer the funds and confirm that the Ferry Flight Agreement and Insurance Certificate provided in draft were acceptable. The timeline envisaged the confirmation of funds as taking place between 20 and 26 September 2018 and latest by 28 September 2018, with the Bill of Sale being released by the escrow agent following the ferry flight on 9–10 October 2018. Having supplied the invoice between 21 and 29 September 2018, SIA reminded CSDS of its obligation to pay the balance of the purchase price and to appoint its process agent in England. On 20 September 2018, SIA had suggested ferry dates of 8–10 October 2018 on the basis of the Technical Acceptance Execution letter being dated on 20 September 2018, subject to the conditions precedent being satisfied. Confirmation of transfer of funds or

release had to be made by 28 September 2018 for ferry flight arrangements to be made for the dates suggested because of the 14 day lead time now required for obtaining approval for the flight from the CAAS. On 27 September 2018, Mr Sirimanne proposed a transfer of the funds on 5 October 2018 but SIA stated that, to allow for a ferry flight on 10 October 2018, the fund transfers had to be complete by the beginning of 3 October 2018 at the latest.

22 On 28 September 2018, Mr Kamari and Mr Sirimanne agreed, as recorded in an SIA email of that date that CSDS would send the executed Technical Acceptance and Exception letter that day and would arrange for the transfer of funds to reach SIA by 2 October 2018. The CAAS had approved the ferry arrangements for 10 October 2018 which meant that the programme had to be maintained. On 2 October 2018, however, no payment was made and CSDS requested a delay in the ferry arrangements until 15 October 2018 which required fresh approval from the CAAS. For this, CSDS had to confirm the dates of the fund transfer since SIA needed that some seven days before the ferry flight. On 3 October 2018, Mr Sirimanne, in an email, sought a further postponement beyond 15 October 2018 on the basis that the Avocet maintenance area at Sanford Airport was fully occupied. He said he did not anticipate further delays, but that, if this was acceptable, he would send the executed Technical Acceptance and transfer the funds to SIA's account no later than 10 October 2018. The same day, Mr Cheong, in an email, stated that SIA would do its best to obtain consent from CAAS to a shift in the ferry arrangements and reminded Mr Sirimanne that the balance of the price had to be received by 7 October 2018 latest.

23 CSDS provided the Technical Acceptance and Delivery Exceptions letter and agreed to transfer the balance of the funds on 8 October 2018, according to the record of the telephone conversation in Mr Kamari's email of

5 October 2018. The following day, Ms Shapiro said that the information about the process agent in England would be provided as soon as possible in response to Mr Kamari's email requesting information on this. Mr Kamari also reminded Mr Sirimanne that it would only be on receipt of the funds that SIA would reengage its Flight Operations department in relation to the ferry date and dispatch the undated Bill of Sale to AEROtitle. Both activities required seven days lead time. SIA was thus insisting, in accordance with the terms of the Agreement, that the precondition of payment or release of funds for the purchase be complied with before any delivery by means of a Warranty Bill of Sale through the escrow agent. At this stage, CSDS had failed to transfer funds on two agreed dates, namely 2 and 8 October 2018 and SIA was clearly troubled.

24 SIA's concern was reinforced as a result of WhatsApp exchanges on 8–9 October 2018 when, following a reminder on the need for transfer of funds, Mr Sirimanne stated that he had decided to pull out of the deal and did not like the pressure being put on him. He would send a letter to that effect and declined to discuss the matter on the telephone. Twenty minutes later, however, he sent an email referring to the "huge logistical burden" on him because of the need to move four aircraft in Ethiopia, but stating that he was still prepared to pursue the transaction if it was not done under extreme time pressure. In order to go ahead, he said that CSDS needed to make sure that they could accept the aircraft in Sanford or Opa Locka Airport and that the Original Bill of Sale had be in escrow with AEROtitle before any transfer of funds. Mr Sirimanne was demanding that the Warranty Bill of Sale be in AEROtitle's hands before he was prepared to put AEROtitle in funds, although there was no provision in the Agreement to this effect.

25 On 11 October 2018, Mr Kamari sent a scanned copy of the signed and un-dated Bill of Sale to CSDS, saying that arrangements had been made with

the courier to take the original to AEROtitle and that an air waybill would be provided so that CSDS could track it. That was a reversion to the position discussed at the time of the conclusion of the Agreement, albeit not in the Agreement itself. On 12 October 2018, a scanned copy of the signed and undated Bill of Sale was sent to both AEROtitle and Mr Sirimanne. The air waybill reference for the sending of the original to AEROtitle was given to both. At the same time, Mr Kamari recorded the contents of his telephone conversation with Mr Sirimanne in which he had said that the CAAS had required the ferry flight to be completed within seven days from 11 October 2018 but SIA had requested an additional five days from it because CSDS had not yet transferred funds or confirmed the airport destination. In consequence the deadline for the flight to be completed was now 23 October 2018. The email recorded that Mr Sirimanne had confirmed that the funds transfer would be effected the following day, 13 October 2018 and a WhatsApp conversation shows Mr Sirimanne saying that he would wire the funds that day. Agreement had been reached that SIA would send a copy of the undated signed Bill of Sale to CSDS and the original to the escrow agent whilst the funds would be transferred by CSDS.

26 By 15 October 2018, however, no funds had been transmitted, this being the third occasion upon which payment had been promised but not made. Mr Kamari asked for the status of the transfer of funds, stating that there were now only eight days left until the 23 October 2018 deadline for the flight. Mr Sirimanne's email response was to assure SIA that the transfer would be complete on Tuesday 16 October 2018 and that confirmation would be given once the transfer had been made. No confirmation was then received and on 17 October 2018, Mr Sirimanne, in a yet further email stated: "I know our comptroller sent the wire this morning. I don't have the confirmation but I will

get it to you in the morning. On the last wire we sent, it hit SIA account in 48 hours. So I am assuming the timing is the same. I should have the actual swift confirmation tomorrow. I will keep you posted." No funds were transferred, contrary to the fourth and fifth assurances given of payment on the dates in question. From the exchanges, as was apparent to SIA, Mr Sirimanne and CSDS were procrastinating and prevaricating, despite agreeing to transfer the funds and confirm the transfer.

27 On 18 October 2018, Ms Shapiro emailed SIA to say that the funds had been held up due to the problem of the Bill of Sale not being in escrow and the fact that CSDS did not have a letter from insurance stating that the loss payee would be CSDS if anything happened to the aircraft before delivery. In response, Mr Kamari's email stated that there had been agreement between SIA and Mr Sirimanne on 12 October 2018 that the balance of the purchase price would be made available on provision of a copy of the Bill of Sale and the air waybill details, both of which had been provided that day. There was therefore no basis for holding up the transfer of funds until AEROtitle received the Original Bill of Sale. As to the insurance, this was covered by cl 7 of the Ferry Flight Agreement and the draft Certificate of Insurance which had been provided as far back as 5 September 2018 but which had not been the subject of any comment by CSDS. The email expressed the dissatisfaction of SIA at these excuses for non-payment. Mr Kamari sought to speak to Mr Sirimanne but without success. Mr Sirimanne, in an email stated he would be back in the office following day and would send the remittance information.

28 On the following day, 19 October 2018, there was a telephone conversation between Mr Sirimanne, Mr Cheong and Mr Kamari, as recorded by Mr Kamari's email of that date. In that conversation Mr Sirimanne confirmed that fund transfers had yet to be made and that it was his "partner" who was now

demanding additional requirements before releasing funds. Mr Sirimanne assured them that he would advise his partner, complete the transfer and provide proof of remittance that night. The prior agreement to transfer funds against the sending of the Original Bill of Sale to AEROtitle and scanned copy to CSDS was confirmed. By the next morning however nothing had been received from CSDS about any progress in the transfer of funds. This was the sixth failure to make payment/confirm release of funds in accordance with the assurances given.

29 On 21 October 2018, Ms Shapiro again raised the question of the Bill of Sale asking if there was a reason for SIA not to provide it signed but undated in original form, which SIA had already set in motion with arrangements with a courier, though not actually effected. Mr Kamari responded on 22 October 2018 by referring to the agreement reached with Mr Sirimanne that upon confirmation of the transfer of the funds, the Original Bill of Sale would be sent to AEROtitle and reminding her that SIA had already provided a scanned copy of the undated and signed Bill of Sale to both CSDS and AEROtitle, with the air waybill reference for the original. Mr Kamari's email set out the history of delays on the part of CSDS in the face of chasers from SIA, recording that the issue over transfer of funds had been the subject of nine reminders and multiple assurances of payment, the latest being a promise that payment would be made on 19 October 2018 and confirmation of remittance provided on the following day. CSDS had requested changes in the ferry date and destination on numerous occasions, which had presented problems because of the lead time that was required to make the necessary arrangements for the flight after the precondition of transfer of funds had been satisfied. The funds transfer and the identification of the final ferry destination were both still outstanding.

30 It was in these circumstances that on 23 October 2018, SIA sent a Letter of Demand, referring to cll 2.1, 3.1 and 4.1(a) of the Agreement and to the reminders which had been sent about such payment and/or assurances given from 20 September through to 19 October 2018. Paragraphs 5 and 6 of that letter read as follows:

> 5. As a result of your failure to comply with the terms of the Purchase Agreement, SIA has incurred, and continues to incur, substantial loss and damage to date. We therefore require you to make payment of the Outstanding Sum of US $6,250,000 in accordance with the terms of the Purchase Agreement, immediately and in any event by **5 pm on Friday, 26 October 2018.**
>
> 6. **TAKE NOTICE** that if you fail and/or refuse to do so, we shall take such further steps as we may deem necessary to protect our rights and interests without further reference to you. In such event, we reserve our right to commence legal proceedings against you for recovery of the full measure of the loss and damage caused to SIA, including but not limited to the Outstanding Sum, interest on such amounts, as well as legal costs. [emphasis in original]

31 This led to an email from Ms Shapiro the same day saying that she was unclear what the problem was in putting the original signed undated Bills of Sale in escrow. She said, as was obvious that the escrow would not release the funds without holding the original signed, undated Bill of Sale in escrow, ignoring the terms of the Agreement that required payment or evidence of release of funds to be made as a precondition of any delivery of the Bill of Sale. In asking whether SIA would comply with "this reasonable and standard procedure which we have been requesting so that the transaction may be completed", as a lawyer she could only have been deliberately evading the issue. This was pointed out by Mr Kamari on the following day in an email which drew attention to the absence of any contractual requirement for SIA to deliver the Original Bill of Sale until CSDS had fulfilled the conditions precedent in cl 4.1 of the Agreement. He pointed out that no payment/release of funds had

been confirmed and no process agent in England had yet been appointed by CSDS. Copies of all Bills of Sales related to the aircraft had been supplied by SIA in accordance with cl 4.2(b).

32 On 25 October 2018, with the deadline of 5.00pm on 26 October 2018 approaching, Mr Kamari sought to reach out to CSDS in the hope of finding some resolution for the benefit of both parties but could only leave voicemail messages. At 8.39pm California time, Mr Sirimanne emailed to say that he understood SIA's position but asked:

> [W]hat harm would SIA suffer if the Original Bill of Sale was placed in escrow prior to the ferry flight? We still didnt [*sic*] get a proper explanation for that. This is the only sticking point. We are ready to perform as agreed but please comply with this one request. I would really appreciate it.

33 In my judgment, it is clear that Mr Sirimanne realised that he was not justified contractually in his demands but was seeking accommodation from SIA. The reason for this, as now advanced, is that the financing arrangements which CSDS were said to have made with GLG Capital Corp ("GLG") required two documents to be in the hands of the escrow agents before any funds would be produced for the purchase. The two documents in question were a signed purchase agreement and an Original Bill of Sale placed with an accepted escrow. Having agreed to the terms of the Agreement which provided for payment or evidence of release of funds as a precondition of delivery of the Aircraft and of any Original Bill of Sale by which that was to be effected, and having also agreed to the mechanism of transfer of funds contemporaneously with transmission of the Bill of Sale by SIA to the escrow agent (which necessarily meant that it would not arrive for some days) CSDS could not, on its own case, obtain finance to meet its obligations under the Agreement because

its financiers insisted on the escrow agent actually having the Bill of Sale in hand before provision of any funds.

34 In the afternoon of 26 October 2018 (Singapore time), Mr Cheong and Mr Kamari spoke to Mr Sirimanne on the telephone, the contents of which were recorded in an email at 5.23pm from Mr Kamari to all concerned, including Ms Vincent of AEROtitle. It was agreed that SIA would send out the Bills of Sale to AEROtitle that day and CSDS would transfer the funds that night, at the opening of the US day, with confirmation of such payment by close of business 26 October 2018 in the USA. The email attached the air waybill dated 26 October 2018 with the reference previously given, evidencing the sending of the undated Original Bill of Sale. It also requested confirmation of payment, in accordance with the agreement reached, of US$6.25m by the deadline of close of business 26 October 2018 in the USA. The email continued that if this was not fulfilled, para 6 of the demand letter would be enforced, repeating the last sentence of that paragraph.

35 The same email, under the heading "Dear Meagan", stated that, in addition, SIA would instruct AEROtitle to return the Bill of Sale on receipt if CSDS failed to provide the remittance confirmation by the deadline set out. Confirmation was sought from AEROtitle that, in that event, it would not release the undated Bill of sale and that it would post it back to SIA upon its instructions to do so. If, however, CSDS provided the remittance confirmation by the deadline, completion could proceed in accordance with the Agreement and the understanding previously reached.

36 The terms of this agreement are not disputed by Mr Sirimanne in his AEIC. He states that his financiers GLG had funds available as of 25 October 2018 but would not supply those funds without the two documents

which it required and exhibited a letter from GLG dated 14 January 2019, the authenticity of which was in issue, to that effect.

37 For current purposes the key issue is that CSDS agreed to transfer the purchase funds and supply confirmation of remittance by close of business on 26 October 2018 (California time) and failed to do so. Inherent in that agreement, was an agreement for delivery to take place once the funds had been provided to the escrow agents. The escrow agents were in receipt of the Bill of Sale which was in AEROtitle's hands by 31 October 2018, according to an email from Ms Vincent of that date.

38 In an email sent by Mr Kamari some 27 minutes after the expiry of the deadline imposed by his email of 26 October 2018 at 5.23pm Singapore time, referred to above, SIA stated that it had not received any report on a remittance from CSDS and as the agreed deadline had passed, it had no other choice but proceed with the next course of action in accordance with its letter of demand. In the same email AEROtitle was asked to return the Bill of Sale on receipt and to give confirmation that this would be done.

39 The response to that from Mr Sirimanne on 27 October 2018 was to say: "[w]e still do not have the Bill of sale in escrow. If it goes to escrow and Meagan confirms, we are good to close. If not you may proceed in any legal [a]venue you wish but please understand we will mount a counter claim. Have no doubt." The receipt of the Bill of Sale by the escrow agent was of course irrelevant in the context of the original understanding and the agreement reached on 26 October 2018 which was for it to be sent by SIA to the agent which would inevitably take time, as previous timeline charts had set out, whilst CSDS was to make payment at once and provide confirmation by the close of business that day. In a further email of the same date, Mr Sirimanne accused SIA of bad faith,

said he was "done talking to [them]" and that the matter would be settled in court.

40 On 29 October 2018 California time (3.23am on 30 October 2018 Singapore time), Ms Shapiro sent a letter by email giving "formal notice" that because SIA had refused and failed to provide the original signed but undated Bill of Sale to escrow, it had prevented CSDS from completing the purchase of the Aircraft. In consequence CSDS demanded the return of the US$250,000 deposit and stated that legal action would be commenced if it was not received within 72 hours. The Original Bill of Sale was received in fact and was held by AEROtitle as the escrow agent, as confirmed by an email of 31 October 2018 from Ms Vincent, having been sent on 26 October 2018 as evidenced by the air waybill, a copy of which had been supplied to both CSDS and AEROtitle.

41 The evidence of Mr Sirimanne, to which I have already referred, which exhibited the letter from GLG dated 14 January 2019 leads to the conclusion that no funds would have been produced to the escrow agent unless and until the Warranty Bill of Sale was in the hands of the agent and confirmation was given by the agent of that to the funder. Despite promising the provision of funds on 26 October 2018, CSDS was not therefore in a position to provide any funds prior to 31 October 2018 when the Original Bill of Sale reached the escrow agent. What is more, CSDS in the persons of Mr Sirimanne and Ms Shapiro must at all times have been aware of this, which explains the absence of any confirmation of remittance by the agreed deadline of 26 October 2018.

The effect of the exchanges prior to 31 October 2018

42 It is clear that CSDS never fulfilled the condition precedent of payment of the balance of the purchase price or provision of evidence that funds in that

amount had been released, quite apart from not fulfilling the condition precedent of appointment of a process agent in England. The obligation of SIA to deliver the Aircraft and the Bill of Sale therefore never arose. Regardless of all the efforts made to agree a closing mechanism and the understanding reached both at the time of conclusion of the Agreement and again on 26 October 2018 of the sending of an Original Bill of Sale to the Escrow Agent, evidenced by an air waybill, with prior or effectively contemporaneous transfer of funds and confirmation thereof, with a later ferry flight and delivery of the Bill of Sale, it was at all times a condition precedent which was never waived, that payment or evidence of release of sufficient funds for the purchase price was produced before delivery of the aircraft in Singapore, delivery of the Original Bill of Sale and ferrying of the Aircraft to Sanford.

43 No amendment or modification of the Agreement was made within the meaning of the first sentence of cl 15.2 because nothing appeared in writing which was signed by each of the parties. Nonetheless, Mr Kamari's email of 26 October 2018, timed at 5.23pm Singapore time provided a final deadline for satisfaction by CSDS of the condition precedent set out in cl 4.1(a) which the latter failed to meet. If CSDS had complied with that deadline then, subject to fulfilment of the other condition precedent of appointment of an English process agent, SIA would have been bound to complete the sale and doubtless would have done so.

44 The Purchase Price for the Aircraft, less the Deposit was, under cl 2.1 of the Agreement, to be payable on the Delivery Date (as defined therein). The condition precedent of payment or evidence of release of funds under cl 4.1 had, self-evidently, to be made prior to that. Unless it was made, delivery could not take place and the obligation either to pay or provide evidence of release of

funds to the escrow agent was fundamental to the sale and purchase going ahead.

45 Given the history of delay, prevarication and procrastination on the part of CSDS, in my judgment, CSDS were in repudiatory breach of the Agreement as at close of business on 26 October 2018 (California time) which gave rise, at common law, to the right of SIA to accept that repudiation as bringing the contract to an end, regardless of the contractual provisions of cl 16 of the Agreement.

46 It is also the case, however, that the failure, over an extended period of time, to comply with the condition precedent to delivery, in the context of the agreements, assurances or promises made of payment, would also amount to an Event of Default within clause 16.1 of the Agreement if continuing for five business days following a notice from the aggrieved party. SIA was bound to give notice, as the "aggrieved party" under cll 16.1(a) and/or (f) if alleging a breach in failing to make payment or nominate the process agent. No such notice was given in relation to the latter, but the Letter of Demand of 23 October 2018, in my judgment, complied with the notice requirement of the former sub-clause in complaining that payment had not been made, albeit setting a deadline for payment of three days only, rather than the five business days which were required to expire before such non-payment actually constituted an Event of Default. Nonetheless, when five business days had expired following the giving of that notice by the Letter of Demand, SIA would have been entitled under cl 16.2, as a matter of contract, whilst the Event of Default was still continuing, to accept the non-payment as a repudiation and give a notice of termination with immediate effect. I do not consider that the Letter of Demand which constituted a notice from an aggrieved party, was nullified by the renewed agreement of 26 October 2018 with the short additional period allowed for compliance before

the deadline that it imposed. All that the email timed at 5.23pm on 26 October 2018 did was to delay the start of the five business days, which therefore ran from the deadline of close of business that day in California so that the period expired at close of business California time on 2 November 2018 which was 8.00am Singapore time on 3 November 2018.

Events from 31 October 2018 onwards

47 The central arguments which were pursued before me all turned on the events in this period. The essential difficulty which SIA created for itself, in pursuing its claim for termination, was to institute proceedings in the Singapore High Court on 31 October 2018, in which it sought (*inter alia*) an order for specific performance. The Writ was endorsed with a Statement of Claim which pleaded that CSDS had failed and/or refused to make payment of the remainder of the purchase price or provide evidence that it had appointed a process agent in England, whilst SIA was at all times ready willing and able to fulfil its obligations under the Agreement. At paras 12 and 13, SIA claimed entitlement to specific performance of the Agreement and payment of the balance of the purchase price. Alternatively, by reason of CSDS' alleged breaches, SIA claimed damages. In the prayer for relief an order for specific performance was sought together with payment of US$6.25m with, in the alternative, damages to be assessed and interest on the unpaid purchase price. The exact terms of the Writ and Statement of Claim assumed some importance in the arguments of Counsel because it was said by CSDS that the service of these proceedings constituted an unequivocal waiver of past breaches and an election to affirm the Agreement. SIA said that there was nothing unequivocal about this, with the alternative claim for damages and that it was not an election for all time, in any event.

48 Before these proceedings had been served on CSDS, Ms Shapiro sent an email to SIA at 7.21am Singapore time on 1 November 2018 (4.21pm California time on 31 October 2018) stating: "CSDS is still willing to close this transaction provided that the time for closing is extended". This email recognised that there was a need for such an extension in the light of all that had gone before and the requirement of payment by the deadline of 26 October 2018. No payment was offered or made.

49 On the same day, at 8.25pm Singapore time on 1 November 2018, which was 5.25am California time, by way of response, Mr Cheong sent a letter by email to Ms Shapiro reiterating SIA's case that there was no basis for the claim that SIA was obliged to provide the original signed but undated Bill of Sale to the escrow agent at any time prior to CSDS' compliance with the condition precedent of payment of the outstanding balance of the purchase price or evidence of release of the funds in accordance with cl 4.1(a) of the Agreement.

(a) The critical part of the message is, however, to be found in para 7 where it was said that SIA was prepared to consider an extension of time for CSDS to complete the purchase of the Aircraft on condition that it agreed to the terms set out in that paragraph.

(b) The acceptance of those terms would supplement the Agreement. The offer was expressly only open for acceptance by 12.00pm on 2 November 2018 Singapore time which, I take to mean midday that day, which was the equivalent of 9.00pm on 1 November 2018 California time.

(c) The first and most important condition was that CSDS should pay the balance of the purchase price to SIA and deliver a swift payment

message (MT103) to SIA evidencing that payment had been made no later than 12.00pm on 2 November 2018 Singapore time, the same deadline as that set for acceptance of the offer.

(d) The other conditions largely related to other matters which were necessary for the purpose of completion but are of no concern for present purposes because there was no acceptance nor any payment or confirmation of payment by the deadline given which was effectively 15.5 hours after the time of the email on Thursday, 1 November 2018 (California time) which was a business day.

50 The Singapore proceedings were served on both Ms Shapiro and Mr Sirimanne during the course of Friday, 2 November 2018 (California time), at 11.50am and 1.13pm which is before the expiry of five business days from close of business US time on 26 October 2018.

51 It was within 16 minutes of service on her of the proceedings that Friday that Ms Shapiro emailed SIA saying that she had received the Writ of Summons and Statement of Claim. She responded: "CSDS will perform as per the court filing". That response was ambiguous. It could have meant that CSDS would perform the contract or would enter an appearance as required by the Writ and Statement of Claim. The Writ itself stated: "You must: 1. satisfy the claim; or 2. enter an appearance … within twenty-one (21) days after the service of this Writ on you". SIA's response was to say that it understood that this meant that CSDS would enter an appearance in the suit within the time stated in the Writ.

52 On Sunday, 4 November 2018, by solicitors' letter, SIA wrote to Ms Shapiro:

…

> 5. In breach of the Agreement, your client has, to date, failed and/or refused to pay the Outstanding Sum or any part thereof to our client, despite our client's repeated reminders, including by way of text messages, emails and letters on 20 September 2018, 2, 8, 11, 12, 15, 17, 18 and 23 October 2018, and 1 November 2080.
>
> 6. As a result of your client's breach, our client has incurred, and will continue to incur losses and expenses.
>
> …
>
> 9. In the circumstances, your client leaves our clients no choice but to accept your client's repudiation of the Agreement, and terminate the Agreement with immediate effect, pursuant to clause 16.2 of the Agreement.

53 Ms Shapiro's response was to ask whether new and additional demands were being made beyond that in the Writ and Statement of Claim and to say that "CSDS will perform, as I stated before, pursuant to the demand in the court papers. Per the court papers CSDS has 21 days from date of service to perform. Please explain your Nov. 4th letter in the context of the lawsuit." Whilst this can be read as CSDS saying that it had 21 days to perform the Agreement in accordance with the Writ, even this message was not clear and perhaps deliberately so, although it was asking whether SIA was seeking performance of the Agreement as the Statement of Claim had sought or was terminating the contract as the letter of 4 November 2018 stated. The more likely use of the word "perform" would, to an objective reader, suggest that Ms Shapiro was saying that CSDS would complete the transaction in 21 days, which she was arguing amounted to a contractual extension of time, which, of course, it did not.

54 On the same day, 5 November 2018, SIA amended the Writ of Summons and Statement of Claim to plead SIA's acceptance of CSDS' repudiatory breach, deleting its claim for specific performance and seeking damages alone on the basis of CSDS' repudiation in failing to pay the balance of the purchase

price. Before the amended pleadings were served on CSDS, Mr Sirimanne asked whether SIA wanted to enforce the contract as stated in the original Writ or wished to terminate the contract in accordance with the letter of 4 November 2018, thereby repeating Ms Shapiro's question.

55 Service of the amended proceedings took place at 2.05pm and 6.25pm California time on Monday, 5 November 2018 (6.05am and 10.25am Singapore time on 6 November 2018) on Ms Shapiro and Mr Sirimanne respectively. Ms Shapiro sent an email on 6 November 2018 to SIA complaining that the Bill of Sale had now been sent back by the escrow agent on SIA's instructions, effectively preventing the performance demanded in the original Writ which had, she said, given CSDS 21 days to perform the transaction. Complaint was then made at the termination of the agreement after filing a lawsuit demanding that CSDS complete it. The email continued:

> Please advise on what course of action your client has determined will be taken, be it (1) termination of the contract and return of CSDS deposit, or (2) completion of the transaction by immediate return of the Bill of Sale to the escrow agent, or (3) if your client really prefers to litigate this matter in [t]he courts.
>
> CSDS is ready and willing to engage with your client on any of these three bases. And, please note that at all times CSDS has been willing and able to complete the transaction but for your client's refusal to put the Bill of Sale in escrow which has, and now continues to prevent CSDS from completing the transaction.
>
> In short, it is all because of actions by your client that the transaction has been delayed, and now cannot be completed.

56 On the face of this email, CSDS was expressing uncertainty as to whether SIA wanted to go ahead with the transaction as per the claim for specific performance in the proceedings served on it on 3 November 2018 or was terminating the agreement as per the emailed letter of the following day. It

is clear that it was not treating SIA as having adopted one course or the other and was not relying on any statement or representation that either course had been chosen. But what CSDS was also saying was that it was not prepared to release the funds unless the Original Bill of Sale was in the escrow agent's hands. It was ready to complete if the Original Bill of Sale was sent back to the escrow agent but not to pay the balance of the price in advance of that. CSDS thus maintained its stance which was contrary to the Agreement. In my judgment there was not only a failure to comply with the Agreement in making payment or providing evidence that funds had been released to the escrow agent but a refusal to comply in the future save on terms for which the Agreement did not provide. There was thus a further repudiatory or renunciatory stance taken.

57 SIA's lawyers' response of 7 November 2018 to this made it plain that SIA had terminated the Agreement pursuant to cl 16.2 on 4 November 2018 and had amended the Singapore proceedings accordingly. It did not expressly use words which stated that it was now accepting any fresh breach but made it transparently clear that it was treating the Agreement as at an end by reason of CSDS' breach. In relying on that emailed letter, it is trite law that SIA is entitled to rely on anything that would justify that stance, even if not referred to in the letter itself. SIA was thus entitled to rely on the position adopted by Ms Shapiro in her letter of 6 November 2018.

58 On 13 December 2018, Ms Shapiro emailed SIA, demanding the return of the deposit and stating:

> Singapore Airlines failed to comply with the terms of the contract, resulting in a Notice of Default on October 29, 2018 wherein the contract was terminated and the deposit demanded to be returned. This Notice of Default was never cured and it was never rescinded. Therefore, the contract was terminated and the deposit refund was due as of October 29, 2018.
>
> …

> In November of 2018, Singapore Airlines filed a lawsuit in Singapore demanding specific performance of the contract and providing certain time for which the purchase could be completed. However, Singapore Airlines, upon receiving notice that CSDS would perform as demanded in the lawsuit, then filed an amended pleading wherein the specific performance was removed and only monetary damages alleged. With the amended pleading, the contract was effectively terminated by Singapore Airlines despite the earlier Notice of Default in October 2018 by CSDS. Singapore Airlines still failed to return the deposit even upon the clear and unambiguous cancelation of the contract by removing the demand for specific performance by CSDS.

59 The email went on say that it was SIA which had prevented performance by CSDS, and that SIA had acted in bad faith. The email threatened a claim in fraud if the deposit was not returned. What emerges from this email is CSDS was taking the position that the Agreement was at an end for two different reasons, both of which, it said, required the return of the deposit.

(a) First, CSDS said that its letter of 29 October 2018 was both a Notice of Default and a notice which had brought the contract to an end, based on the failure of SIA to provide the Original Bill of Sale to the escrow agent before CSDS released funds to it. CSDS was maintaining the stance it had adopted at various stages in the history of insisting on that sequence of events, contrary to the requirements of the Agreement, which provided that the payment or confirmation of release of funds was a condition precedent to delivery. Thus it was said that CSDS had terminated the contract on the basis of SIA's breach.

(b) Secondly CSDS was saying that SIA had brought the contract to an end on 5/6 November 2018 by service of the amended Writ and Statement of Claim, in which damages were sought for repudiatory breach.

60 Despite adopting this stance, CSDS had failed to enter any appearance to the Singapore action with the result that SIA obtained judgment against it in default of appearance on 28 November 2018 which was notified to CSDS by two letters on 14 December 2018 by which the judgment was served. This led to an application to set aside the judgment which was successful on the basis that CSDS had arguable defences to the claim. In para 45 of Ms Shapiro's affidavit of 22 January 2019, CSDS stated that it accepted SIA's repudiatory conduct as bringing the Agreement to an end.

The effect of events post 31 October 2018

61 The key issue here turns on the effect of SIA serving proceedings on CSDS which claimed specific performance or alternatively damages on 2/3 November 2018 and purporting to accept a repudiatory breach on 4 November 2018 before withdrawing the claim for specific performance on 5 November 2018 and serving the amended claim for damages for repudiation on 5/6 November 2018, with the exchanges which followed thereafter.

62 As appears from the dates set out above, I consider that SIA could not have terminated the Agreement under cl 16.1 without waiting for the expiry of five business days from the date of breach in failing to pay the outstanding purchase price or provide evidence of release of funds. The last extension of time given by SIA was on 26 October 2018 until close of business US time that day. The five business day period would not therefore have expired until US close of business on 2 November 2018, whereas the service of the original Singapore proceedings was effected at 11.50am California time on Ms Shapiro and at 1.13pm California time on Mr Sirimanne.

63 Before the letter of termination was sent on 4 November 2018 and before the expiry of the five business day period, therefore, SIA had, by serving the Writ and Statement of Claim on CSDS either told CSDS that it wanted performance of the Agreement, rather than termination, or at the very least had intimated that it wanted specific performance or damages for breach.

64 Whilst I consider that, as a matter of common law, CSDS was in repudiatory breach in failing to comply with the condition precedent in the three day period allowed by SIA's 23 October 2018 letter or the day allowed by its 26 October 2018 email, no termination notice, accepting such repudiatory conduct, was sent at that point. In the context of acceptance of repudiatory breach, before purporting to do on 4 November 2018, SIA had served proceedings which conveyed the message to CSDS that SIA was seeking performance of the contract, or damages in respect of breaches already committed. By that stage, although five business days had not expired since the 26 October 2018 deadline for payment, it was open to SIA to claim that there had been a repudiation of the Agreement and to accept that repudiation. Instead, SIA served the Writ and Statement of Claim which did not do so.

65 It is in this context that the decision of the Court of Appeal in *The Public Trustee v Pearlberg* [1940] 2 KB 1 ("*Pearlberg*") was relied on by CSDS. CSDS submitted that the effect of this decision was that SIA, in bringing and serving proceedings claiming specific performance, had unequivocally elected to affirm the Agreement, with the result that the alleged prior breaches of contract by CSDS were waived or spent. In consequence the termination letter sent by SIA on 4 November 2018 was not an effective letter under cl 16.2 of the Agreement nor an effective acceptance of CSDS' alleged repudiatory breaches. Instead, it was in itself repudiatory in purporting to terminate the Agreement. The insuperable difficulty with the latter point, in the context of CSDS'

counterclaim, is that at no point thereafter, until arguably on 13 December 2018 or 22 January 2019, was there any acceptance of any conduct of SIA as repudiatory and thereby bringing the Agreement to an end and by that stage, the Agreement had undoubtedly long since been terminated.

66 There was in my judgment, for the reasons which appear below, no unequivocal affirmation of the Agreement by reason of the service of proceedings on 2 November 2018 California time and no election which prevented SIA from relying on the further and continuing breaches of the Agreement by CSDS after withdrawing the claim for specific performance and serving on 5 November 2018, the amended Writ and Statement of Claim which claimed accepted repudiation and damages.

The relevant law

67 The decision in *Pearlberg* is concerned with the validity of a notice or notices of termination under a contract for the sale and purchase of land in circumstances where the vendor's executor had issued and served proceedings seeking specific performance of the contract and an appearance had been entered. The matter had proceeded no further in court but the proceedings had never been withdrawn. A notice was served on the purchaser making time of the essence and requiring completion of the purchase within 14 days, failing which the contract would be "rescinded" and the deposit forfeited. As expressed by Slesser LJ, the whole question at issue turned upon the validity of the notice to complete which was sent whilst proceedings for specific performance were still on foot. The appeal to the court arose on the counterclaim made by the defendant for return of the deposit. The court held that the vendor could not, in the circumstances, "rescind" the contract whilst the writ claiming specific performance was on the file and retain the deposit. Each of the members of the

Court of Appeal gave separate judgments and the reasoning of Goddard LJ differed from the other two members in speaking of the governing proposition as a rule of the common law, whilst the others spoke of it as a rule arising out of the practice of the Court of Chancery.

68 Whilst that might seem an abstruse distinction since the fusion of common law and equity, it is potentially of some significance because the correctness of the decision in its application to other contexts where there are no rules of practice relating to the relief which the court can grant, has been doubted. Nonetheless, all three members of the Court of Appeal were clear that if a writ was unequivocal in nature in seeking performance of a contract, it was not open to the party pursuing that remedy to issue a notice terminating the contract unless and until the proceedings seeking performance were discontinued. The basis of the rule was stated by Slesser LJ (at 9) to be, by reference to the practice of the Court of Chancery, that: "[y]ou cannot be acting on the contract and assuming it to exist, and at the same time exercising a right to put an end to it by rescinding it". There was discussion about the nature of the claim endorsed on the writ which was for specific performance and for damages in addition to or in substitution for such an order. Each of the members of the court concluded that the alternative damages claim was no more than a claim under the Chancery Amendment Act 1858 (UK) ("Lord Cairns' Act") and could not be understood as a claim made for damages for rescission/repudiation of the contract. Thus, on an objective reading of the writ, the plaintiff was seeking the discretionary exercise of the powers of the court in equity to grant specific performance or damages in lieu, if the court was not prepared to make the former order.

69 All three members of the court considered that the plaintiff could resile from that position by discontinuing the proceedings and, if the purchaser was

still at fault, accept the repudiation and forfeit the deposit. "The vendor may recover his power to rescind provided he gets rid of his bill" per Slesser LJ (at 11). What he could not do, whilst seeking the court's assistance for the performance of the contract, was, at the same time, to adopt the remedy of rescission that was otherwise open to him.

70 None of the three Lords Justices used the language of election or affirmation of contract (although Luxmoore LJ referred to and applied "affirmance" of the contract by bringing the claim for specific performance), but each, including Goddard LJ, used the language of acceptance of repudiation or refusal to accept it which resulted in keeping the contract alive. Each stated expressly that it was open to the innocent party to discontinue the claim for specific performance and , if the purchaser was still at fault, to accept the repudiation. The effect of the rule, as submitted by Mr Stephen Houseman QC for SIA, was procedural only and suspensory in nature because the inconsistency could be cured by abandoning the claim for specific performance in order to exercise other contractual rights. Only Luxmoore LJ, in an *obiter* passage, spoke of what might be required after the claim for specific performance was discontinued, if the innocent party wished then to accept the repudiation. He stated (at 19) that where, as in the case before him, time for completion was not of the essence of the contract, it was always open to a vendor to fix a reasonable time for completion and so make time of the essence. "[I]f the action for specific performance [was] discontinued, [a] right to fix a new time for completion under the contract must necessarily revive" (*Pearlberg* at 19).

71 The decision has been the subject of criticism in Commonwealth courts, including the High Court of Australia which has held it to be wrong, at least in the width of the proposition expressed. The decision was cited to the House of

Lords in *Johnson v Agnew* [1980] AC 367 ("*Johnson v Agnew*") but not specifically referred to in the judgment of Lord Wilberforce, with whom the other law lords agreed. The authorities relied on in the judgments in *Pearlberg* were, however, disapproved. Lord Wilberforce (at 392E onwards) stated five principles of law. The first was that, in a contract for the sale of land, after time had been made, or had become, of the essence, if the purchaser failed to complete, the vendor could either treat him as having repudiated the contract, accept the repudiation and proceed to claim damages for breach of the contract, with both parties being discharged from further performance, or he could seek an order from the court for specific performance. The second was that he could proceed by action for those remedies in the alternative but would have to elect which remedy to pursue at trial (he went on to dissipate the source of confusion engendered by the use of the word "rescission" as opposed to "repudiation", since the former carried connotations of "rescission *ab initio*", whereas the latter brought the contract to an end by discharging the parties from future obligations). The fifth proposition was that if an order for specific performance was made but not complied with, the vendor could either apply to the court for enforcement of that order or could apply to the court to dissolve the order and ask the court to put an end to the contract and recover damages. It followed automatically that the contract remained in force after an order for specific performance and a purchaser who failed to remedy or refused to comply was committing a repudiatory breach.

72 At 398E–H, Lord Wilberforce said:

> In my opinion, the argument based on irrevocable election … is unsound. Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity. It is easy to see that a party who has chosen to put an end to a contract by accepting the other party's repudiation cannot afterward seek specific performance. This is simply because the contract has

> gone – what is dead is dead. But it is no more difficult to agree that a party, who has chosen to seek specific performance, may quite well thereafter, if specific performance fails to be realised, say, "Very well, then the contract should be regarded as terminated." It is quite consistent with a decision provisionally to keep alive, to say, "Well, this is no use – let us now end the contract's life." A vendor who seeks (and gets) specific performance is merely electing for a course which may or may not lead to implementation of the contract – what he elects for is not eternal and unconditional affirmation, but a continuance of the contract under control of the court which control involves the power, in certain events, to terminate it. If he makes an election at all, he does so when he decides not to proceed under the order for specific performance, but ask the court to terminate the contract: see the judgment of Sir Wilfred Greene MR in *Austins of East Ham Ltd v Macey* [1941] Ch 338 quoted above. The fact is that the election argument proves too much. If it were correct it would deny the vendor not just the right to damages, but the right to "rescind" the contract, but there is no doubt that this right exists: what is in question is only the right on "rescission," to claim damages.

73 In *Ogle v Comboyuro Investments Pty Ltd* [1976] 9 ALR 309 ("*Ogle*"), the High Court of Australia referred to *Pearlberg* and Barwick CJ stated at 314:

> It is said that, because a suit for specific performance was on foot, there could be no claim for damages for repudiation and for this we were referred to some cases which depended upon procedures formerly obtaining in Chancery and to a case in the Court of Appeal: *Public Trustee v Pearlberg* … The cases in Chancery and the case in King's Bench, in which they were cited, were all cases which dealt with a contractual right to rescind in the sense of treating the contract as inoperative from its beginning. They were none of them cases which involved the termination of a contract resulting from an accepted repudiation. Further, the first three cases which are referred to in … *Pearlberg* … depend on the understandable rule of the Court of Chancery that no case at law antithetic to the basis of a suit in Chancery could be permitted. But once the suit in Chancery was disposed of, the reason for denying the cause of action at law disappeared. These procedural rules of Chancery really had no place in the judicature system. Thus, within that system, as in the Supreme Court of Queensland, a plaintiff could sue concurrently for specific performance and, in the alternative, for common law damages, ultimately choosing between the remedies. It cannot be said as of these times that a suit for specific performance and an alternative claim for

> damages for loss of bargain cannot co-exist in point of procedure.
>
> Consequently, I question the validity of the conclusions in … *Pearlberg*. But however that might be, I am unable to accept so much of the views of Luxmoore and Goddard LJJ as would carry over these rules and considerations of the Court of Chancery into the common law as to rescission of contracts upon accepted anticipatory breach.

74 Gibbs, Mason and Jacobs JJ stated at 321 that, if in Goddard LJ's judgment, he had meant that the action for specific performance had to be abandoned before the repudiation was accepted, it was too wide. It might be correct in cases where the fault of the purchaser was the original continuing breach but not in those cases where the purchaser committed a further breach of contract or evinced an intention never to complete and thus impliedly repudiated the whole contract. Legal rights were not affected at law by the mere existence of an action for specific performance, although they were affected by any election involved in its institution. In equity a party would not, in certain circumstances, have been allowed to rescind the contract if his action for specific performance was still pending and that was an understandable rule of equity, unaffected in principle by the introduction of the judicature system. In specific performance there had to be mutuality and so it was, in equity, inconsistent for a person to rescind the contract whilst continuing to seek specific performance so he might need to discontinue the action before terminating. "It may be that he would need to give the defendant a further chance to perform the contract by fixing a fresh date for completion if not to do so would mean that the defendant who had impliedly concurred in having the parties' rights determined in equity was thereby prejudiced and an inequitable advantage was thereby obtained at law by the plaintiff" (*Ogle* at 322).

75 The three held that the "rule" was not applicable to all cases where an action for specific performance was pending. "If a party has by his conduct

shown and continues to show an intention never to complete the contract, especially where his conduct by express act or by implication is not consistent with an intention to perform the contract pursuant to any judgment for specific performance, then it must be open to a vendor to rescind, even if there is current an action for specific performance. If there is a further breach of an essential term or some further conduct amounting to a repudiation while the action for specific performance is pending, the existence of the action will not then prevent the vendor electing to rescind but he will on such an election lose the right which he previously had to specific performance and will be limited to damages for the breach" (*Ogle* at 322).

76 Murphy J, at 324, said that there was no rule that a contract could not be rescinded for repudiation whilst a suit for specific performance was in existence. The conduct of the defendant in his defence or otherwise might entitle a plaintiff to rescind for repudiation. *Ogle* has been followed by the New Zealand Court of Appeal in *Chatfield v Jones* [1990] 3 NZLR 285 in allowing a plaintiff in a specific performance suit, the right to accept a further repudiation.

77 It is the element of inconsistency in a plaintiff's approach which has been the courts' concern. In *PW & Co v Milton Gates Investments Ltd* [2004] Ch 142, Neuberger J (as he then was) referred to *Pearlberg* and said that the effect of the decision was that, so long as a party had live proceedings seeking specific performance of a contract, he could not seek to rescind the contract. He went on to say that there was nothing in the reasoning in that case to prevent a party putting forward alternative cases and that once the specific performance action was discontinued, rescission could clearly be sought. In *Morley London Developments Limited v Rightside Properties Ltd* (1973) 231 EG [*Estates Gazette*] 235, the Court of Appeal confirmed a judgment in default of defence for damages to be assessed, when a writ had been issued claiming specific

performance and that had been abandoned. The plaintiff was free to choose the relief he wished to pursue and the only requirement was that, when the matter came to court he should make it plain what remedy he was seeking. Here, the respondents to the appeal had informed the court and the appellants' advisers of their decision to seek damages alone before doing so.

78 The standard textbooks cast doubt on the decision in *Pearlberg*. In *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018), it is not considered at all in the context of election, affirmation or acceptance of repudiation. In Gareth Jones and William Goodhart, *Specific Performance* (Butterworths, 2nd Ed, 1996), in an earlier edition the authors pointed to the decision in *Ogle* and stated that it was arguable that *Pearlberg* was inconsistent with the reasoning in *Johnson v Agnew*. In the most recent edition, they state that there is no good reason why the mere existence of the action for specific performance should invalidate the plaintiff's election to accept the repudiation and that the decision appears inconsistent with the reasoning in *Johnson v Agnew* and is almost certainly no longer good law. In *Halsbury's Laws of England* vol 95 (LexisNexis, 5th Ed, 2017) dealing with specific performance, at para 598, it is said that it has been held that where a claimant commenced the claim for specific performance claiming damages as an alternative relief but not rescission, he could not terminate the contract by accepting the repudiation without first discontinuing the claim. The relevant footnote refers to *Pearlberg*, states it was not followed in *Ogle* and contrasts it with *Johnson v Agnew*. In Ian Spry, *The Principles of Equitable Remedies* (Sweet & Maxwell, 9th Ed, 2014) at p 678, the author states that, where an action for specific performance has been commenced, it is unnecessary to commence new proceedings for damages and that it is sufficient to apply to the court to dissolve the order for specific performance and for permission to accept the defendant's repudiation, seeking

a declaration that the contract has been terminated with an award of damages to follow. In the relevant footnote, it is noted that the analysis of *Pearlberg* has been disapproved in *Ogle* and reference is again made to *Johnson v Agnew*.

79 It does not seem to me that there is any overriding substantive rule of law which arises out of the *Pearlberg* decision. The language of the judgments in that case show that it did, to an extent, turn upon questions of Chancery practice, if not principles applicable to the exercise of the court's jurisdiction in equity which, by virtue of Lord Cairns' Act enabled the court to grant damages in lieu of specific performance. In my judgment the matter must be approached in the context of general principles of election and affirmation of a contract where there has been a repudiatory breach, but with particular regard to the way in which the innocent party resorts to the court.

80 The relevant principles of election and affirmation were not in dispute as between the parties. Reference was made to the House of Lords decision in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 and the passage at 398–399 in the speech of Lord Goff. In speaking of repudiation by one party to the contract, he stated that the effect is that the other then has a choice whether to accept the repudiation and bring the contract to an end or to affirm it, thereby waiving or abandoning his right to terminate it. If, with knowledge of the facts giving rise to the repudiation, the other party to the contract acts (for example) in a manner consistent only with treating that contract as still alive, he is taken in law to have exercised an election to affirm the contract.

81 The most helpful decisions in this area, for current purposes, are to be found in the judgment at first instance of Thomas J, as he then was, in *Stocznia Gdanska SA v Latvian Shipping Co Latreefer Inc and Others* [2001] 1 Lloyd's

Rep 537 ("*Stocznia (HC)*") and of the Court of Appeal in the same case at [2002] 2 Lloyd's Rep 436 ("*Stocznia (CA)*"). The critical passages appear at [168]–[170] at first instance and in the judgment of Rix LJ at [87] and [95]–[96], including the reference to the decision of Jonathan Sumption QC (as he then was) in *Safehaven Investments Inc v Springbok Ltd* [1996] 71 P&CR [*Property, Planning and Compensation Reports*] 59 ("*Safehaven*").

82 At first instance, the Judge referred to the passage at 398 in the speech of Lord Wilberforce in *Johnson v Agnew* and to the judgment in *Safehaven*, where a seller had refused to accept the purchaser's repudiation and persisted in demanding performance. The purchaser refused to perform and the seller accepted the continued refusal as a repudiation, terminating the contract. The passage from the latter judgment (at [169]) upon which Mr Roderick Martin SC, counsel for CSDS, placed reliance, read thus:

> It does not follow from this analysis that the innocent party may in all cases change his mind after affirming the contract. If, after he had affirmed it, the repudiating party's conduct suggested that he proposed to perform after all, then the previous party's repudiation is spent. It has no further legal significance. If on the other hand, the repudiating party persists in his refusal to perform, the innocent party may later treat the contract as being at an end. The correct analysis in this case is not that the innocent party is terminating on account of the original repudiation and going back on his election to affirm. It is that he is treating the contract as being at an end on account of the continuing repudiation reflected in the other party's behaviour after the affirmation.

83 The Judge in *Stocznia (HC)* agreed with that analysis, stating that it fitted in with the ordinary conduct of business. An innocent party, faced with a repudiatory breach should be able to press for performance of continuing obligations by the party in breach, albeit taking the risk that, if the party in breach had a change of heart and performed his continuing obligations, the contract was then kept alive for both parties. The repudiation would then be

spent and the innocent party would have to perform his part of the contract and could not thereafter change his mind. If, however, there was a continued refusal to perform by the party in breach and that continued refusal amounted to further repudiatory conduct, the innocent party was entitled to bring the contract to an end, otherwise he would have continue to go on performing his obligations when it was clear from the continued refusal to perform that the party in breach would never do so.

84 Reference was also made to decisions on acceptance of repudiation, which require no particular formality as long as by words or conduct it is made clear by the innocent party that he is treating the contract as at an end: see by way of example, *Vitol SA v Norelf Ltd* [1996] AC 800.

85 In the Court of Appeal, Rix LJ stated at [87] that there was a middle ground between acceptance of repudiation and affirmation of the contract which was constituted by a period when the innocent party was making up his mind what to do. If he took too long, there might come a time when the law would treat him as having affirmed but if he maintained the contract in being, whilst preserving his right to treat it as repudiated if the other party persisted in the repudiation, he had not then elected. Whilst the contract remained alive, the innocent party ran the risk that a merely anticipatory repudiatory breach, a thing "writ in water" until acceptance could be overtaken by another event which prejudiced the innocent party's rights under the contract, such as frustration or even his own breach. He also ran the risk, if that was the right word to use, that the party in repudiation could resume performance of the contract and thus end the continuing right in the innocent party to elect to accept the former repudiation as terminating it.

86 The only other authority to which it is necessary to refer is the decision of Moore-Bick J (as he then was) in *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia* [1996] 2 Lloyd's Rep 604 ("*Yukong*"). Although he was there dealing with renunciation, he set out the principles which applied to anticipatory breach, affirmation and election. He set out eight principles (at 607). The fifth principle set out the proposition that although the injured party was bound by his election once it was made, the fact that he had affirmed the contract did not preclude him from treating it as discharged on a subsequent occasion, if the other party again repudiated it. In his seventh principle he referred to the need for a communication of choice to be in clear and unequivocal terms to constitute a binding election. The innocent party would not be held bound by a qualified or conditional decision. The eighth principle he set out was that election could be express or implied and would be implied where the injured party acted in a way which was consistent only with a decision to keep the contract alive or where he exercised rights which would only be available to him if the contract had been affirmed. In a passage at 608, he stated that the court should not adopt an unduly technical approach to deciding whether the injured party had affirmed the contract and should not be willing to hold that the contract had been affirmed without very clear evidence that the injured party had indeed chosen to go on with the contract notwithstanding the other party's repudiation. His view was that the court should generally be slow to accept that the injured party had committed himself irrevocably to continuing with the contract in the knowledge that if, without finally committing himself, the injured party had made an unequivocal statement of some kind on which the party in repudiation had relied, the doctrine of estoppel was likely to prevent any injustice being done.

Application of the legal principles and Conclusion

87 CSDS does not put forward a case of reliance or estoppel. It would not be possible to do so in the light of the responses of Ms Shapiro to the actions taken and emails sent by SIA and her questioning of their intentions. CSDS' case is solely a case of waiver or affirmation based upon the communications between the parties and in particular the service of proceedings by SIA on it on 2 November 2018 (California time). For any waiver to be effective against a party, there must be, under cl 15.2 an instrument in writing signed by the party against which the waiver is alleged.

88 What is clear from the authorities set out above is that no irrevocable election was made by SIA for all time in serving the proceedings on that date which sought specific performance and damages in the alternative. The form of the Writ and Statement of Claim show that the primary remedy being sought was specific performance, as the pleas in paras 10–12 of the latter demonstrate. There was, however, an alternative claim for damages by reason of the failure of CSDS to comply with the condition precedent of payment of the balance of the purchase price or the provision of evidence that funds had been released, although there is no plea of repudiation, acceptance of repudiation or termination of the Agreement by reference to cl 16.2.

89 There was some debate at the hearing about the effect of such an alternative claim for damages. In *Pearlberg*, the alternative claim for damages was seen as a claim under Lord Cairns' Act and so was no more than an ancillary aspect of the claim for specific performance, which offended against Chancery rules of practice. It is common ground between the parties that a Writ can now include both a claim for specific performance and alternatively a claim for substantive damages for breach, as the authorities cited above make clear.

Counsel for CSDS actually submitted that there was in fact no need for SIA to amend its pleadings at all, after service on 2 November 2018, since it could enter judgment for damages to be assessed on those pleadings, simply by abandoning its claim for specific performance at any time up to the point where it sought relief, in this case by way of default judgment in late November. He accepted that the damages available on the original unamended Writ and Statement of Claim would be no different from those which fell to be assessed on any accepted repudiation.

90 Whilst there is a conceptual difficulty here, because the loss of the bargain can only result from termination of the contract, which had not then been pleaded, that would involve a narrow reading of the Writ and Statement of Claim and illustrates that the service of the proceedings in the form that they took on 2 November 2018 was not an unequivocal representation that termination would not follow if there was a continuing failure to pay nor waiver of the right to terminate the Agreement for such failure. The authorities make clear that the contract persists not just following the institution of a claim for specific performance but after such an order is granted. Contractual rights continue to apply throughout so that, as a matter of principle any further breaches in that period can give rise to the right to terminate, either under the contract or at common law.

91 The situation is not on all fours with that in *Pearlberg*, where the peculiarities of Chancery practice and procedure meant that the Writ there was read in a limited manner, with the alternative damages claim tied in completely to the claim for specific performance. Such a reading would be overly technical and out of place in this day and age as CSDS' counsel appeared to accept. The effect of his submission was that, objectively, although the primary remedy sought by SIA was specific performance, there remained intact a claim for

damages for breach of contract, which was not limited to damages under Lord Cairns' Act. This detracted from the argument that CSDS' counsel sought to make that the service of those proceedings amounted to a clear and unequivocal election to affirm the contract and its continued existence. If SIA was seeking both specific performance and, as an alternative, damages which were not limited to loss incurred as a result of any delay in performance that the court might order CSDS to make, the only other damages which SIA could be seeking would be those relating to the refusal of CSDS to perform the contract according to its terms. If the court refused to order specific performance, which the alternative claim necessarily posited, damages would be granted, whether under Lord Cairns' Act or otherwise, for the loss incurred from such continuing non-performance in which, *ex hypothesi*, CSDS persisted. That would not appear to differ from the position on an accepted repudiation.

92 I conclude therefore that, when serving proceedings on CSDS on 2 November 2018, SIA was not electing to affirm the contract, but was leaving its options open to terminate and claim damages. There was no waiver within the meaning of cl 15.2 of the right to terminate, whether under cl 16.2 of the Agreement or at common law. The form of the Writ and Statement of Claim are not sufficiently unequivocal in showing that SIA wanted only specific performance at that stage. Whether or not that is the case, it was certainly not making an election for all time. It is clear to me that there could be no irrevocable election in issuing or serving proceedings in the form served on CSDS on 2 November 2018, both in the light of the history of events before and after and in the light of the authorities.

93 *Pearlberg* itself made it clear that it is open to a party to discontinue its claim for specific performance and pursue a claim for termination and damages if the breach is persisted in. *Pearlberg* itself made it clear that the effect of

bringing and serving a claim for specific performance is to only to suspend the right to terminate. Because the Agreement provided expressly that time was of the essence and because of the stance taken by CSDS, there was no requirement to serve another notice requiring payment in any given time. No allegation of estoppel is made on the part of CSDS, as in *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616 and it is apparent from Ms Shapiro's emails that she did not understand SIA to be committing itself to one course of action rather than another. In particular, her emails of 5 and 6 November 2018 asking for clarification from SIA, show that she was not working on the basis that an extension of time had been given for payment, even though she tried to argue the point that the Court papers allowed 21 days to CSDS to perform. In practice, any further notice would in any event have been futile because, as Ms Shapiro's email of 6 November demonstrated, CSDS was not going to pay unless the Original Bill of Sale was returned to the escrow agent. It was insisting on a non-contractual requirement.

94 In accordance with the principles set out in *Johnson v Agnew*, *Ogle*, *Yukong* and *Stocznia (HC)/(CA)*, there is no absolute rule that a party cannot terminate, even whilst it has a claim for specific performance before the Court because a continued breach, a fresh breach or a refusal to comply with contractual obligations may all constitute further repudiatory conduct following the initiation of the proceedings. Here, as appears from the exchanges between the parties, CSDS continued to refuse to perform by complying with the condition precedent in cl 4.1(a) of the Agreement and made it plain that it would never do so unless the escrow agent actually had the Bill of Sale in hand. No payment was forthcoming on 2–5 November 2018. SIA was justified in its suspicion that the money would never be forthcoming and the inability of CSDS to demonstrate the authenticity of the GLG letter of 14 January 2019 confirming

the availability of funds from 25 October 2018 if a Bill of Sale was actually in the escrow agent's hands, is telling.

95 The history of the crucial period, set out in more detail earlier in this judgment can be summarised in the following way:

(a) On 23 October 2018, SIA had issued its letter of demand requiring payment by 5.00pm on Friday, 26 October 2018.

(b) As evidenced by the email at 5.23pm Singapore time on 26 October 2018, CSDS had agreed with SIA in a telephone conversation, not long before, that:

(i) payment would be made at the beginning of the US working day of 26 October 2018;

(ii) Confirmation of remittance would be given by close of business California time that day; and

(iii) Any failure by CSDS in these respect would result in SIA's ability to enforce para 6 of the letter of demand and to commence legal proceedings for the full loss and damage suffered by SIA, not limited to the outstanding purchase price, interest and costs.

(c) Time was running under cl 16.1 (a) of the Agreement, at latest from 5.00pm on 26 October 2018.

(d) In the context of the contractual mechanism which had been agreed in cl 16, termination was a known remedy which was open to SIA.

(e) The failure to pay continued day by day from 26 October 2018 onwards and was never made good.

(f) On 29 October 2018, CSDS sent what it later referred to as a Notice of Default contending that because the Original Bill of Sale had not arrived with the escrow agent, this prevented CSDS making payment of the purchase price.

(g) The escrow agent had the Original Bill of Sale by 31 October 2018 California time.

(h) The last chance offer made at 5.25am California time on 1 November 2018 by SIA for acceptance by CSDS and payment by CSDS of the purchase price by 9.00pm that day California time was not accepted.

(i) SIA notified CSDS at 11.48pm California time on 1 November 2018 that CSDS had not responded to the last chance offer or made payment.

(j) The effect of the service of the unamended proceedings at 11.50am on 2 November 2018 (California time) did not unequivocally show that SIA would not terminate if default in payment continued, as it did.

(k) Even on the basis of *Pearlberg*, its effect, at best from CSDS' standpoint, was at most to suspend the period of time running under cl 16.1 of the Agreement and to prevent termination until the claim for specific performance was withdrawn.

(l) Ms Shapiro's email within 16 minutes of service, saying that CSDS would perform as per the court filing was ambiguous and, even if understood as saying that it would perform the contract, was only another assurance without any tender of payment to SIA or the escrow agent. It was understood by SIA as meaning that CSDS would enter an appearance.

(m) On Sunday, 4 November 2018 SIA's lawyers sent a letter of termination, under cl 16.2 and accepted CSDS repudiatory conduct as bringing the contract to an end. Five business days had long since expired from close of business California time on 26 October 2018.

(n) At 1.32pm on 4 November 2018, California time, Ms Shapiro asked for an explanation for the termination, saying in an email that CSDS would perform pursuant to the demand in the Court papers without tendering any payment and apparently looking for 21 days' additional time.

(o) Any suspensory period, as per *Pearlberg*, had expired by the time of service at 2.05pm on 5 November 2018 (California time) of the amended Writ and Statement of Claim which made it plain that the Agreement was at an end.

(p) Five business days had long since passed by 2.05pm on 5 November 2018 (California time) since the deadline of close of business of 26 October 2018.

(q) There was no payment on 5 November 2018.

(r) On 6 November 2018, Ms Shapiro asked what SIA's intentions were, whether to terminate the contract and return the deposit, to

complete the transaction by returning the Bill of Sale to the escrow agents or to litigate. She stated that CSDS was prepared to engage with SIA on any of the three options. However, she maintained the need for the Original Bill of Sale to be put in escrow before CSDS made payment, saying that SIA was preventing CSDS from completing the transaction. This was, on any view, a further refusal to comply with the terms of the Agreement.

(s) No payment was made on 6 November 2018.

(t) No payment was made on 7 November 2018.

(u) On 7 November 2018, SIA's lawyers replied to Ms Shapiro making it clear that the contract was at an end. Although the letter referred to a termination already made on 4 November 2018, that and the reference to the amended Writ and Statement of Claim could only be understood as saying that the contract was terminated as a result of CSDS' breach.

(v) On 13 December 2018, Ms Shapiro claimed the return of the deposit on the basis that, one way or another the contract was at an end.

(w) On 14 December 2018, SIA served the default judgment obtained at the end of November, saying that it would hold the deposit and set it off against the damages to be awarded for CSDS' repudiation.

96 This sequence of events makes it clear that, CSDS were in breach by failing to pay, with interest accruing since the last agreed date for payment on 26 October 2018 at latest. No extension of time for payment was ever given by making a claim for specific performance and no payment was made in that

intervening period before the claim for specific performance was withdrawn. The contract remained in being, in accordance with the authorities and CSDS made no payment and continued to refuse to perform, save on its own terms.

97 In my judgment, the continuing failure to pay constituted a continuing breach of the condition precedent throughout the period when the claim for specific performance was being pursued and before its abandonment. Every day which passed presented a fresh opportunity to pay and the delay in doing so was cumulative in its effect as repudiatory conduct. That in itself would make the 4 November 2018 letter of termination good, regardless of *Pearlberg* in the light of *Johnson v Agnew* and the other authorities cited above. Further, the service of the amended proceedings on 5 November 2018 was seen by CSDS as termination on the basis of continuing breaches of non-payment, as appears from Ms Shapiro's email of 13 December 2018.

98 Furthermore, following abandonment of the claim for specific performance on serving the amended Writ and Statement of Claim on 5 November 2018, CSDS, on 6 November 2018, made it plain that it would only make payment if SIA put the Original Bill of Sale in the hands of the escrow agent, thereby insisting on a non-contractual requirement. Even allowing for a *Pearlberg* period of suspension of the right to terminate, there were thus fresh breaches both in failing to pay and in refusal to comply with the contract obligations, which made it plain that payment would not be made and which, together, amounted, in the light of all the past history, to repudiatory conduct after 5 November 2018, which SIA accepted on 7 November 2018 or alternatively, 14 December 2018. The 7 November 2018 email was sufficient notice that the contract was at an end for all purposes and the service of a default judgment for damages to be assessed on the latter date could not be a clearer statement that the contract was at an end by reason of CSDS' breach.

99 Because of CSDS' repudiatory breach, it is not strictly necessary for SIA to rely on cl 16.1 (a) and the expiry of a five business day period, as such since close of business on 26 October 2018, although I find that the requirements of cll 16.1 and 16.2 were in fact satisfied as of the time when the 4 November 2018 letter of termination and the 7 November 2018 confirmatory letter of termination were sent. Clause 16.2 makes it plain that SIA's rights at common law are preserved and, on the facts as I have found them, CSDS were in repudiatory breach, not only on 4 November but on 6/7 November 2018 which repudiation was accepted by SIA, as set out above.

100 I do find that CSDS was in breach of cl 16.1(a) in failing to make payment in five business days following close of business on 26 October 2018. Although the period would not have expired prior to service of the unamended Writ and Statement of Claim, the obligation to make that payment was not suspended by reason of the issue of proceedings and service of them. The very point of the claim for specific performance was to compel such payment and CSDS obviously knew, contrary to Ms Shapiro's argumentative email of 5 November 2018 that time was not extended for such payment. The contract provisions still applied. In consequence time continued to run between 2 and 5 November 2018 for the purpose of cl 16, even if the effect of seeking specific performance in accordance with the *Pearlberg* "rule" was that no notice of termination under cl 16.2 could be effective whilst that claim was being pursued.

101 As soon as the claim for specific performance was withdrawn, however, it was open to SIA to terminate on the ground of failure to pay under cl 16. Termination under cl 16.2 was to be effected by notice at any time while the Event of Default was continuing. Once again, that event continued to 7 November 2018 and even to 14 December 2018 and, as the notice did not have

to take any particular form, save to express termination, the letters of those dates suffice for that purpose, since CSDS must have appreciated that they evidenced termination by SIA.

102 In the result, SIA were entitled to terminate the Agreement both as a matter of contract and as a matter of common law.

103 I do not need to decide, in these circumstances whether the 4 November 2018 letter of termination, which was sent at a time when specific performance was being claimed, could take effect once the suspensory period was over, if, contrary to my conclusion above, it was ineffective whilst that claim was being pursued, whether because of *Pearlberg* or otherwise. I see no reason in principle why it should not be.

104 There was no repudiation by SIA in sending the termination letter of 4 November 2018, because it was merely ineffective if the *Pearlberg* "rule" gives rise to a suspensory period, which would likely mean that it could be effective once the period came to an end. There is no basis upon which CSDS could rely on that letter as a repudiatory breach for the reasons I have already given, including the absence of any acceptance of that as an alleged repudiation until long after the Agreement had been ended by SIA's acceptance of CSDS' repudiation.

105 There remains the question of the deposit since CSDS claimed its return. There is no provision for forfeit of the deposit whether on the grounds of lawful termination for repudiatory breach or breach of cl 16. Indeed, under the terms of cl 16.2 the deposit is refundable to CSDS. SIA seeks substantial damages and is holding on to the deposit and says it will set it off against the damages awarded to it. That issue will have to await another day.

106 As to costs , the parties agreed that costs would follow the event. In those circumstances, SIA is entitled to an award of costs of the issues of liability to be the subject of assessment if not agreed.

107 SIA is therefore entitled to a declaration:

(a) that it lawfully terminated the Agreement on 4 November 2018 by reason of CSDS' breaches of contract which were repudiatory in nature and under cl 16.2 of the Agreement;

(b) that it is entitled to such damages in respect of such breaches as may be found on assessment; and

(c) that it is entitled to an award of the costs on the liability issues, such costs to be the subject of assessment if not agreed.

108 The parties should seek to agree the form of the order to be made and submit it for approval and to agree the costs in the light of this judgment.

Jeremy Lionel Cooke
International Judge

Stephen Houseman QC (instructed), Kelvin Tan, Jason Chen and Chng Hu Ping (Drew & Napier LLC) for the plaintiff;
Roderick Martin SC, Rajaram Ramiah, Senthil Dayalan, Gideon Yap and Eugene Tan (RHTLaw Asia LLP) for the defendant.