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

[2021] SGHC 20

Suit No 889 of 2019

Between

Nambu PVD Pte Ltd

… *Plaintiff*

And

UBTS Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Tort] — [Negligence]
[Bailment] — [Contract]
[Contract] — [Contractual terms] — [Exclusion clauses]
[Tort] — [Conversion]
[Tort] — [Detinue]
[Civil Procedure] — [Costs]

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Nambu PVD Pte Ltd
v
UBTS Pte Ltd

[2021] SGHC 20

General Division of the High Court — Suit No 889 of 2019
Andre Maniam JC
21, 22, 23, 28, 29, 30 July; 4, 5, 6, 7, 11 August; 30 September; 28 December 2020

2 February 2021

Andre Maniam JC:

Introduction

1 The plaintiff ("Nambu") sued the defendant ("UBTS") for fire damage to a Prefabricated Vertical Drain ("PVD") machine ("the PVD Machine") that UBTS had contracted to transport. The fire took place at around 2.00 am on 10 September 2016 along the Pan-Island Expressway in the direction of Tuas. The fire started at or around the rear left tyre of UBTS' trailer that was carrying the PVD Machine.

2 UBTS contended that the fire was not due to negligence on its part. It also relied on excluding and limiting conditions in (a) UBTS' standard terms and conditions ("the UBTS T&Cs"); and (b) standard terms and conditions of the Singapore Logistics Association ("SLA") ("the SLA T&Cs"), both of which

it argued were incorporated into the contract between the parties ("the subject contract").

3 I found that the fire was due to negligence on UBTS' part (see [8] – [31] below). I also found that neither the UBTS T&Cs nor the SLA T&Cs had been incorporated into the subject contract (see [32]–[66] below). I thus granted judgment in favour of Nambu.

4 However, of Nambu's claims totalling $1,226,807.20 on the basis of replacement (alternatively $1,279,537.20 on the basis of repair), I only awarded Nambu $248,240.00, together with interest and costs of $160,000.00 (excluding disbursements to be fixed or taxed, if not agreed). I decided that the PVD Machine could have been repaired for less than its replacement cost, and that this ought to have been done within six months of the accident – accordingly, I only allowed Nambu's claims for loss of use, and for storage and relocation charges, for that six month period (see [81]–[135] below). I also reduced the amount of repair costs claimed, relying on the opinion of UBTS' damages expert (see [96]–[109] below).

5 Nambu has appealed in respect of the quantum of damages and costs awarded to it. UBTS has appealed in respect of my decision that the SLA T&Cs were not incorporated into the subject contract.

6 These are my grounds of decision. For completeness, I will also address the cause of the fire (and whether UBTS was negligent) and the non-incorporation of the UBTS T&Cs, although those aspects have not been appealed against.

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Issues

7 The issues at first instance were:

(a) Was the damage to the PVD Machine due to UBTS' negligence?

(b) Were the excluding or limiting provisions in the UBTS T&Cs and the SLA T&Cs incorporated into the subject contract?

(c) If UBTS were liable, what relief was Nambu entitled to?

Cause of damage to the PVD Machine

8 I addressed the following:

(a) What caused the fire?

(b) Was UBTS negligent in the transport of the PVD Machine?

(c) Was the fire caused or contributed to by any negligence on UBTS' part?

Cause of the fire

9 The Singapore Civil Defence Force ("SCDF") Accidental Fire Investigation Report stated that the probable cause of the fire was frictional heat at the rear left tyre of UBTS' trailer.[1]

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[1] Singapore Civil Defence Force Accidental Fire Investigation Report ("SCDF Report") at p 3 in Agreed Bundle of Documents ("ABOD") at p 209.

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10 It was common ground between Nambu's expert Dr David J Rose ("Dr Rose") and UBTS' expert Koay Hean Lye Kelvin ("Mr Koay") that heat was generated by a tyre not being fully inflated.[2]

11 The experts differed in two main respects:

(a) was the tyre punctured;[3] and

(b) was there hydraulic fluid that caught fire before the tyre did?[4]

12 I preferred Dr Rose's opinion to Mr Koay's on whether the tyre was punctured. I found that it was likely underinflated and not punctured.

13 I also preferred Dr Rose's opinion to Mr Koay's that it was the tyre, rather than any hydraulic fluid that may have been present, which caught fire.

14 The presence of hydraulic fluid, in the first place, rested on the evidence of Mr Wang Xuankun ("Mr Wang") (the driver of UBTS' trailer at the material time), which I did not accept. Instead, I accepted the evidence of Mr Park Huijang ("Mr Park") (Nambu's project manager) that:

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2 Affidavit of Evidence-in-Chief of Dr David J Rose ("Dr Rose's AEIC") at pp 26–27; Affidavit of Evidence-in-Chief of Koay Hean Lye Kelvin ("Mr Koay's AEIC") at pp 25–26.

3 Dr Rose's AEIC at pp 25–26; Mr Koay's AEIC at p 23.

4 Dr Rose's AEIC pp 28–31; Mr Koay's AEIC at p 24.

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(a) the mast of the PVD had been detached from the PVD Machine and cleaned of hydraulic oil, and the hydraulic pipes were capped, some days before transportation;[5]

(b) on the day of transport there was no hydraulic fluid leaking from the PVD Machine, nor had any seeped onto the trailer's platform; and

(c) Mr Wang would not have seen any hydraulic fluid in the morning, or at night in the darkened worksite.[6]

15 I noted that Mr Wang did not mention the presence of hydraulic fluid to the SCDF,[7] nor in his police report.[8] This was also not mentioned in the preliminary report of Mr Heng Seng Yong ("Mr Heng") (the loss adjuster).[9] In his police report, Mr Wang said, "I wish state [*sic*] that I suspect that the fire may be due to the faulty [tyre]" (a statement which he later returned to delete), but he said nothing about the presence of hydraulic fluid. In his Affidavit of Evidence-in-Chief ("AEIC"), Mr Wang said, "*[e]xcept for the oil leakage*, I did not observe anything *unusual* to the lorry or trailer after the [PVD Machine] was loaded and secured" [emphasis added].[10] This indicated that Mr Wang considered the oil leakage to be "unusual", yet he did not mention it to the SCDF or the police, nor was it conveyed to Mr Heng.

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5 Affidavit of Evidence-in-Chief of Park Huijang ("Mr Park's AEIC") at para 35.

6 Mr Park's AEIC at para 49.

7 SCDF Report at p 2 in ABOD at p 208.

8 Affidavit of Evidence-in-Chief of Wang Xuankun ("Mr Wang's AEIC) at pp 11–13.

9 Affidavit of Evidence-in-Chief of Heng Seng Yong ("Mr Heng's AEIC).

10 Mr Wang's AEIC at para 8.

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16 The first document referring to the presence of hydraulic fluid, was UBTS' lawyer's letter of 8 August 2019[11] in response to Nambu's lawyer's letter of demand.[12] When Mr Wang was interviewed by Mr Koay subsequently on 14 March 2020, he still did not mention any presence of hydraulic fluid. Mr Koay was only told of the presence of hydraulic fluid after the interview,[13] and it then became the cornerstone of his opinion.

Was UBTS negligent?

Burden of proof

17 As the subject contract between the parties involved the bailment of the PVD Machine, the onus was on UBTS to prove, on a balance of probabilities, that it had taken reasonable care of the PVD Machine: see *Huationg Contractor Pte Ltd v Choon Lai Kuen (trading as Yishun Trading Towing Service)* [2020] SGHC 129 at [12] ("*Huationg*"), a case which coincidentally also involved a vehicle catching fire on an expressway in the course of transportation.

18 Even if the burden of proof had been on Nambu to prove that UBTS' negligence had caused the fire, for the reasons below, I would have found that Nambu had discharged that burden.

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11 ABOD at pp 204–205.

12 ABOD at pp 202–203.

13 Mr Koay's AEIC at p 36.

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Tyres

19 I found that UBTS was negligent in that Mr Wang had not checked the tyres for underinflation before driving off with the PVD Machine on the night in question (*ie*, 9 September 2016).

20 In this regard, I did not accept Mr Wang's evidence that he had checked the tyres. Mr Wang relied on UBTS' safety checklist which purports to be a daily inspection checklist ("the Safety Checklist").[14] However, there was only one set of ticks for the four different dates recorded on the Safety Checklist, the latest of which was 9 September 2016. The handwriting for 5 September 2016 (which was written in a numerical format as "5-9-16"), in particular, the number "9", matched Mr Wang's handwriting on two delivery orders dated 9 September 2016[15] but the dates for 6, 7, and 9 September 2016 (which were similarly written in numerical formats) on the Safety Checklist appeared to have been written by someone else. I did not accept Mr Wang's explanation that he had two different ways of writing the number "9"[16] – it is likely that someone other than Mr Wang wrote the dates 6 and 7 September 2016 and, most crucially, 9 September 2016 as that was the day the PVD Machine was transported.

21 Moreover, the fact that there was only one set of ticks (likely made on the first date – 5 September 2016) diminished the value of the Safety Checklist in showing that the checks had indeed been done on 9 September 2016. Taken together with the fact that Mr Wang did not write the date for 9 September 2016,

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14 Mr Wang's AEIC at p 9.

15 ABOD at pp 89 and 91.

16 Transcript, 11 August 2020, p 68 lines 9–27.

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the Safety Checklist did not show that Mr Wang had done the checks on that date.

22 Further, the Safety Checklist only covered the prime mover and not the trailer (which in this case was the more crucial vehicle). Mr Wang claimed that there was "another page, another side to this page" of the Safety Checklist for the trailer,[17] but there was no such "other page" or "other side" of the Safety Checklist as exhibited in Mr Wang's AEIC, and no other document was produced.

23 The LTA Vicom Certificate dated 5 February 2016 for the trailer predated the accident by more than seven months,[18] and was of little value in showing the condition of the trailers' tyres (especially whether they were underinflated) on the date of the accident.

24 I did not accept Mr Wang's evidence that he was unaccompanied on the night of 9 September 2016 when he entered the Changi worksite, allegedly checked the tyres, and then left the worksite with the PVD Machine.[19]

25 I accepted Mr Park's evidence that he had accompanied Mr Wang, and that Mr Wang did not check the tyres in the darkened worksite.[20]

Police escort

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17 Transcript, 11 August 2020, p 64 lines 21–32; p 65 lines 1–8.

18 ABOD at p 10.

19 Transcript, 11 August 2020, p 75 lines 2–32; p 76 lines 1–32; p 77 lines 1–21.

20 Transcript, 22 July 2020, p 30 lines 28–30;

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26 A police escort was statutorily required, given the dimensions of the PVD Machine,[21] but UBTS did not arrange for this. I did not accept that Nambu had agreed to dispense with a police escort,[22] the provision of which was included in what Nambu was paying for.

27 It was negligent of UBTS to have transported the PVD Machine without a police escort.

Fire extinguisher

28 A fire extinguisher in the cabin of the prime mover was one of the items in the Safety Checklist, and the Safety Checklist shows that its absence was noted. However, I did not find that this, by itself, was negligence on UBTS' part.

29 If, however, Mr Wang had noted hydraulic fluid leaking from the PVD Machine, or that it had seeped onto the trailer's platform, UBTS would have been negligent in proceeding to transport the PVD Machine, especially since the prime mover did not have a fire extinguisher.

Was the fire caused or contributed to by any negligence on UBTS' part?

30 UBTS failed to show that the fire had nothing to do with its negligence: the rear left tyre (which was underinflated) overheated and caught fire because Mr Wang had not checked the tyres.

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21 Transcript, 29 July 2020, p 20 lines 26–30; p 21 lines 1–16.

22 Transcript, 29 July 2020, p 26 lines 2–32.

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31 Moreover, had there been a police escort (which UBTS negligently failed to arrange for), the distress to the tyre could have been noticed sooner than Mr Wang had. The police escort could also have helped in addressing the fire – at least in getting the assistance of the SCDF sooner (Mr Wang only called for help after he had tried unsuccessfully to extinguish the fire on his own).[23]

The T&Cs

Were the T&Cs incorporated into the subject contract?

32 The subject contract for the transportation of the PVD Machine on the 9–10 September 2016 was orally agreed to between UBTS' Mr Steven Yen Tuck Hei ("Mr Yen") and Nambu's Mr Park.

33 It was only after the PVD Machine had been burned, that UBTS issued a delivery order ("DO") and invoice for that contract. These documents came too late to introduce terms into the subject contract. The subject contract had already been formed orally, and indeed substantially performed by UBTS until the fire broke out.

34 UBTS relied on the previous course of dealings between the parties as giving Nambu reasonable notice of the UBTS T&Cs and the SLA T&Cs ("T&Cs"), which incorporated those T&Cs into the subject contract.

35 I applied the test in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [53]–[54] ("*Vinmar*"): are

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[23] Mr Wang's AEIC at para 10.

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the circumstances such that, at the time of contracting, both parties, as reasonable persons, would have assumed the inclusion of the terms in the offer and acceptance?

36 I found that Mr Park was not aware of the terms and conditions in the T&Cs. But the question remained whether he had been given reasonable notice of the T&Cs.

37 Most of Mr Yen's communications with Mr Park were oral, and in those communications Mr Yen never mentioned the T&Cs.

38 Mr Yen and Mr Park spoke about potential transportation assignments,[24] before Mr Park sent Mr Yen an email on 3 February 2016.[25]

39 In Mr Yen's reply email on 4 February 2016,[26] he quoted Mr Park prices for what Mr Park wanted. The email also stated, "[a]ll Standard Trading Terms and Conditions in Accordance to [SLA]." However, the email further stated, "[u]pon your acceptant [*sic*] of confirmation, *official quotation* will forward [*sic*] to your company" [emphasis added] and in similar vein, "[a]ll jobs strictly required a *Job Instruction* from your Company for any job to commerce [*sic*] accordingly." [emphasis added]

40 One would expect UBTS' "official quotation" to contain or refer to the terms and conditions on which UBTS proposed to contract, which Nambu could

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24 Mr Park's AEIC at para 12; Affidavit of Evidence-in-Chief of Steven Yen Tuck Hei ("Mr Yen's AEIC") at para 6.

25 ABOD at pp 8–9.

26 ABOD at pp 6–8.

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then decide whether to accept after receiving the "official quotation". Indeed, that was the form of UBTS' official quotation (as shown by exhibits tendered by UBTS) ("the Official Quotation").[27] But UBTS never forwarded the Official Quotation to Nambu for this or any other contract between them, nor was there any written "Job Instruction" from Nambu for the work. Instead, Mr Yen and Mr Park proceeded to conclude contracts between UBTS and Nambu by way of oral agreements between them.[28]

41 Mr Yen said UBTS used the Official Quotation ([40] above) 90% of the time, but it did not use that in its dealings with Nambu (which it characterised as *ad hoc* transactions that formed only 10% of all of UBTS' transactions).[29] Curiously, the terms and conditions in the Official Quotation did not contain an exclusion of liability for fire, which UBTS sought to incorporate vis-à-vis its contracts with Nambu by way of the UBTS T&Cs printed on the back of some (but not all) of the DOs UBTS issued to Nambu.

42 Mr Yen's email of 4 February 2016 referred to the SLA in the context of "Standard Trading Terms and Conditions" (*ie*, the SLA T&Cs), but it did not refer to the UBTS T&Cs.

43 The email was not worded as an offer or an acceptance – instead, it expressly indicated that an official quotation would be sent to Nambu, but that was not done. The Official Quotation ([40] above) requires its customers to sign on it to signify their "confirmation & acceptance"; it states that the customer in

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27 Exhibits D3 and D4.

28 Transcript, 29 July 2020, p 46 lines 21–32; p 47 lines 1–9.

29 Transcript, 4 August 2020, p 48 lines 15–32; p 49 lines 1–15.

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accepting the quotation accepts the "Trading Terms and Conditions". In addition to the stated terms and conditions, the Official Quotation also includes a clause on insurance coverage, which states, "[t]erms and conditions are in accordance with the [SLA] Standard Trading Conditions. Copy for your reference will be provided upon your request."

44 Nambu and UBTS however concluded their contracts more informally, mostly by telephone between Mr Park and Mr Yen.[30] In the circumstances, I did not find that Mr Yen's email of 4 February 2016 gave Mr Park reasonable notice of the SLA T&Cs such that the services Nambu contracted with UBTS for later in February 2016 were governed by the SLA T&Cs. Mr Yen's email of 4 February 2016 also gave Mr Park no notice of the UBTS T&Cs.

45 But even if Mr Yen's email provided reasonable notice of the SLA T&Cs such that those were incorporated into their February 2016 dealings, there was no further reference to the SLA T&Cs in relation to the parties' April and May 2016 dealings, nor in relation to the subject contract for 9–10 September 2016.

46 UBTS did not suggest that the subject contract was partly oral and partly in writing (such writing including Mr Yen's 4 February 2016 email). Instead, UBTS argued that the 4 February 2016 email formed part of parties' previous course of dealings, by which the SLA T&Cs were incorporated into the subject contract.

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30 Transcript, 29 July 2020, p 46 lines 21–32; p 47 lines 1–9.

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47 By September 2016, it was already some seven months since the 4 February 2016 email, and there were no similar emails referring to the SLA T&Cs in relation to the April and May 2016 contracts.[31] The number of dealings between the parties, and how proximate in time they were, are relevant in deciding whether there is reasonable notice and the incorporation of terms by a course of dealings.

48 I did not find that the SLA T&Cs were incorporated into the subject contract by the 4 February 2016 email, and the email made no reference to the UBTS T&Cs (and all the more so, those were not incorporated).

49 It is common ground that for the transactions on which Mr Yen and Mr Park had concluded by oral agreements, DOs and invoices were subsequently issued by UBTS to Nambu.

50 The DOs were in two forms:

(a) rectangular, with UBTS T&Cs printed on the reverse side, and the following printed in fine print at the bottom of the front page: "[a]ll transactions in accordance to Standard terms and conditions of [the SLA]" ("the rectangular DO");[32] and

(b) squarish, with nothing printed on the reverse side, and the following printed in fine print at the bottom of the front page: "[t]erms and conditions are in accordance with the [SLA] (SITA) Standard

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31 ABOD at pp 12–14.

32 Exhibit D1.

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Trading Conditions. Copy for your reference will be provided upon your request" ("the square DO").[33]

51 UBTS' position is that the square DOs were mistakenly issued to Nambu because they were for internal use only.[34] But Nambu would not have known that. Moreover, if the square DOs were for internal use only, it is curious why they would have a reference to the SLA T&Cs (Mr Yen was unable to explain why such a reference was found despite the square DO being for internal use only)[35] and an offer to provide a copy upon request.

52 The fact that some DOs (like the rectangular DO) had UBTS T&Cs and some did not (like the square DO), weakened the previous course of dealing that UBTS was relying on for the incorporation of the UBTS T&Cs into the subject contract: the dealings were not consistent and unequivocal.

53 Nambu first received DOs from UBTS on 5 February 2016:

(a) DO 77244 (in the form of the square DO);[36]

(b) DO 77427 (in the form of the square DO);[37]

(c) DO A 36725 (in the form of the rectangular DO).[38]

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33 Exhibit D2.

34 Transcript, 29 July 2020, p 35 lines 1–26.

35 Transcript, 29 July 2020, p 39 lines 26–32.

36 ABOD at p 37.

37 ABOD at p 38.

38 ABOD at p 41.

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54 Of these, only one – DO A 36725 – had UBTS T&Cs printed on the reverse side; the other two did not. DO 77245 dated 6 February 2016[39] and DO 77246 dated 11 February 2016[40] (both of which were in the form of the square DO) also did not have UBTS T&Cs printed on the reverse side.

55 Moreover, the DOs, like the work orders in *Huationg* ([17] *supra*), were not contractual documents, and they were issued too late to form part of the contract (see *Huationg* at [35]–[49]). They were not intended to supplement the terms of the contract that had already been formed. They were issued merely to verify the work done. The square DOs sought the recipient's signature under the statement, "[g]oods received in satisfactory condition"; the rectangular DOs simply said, "[r]ecipient [a]cknowledge". When such DOs were signed by Nambu, Nambu was merely acknowledging that the transportation services it had contracted for had been performed, and that it had received the goods transported in satisfactory condition. It was not thereby agreeing to any terms and conditions UBTS might have chosen to refer to in the DOs, or to print on the DOs.

56 For the subject contract, Nambu never signed the corresponding DO (that was in the form of the rectangular DO),[41] which was issued only after the PVD Machine was burned, and moreover that transport was not completed.

57 If the UBTS T&Cs were incorporated into the subject contract at all, it would be because they were printed on the reverse side of *some* (but not all) of

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39 ABOD at p 39.

40 ABOD at p 40.

41 ABOD at pp 89–92.

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the DOs (those in the form of the rectangular DO), issued after UBTS' work was done. I do not regard that as giving Nambu reasonable notice of the UBTS T&Cs, especially since those had an exclusion of liability for fire, which in a case like this would (if upheld) exempt UBTS from liability altogether.

58 Turning to the invoices, those had – in fine print – five numbered points below where the price was stated. Point five was: "[a]ll transactions in accordance to [s]tandard terms and conditions of [the SLA]".[42] I consider that the invoices are likewise not contractual documents, and that they were issued too late to form part of the subject contract. Moreover, they referred to the SLA T&Cs, but not to the UBTS T&Cs.

59 UBTS, however, argues that even if each DO and invoice did not incorporate the T&Cs into the contracts they were issued for, they could nevertheless form a course of dealings incorporating the T&Cs into future contracts, specifically the subject contract. I reject that argument, as did the court in *Huationg* ([17] *supra*) which, despite there being some 300 work orders, found that they did not amount to a course of dealing capable of incorporating an exemption clause contained in each of the work orders: see *Huationg* at [41]–[49].

60 To the extent that Mr Park or anyone else from Nambu had looked at the DOs, they would have viewed the DOs simply as a confirmation of work done. Likewise, they would have viewed the invoices simply as a request for payment. They would not have looked at them for an indication of the terms and

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42 ABOD at p 24.

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conditions which UBTS had intended to contract on, but which had come too late in the day to form part of the contracts they pertained to.

61 UBTS submitted that in *Huationg* ([17] *supra*), the court was not asked to consider the proposition that it is not always necessary for the terms to be included or referred to in the documents forming a contract.[43] I do not agree that *Huationg* can be distinguished in this way. The court in *Huationg* had duly considered the test in *Vinmar* ([35] *supra*), and concluded that the exemption clauses in question were not incorporated into the contract by the previous course of dealings (*Huationg* at [44]–[47]). The decision in *Huationg* did not rest simply on the work orders not being contractual documents. Rather, the court did not agree that the plaintiff-owner of the vehicle transported by the defendant had ever assented to the exemption clauses in question, which is the crux of the matter (see *Huationg* at [45]).

62 In *La Rosa v Nudrill Pty Ltd* [2013] WASCA 18 ("*La Rosa*"), the Supreme Court of Western Australia accepted that, in principle, it was possible for documents to incorporate terms into a subsequent contract, even though those documents (and terms) were not part of an earlier contract (see *La Rosa* at [43] and [71]).

63 However, the court went on to find that the invoices in that case, which were sent after each contract, did not incorporate into subsequent contracts the terms they referred to and contained. McLure P (with whom Murphy JA agreed) stated (*La Rosa* at [47]):

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[43] Defendant's Closing Submissions ("DCS") at para 125.

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> The invoices were not a 'contractual document' within either the narrow or wider meaning of the expression. In each case the invoice was provided to the respondent for services already supplied pursuant to a prior contract. The purpose of the invoices was to secure payment for those services. The receipt of the invoices by the respondent in all the circumstances is not sufficient to justify an inference of an acceptance by the respondent of, and readiness to be bound by, the terms on the reverse of the invoices. Nor is it sufficient notice to the respondent of the terms on which the appellant would do business in the future.

64 Similarly, Buss JA stated (*La Rosa* at [88]):

> … each invoice was sent to the respondent after the contract had been performed, and in the circumstances a reasonable person, in the respondent's position, would have been entitled to regard the invoice as merely a request or demand for payment of the contract price, and would not have expected to find contractual terms in relation to the completed work in the invoice.

65 In June 2016, there was an exchange of emails about a potential assignment to transport a PVD machine from Singapore to Korea.[44] That included Mr Yen's email of 22 June 2016 where he said "standard booking & B/L terms & conditions to apply",[45] and his further email of 6 August 2016 which concluded in the same way as his 4 February 2016 email did, with remarks including, "[a]ll Standard Trading Terms and Conditions in Accordance to [SLA]."[46] However, no contract was concluded between the parties for those potential *international* assignments. I do not consider that those emails materially strengthened UBTS' argument that notice had been given to Nambu of the UBTS T&Cs and the SLA T&Cs, or of their incorporation into

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44 ABOD at pp 64–71.

45 ABOD at pp 64–65.

46 ABOD at pp 66–68.

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the subject contract for *local* transportation. There was no reference to the UBTS T&Cs, and only one of Mr Yen's two emails (the latter sent on 6 August 2016) referred to the SLA T&Cs (in similar terms to his 4 February 2016 email (see [42] above), including that UBTS would send an official quotation if Nambu wished to proceed).

66 In all the circumstances, I find that the UBTS T&Cs and the SLA T&Cs were not incorporated into the subject contract.

Were the T&Cs reasonable?

67 If I had found that the T&Cs were incorporated into the subject contract, I would have found it reasonable for UBTS to limit liability to a maximum of $100,000 in any event whatsoever in respect of any one claim, *per* clause 29(a) of the SLA T&Cs.[47] In *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 ("*Press Automation*"), the court reached the same conclusion on the facts of that case, in relation to clause 27 in the Singapore Freight Forwarders' Association Standard Trading Conditions (1986) ("the SFFA Conditions") (the predecessor to the SLA T&Cs), which is the equivalent of clause 29 of the SLA T&Cs (at [42]–[55] and [69]–[79]).

68 However, I would not have found clause 32 of the SLA T&Cs to be reasonable – that clause would discharge UBTS of any liability whatsoever unless:[48]

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47 Mr Yen's AEIC at p 84.

48 Mr Yen's AEIC at p 85.

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(a) Nambu gave notice of a claim in writing within seven days of the date the PVD Machine was delivered, or should have been delivered; and

(b) Nambu sued within nine months of that date.

69 The court in *Press Automation* had found clause 30 of the SFFA Conditions, which is the equivalent of clause 32 of the SLA T&Cs, to be unreasonable on the facts of that case. There, the court noted that there was no evidence that a condition of the insurance cover was that a nine-month time bar be imposed, or that a prohibitive rate of premium would have been charged if the time bar were longer (*Press Automation* at [67]). The position in the present case is even clearer. The relevant policy[49] had a general limit of $500,000 for "any one accident/occurrence", with a deductible of "10% of loss, subject to a minimum of $25,000 each and every claim whichever is higher".[50] It further stipulated:[51]

> The Insured shall trade under their Standard Trading Conditions (STC), which are in accordance with &/or not wider than the terms of the [SLA] … In the event that the Standard Trading Conditions (STC) as mentioned above *are, for whatever reason, not incorporated in the contract of carriage &/or bailment with the cargo owner, the indemnity under this policy shall not exceed*, whichever is the least of:
>
> (A) S$5.00 x per kilo or
>
> (B) Value of the cargo
>
> any one accident or occurrence.
>
> [emphasis added]

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49 ABOD at pp 690–714.

50 ABOD at pp 693–694.

51 ABOD at p 694.

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70 Thus, even if the SLA T&Cs (or their equivalent) were not incorporated into the subject contract between Nambu and UBTS, UBTS would still be covered by the policy, but subject to the aforesaid limits based on weight, or the value of the cargo. In the present case, based on the PVD Machine weighing some 50 tons, and being worth over $300,000, the relevant limit would be $250,000.

71 UBTS was still very substantially insured whether or not the T&Cs were incorporated into the subject contract and, bearing that in mind, it has not shown that a nine-month limitation period is reasonable.

72 Moreover, Nambu was first informed that its claim was rejected, by a letter dated 20 October 2017 from the insurer's loss adjusters.[52] The nine-month limitation period from 10 September 2016 when the fire happened, would have ended on 10 June 2017, but it was only after that that the insurer's position was communicated to Nambu. Indeed, from Mr Heng's evidence,[53] it appears that even up till September 2017 he and the insurer were still looking into Nambu's claim. That reinforces my conclusion that it would not have been reasonable to have required Nambu to have sued within nine months, *ie*, by 10 June 2017.

73 For completeness, I find that Mr Park's WhatsApp message of 16 September 2016[54] was a sufficient notice of claim to satisfy the requirement in clause 32 of the SLA T&Cs to give notice within seven days; but Nambu did not sue within a nine-month period.

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52 ABOD at pp 162–164.

53 Mr Heng's AEIC at paras 15–19.

54 Mr Park's AEIC at para 59 and p 163; ABOD at p 113.

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74 I would also not have found the purported exclusion of liability for fire in the UBTS' T&Cs to be reasonable. This exclusion is not found in the SLA T&Cs, or the Official Quotation[55] on which UBTS contracted for some 90% of its work (see [40] above). There was no satisfactory explanation why UBTS should be allowed to exclude liability for fire in those instances where it contracted more informally, and then issued DOs (in the form of the rectangular DO) with the fire exclusion printed on the reverse side of them. Whether there was a fire exclusion, is not relevant to UBTS' insurance position.

What relief was Nambu entitled to?

Nambu's right to claim in respect of damage to the PVD Machine

75 Nambu pleaded that it owned the PVD Machine or was entitled to possession of it,[56] in response to which UBTS simply said that that was "not admitted".[57]

76 At trial, however, UBTS advanced the case that the PVD Machine was owned by Nambu Korea (Nambu's parent company), instead of Nambu (the plaintiff).

77 Mr Park's evidence was that Nambu took over all the PVD equipment and business of Nambu Korea in Singapore, including the PVD Machine.[58] This was supported by Mr Kim Hyun Woo ("Mr Kim"), Nambu's general manager.[59]

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55 Exhibits D3 and D4.

56 Statement of Claim ("SOC") at para 1.

57 Defence at para 1.

58 Mr Park's AEIC at paras 3–4 and 11; Transcript, 22 July 2020, p 9 lines 1–24; 23 July 2020, p 55, lines 3–7.

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78 On the evidence, it was Nambu that parted with possession of the PVD Machine to UBTS for transportation, and also Nambu that expected to regain possession of the PVD Machine from UBTS after that transportation. UBTS only dealt with Nambu, not Nambu Korea; it contracted with Nambu, not Nambu Korea.[60] Moreover, in Mr Yen's AEIC, he referred to the PVD Machine as "Nambu's": "I agreed with [Mr Park] of [Nambu] to transport [the PVD Machine] from Changi Airport Terminal 5 to Tuas South Boulevard."[61]

79 In the context of bailment, a bailee (here, UBTS) is "estopped from denying the title to the goods of [Nambu] as their bailor, including as an incident of that title [Nambu's] right to possession" (*China Pacific SA v Food Corporation of India* [1982] AC 939 at 959–960 *per* Lord Diplock). Nambu Korea never made a competing demand for possession, such that UBTS had to interplead. UBTS was obliged to return the PVD Machine to Nambu, and indeed, UBTS did.

80 Moreover, Nambu was the contracting party with UBTS, and a contracting party is entitled to claim substantial damages on the basis "that he did not receive what he had bargained and paid for", which in turn "has nothing to do with the ownership of the thing or property" (*Chia Kok Leong and another v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 at [53]).

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59 Affidavit of Evidence-in-Chief of Kim Hyun Woo ("Mr Kim's AEIC") at para 6; Transcript, 28 July 2020, p 17 lines 27–32; p 18 lines 1–20; p 68 lines 29–31; p 69 lines 1–9.

60 Transcript, 29 July 2020, p 14 lines 2–32; p 15 lines 1–13.

61 Mr Yen's AEIC at para 1.

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Replacement or repair

81 I found the series of claims made by Nambu to be significant.

82 On 28 October 2016, Mr Park sent Mr Yen a quotation for required repairs to the PVD Machine ("the October 2016 quotation"), saying, "[w]e want asap reinstatement".[62]

83 The October 2016 quotation bore the name of Dream Heavy Industries ("Dream Heavy").[63] It indicated that it was possible to repair the PVD Machine, and indeed, it was possible for those repairs to be done in Singapore. The quotation stated that the repairing cost of the PVD Machine was for the sum of South Korean won ("KRW") 139,260,000, and that a further KRW 50,000,000 would be chargeable as "travel worker expense" for each PVD machine special mechanic if repairs were to be done in Singapore.

84 Mr Park explained in his AEIC that when he sent the October 2016 quotation, he had mistakenly reflected the figures in the quotation as Singapore dollars when in fact they were denominated in KRW. He also explained that the exchange rate then was $1 to KRW 809.42.[64] With that exchange rate, the repair cost of KRW 139,260,000 worked out to $172,049.12, and the additional KRW 50,000,000 for repairing in Singapore worked out to $61,772.63, making a total of $233,821.75.

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62 ABOD at pp 115, 118–119.

63 ABOD at pp 118–119.

64 Mr Park's AEIC at para 63.

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85 On 3 January 2017, Mr Park prepared an internal report on the accident,[65] a translated version of which he shared with Mr Yen.[66] In that report, Mr Park said that there was "partial damage of equipment due to a fire" and set out the amount of damages as "[a]bout 170,199,900 KRW (SGD 205,060)".

86 On 23 January 2017, another quotation for the repairs was sent by Nambu to UBTS, this time in the form of a tax invoice ("the January 2017 quotation").[67] The cost of repair was stated as $213,309 before 10% VAT, $234,639.90 inclusive of 10% VAT (which is very close to the figure from the October 2016 quotation from Dream Heavy). There were slight arithmetical errors in items nine, 15 and 16 of the January 2017 quotation, as Mr Heng noted.[68]

87 Unlike the October 2016 quotation,[69] however, the January 2017 quotation included, in items 22 and 23 respectively, the cost of air tickets and a "resident charge" for two Korean repairmen. This contemplated that the repairs could, and would, be carried out in Singapore. Another new item in the January 2017 quotation was item 24, an administration charge of $25,000.

88 A further quotation from Dream Heavy was obtained on 31 August 2017 ("the August 2017 quotation")[70] for $583,309 excluding tax (which was

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65 ABOD at p 136.

66 ABOD at p 137; Mr Park's AEIC at para 67.

67 ABOD at pp 141–144.

68 Mr Heng's AEIC at para 13.

69 ABOD at pp 118–119.

70 ABOD at pp 158–159.

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then stated as 15% whereas previously it was 10%). The administration charge (item 26) had risen from $25,000 to $180,000 (being 12 times of $15,000). That did not appear to be Dream Heavy's charge for carrying out the repairs – rather, it was a claim by Nambu itself for a period of 12 months. In similar vein was item 25, opportunity cost in the sum of $12,500 for 12 months totaling $150,000. There was also an item 24 for legal management in the sum of $65,000. If those items 24–26 were removed, what would then remain (in relation to the repairs proper) is $183,309. That is the same as the figure in the January 2017 quotation (in the sum of $213,309) less the $25,000 administration charge.

89 These quotations ([82], [86] and [88] above) were all premised on it being possible to repair the PVD Machine in Singapore.

90 In this suit, however, Nambu asserted that it was *not* possible to repair the PVD Machine, and that if repairs were possible those could not be carried out in Singapore – instead, the PVD Machine would have to be shipped to and from Korea, at great cost.

91 Nambu's damages expert, Mr Robert Khan Yeow Wai ("Mr Khan"), stated in his AEIC that "[t]he PVD machine was completely destroyed and is not capable for [*sic*] repair".[71] In his report, however, Mr Khan relied on the views of third party representatives (from JP Nelson) that due to the severity of the fire damage, their company was unable to carry out the repairs and that it is *unlikely* that any repair yard in Singapore would undertake to carry out such

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71 Affidavit of Evidence-in-Chief of Robert Khan Yeow Wai ("Mr Khan's AEIC") at para 10(a).

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repair works.[72] However, JP Nelson was not saying that the PVD Machine could not be repaired by anyone. Mr Khan annexed a quotation dated 31 August 2017 from FM Electro-Hydraulic ("FM"),[73] the manufacturers of the PVD Machine, for the repair of the PVD Machine ("the FM quotation"). That was for the sum of $197,460, inclusive of a "repair management fee" of $20,000". Evidently the manufacturers of the PVD Machine considered that it *could* be repaired.

92 The FM quotation was essentially the same as the January 2017 quotation and the August 2017 quotation that Nambu had earlier put forward, save that it did not have the arithmetical errors (present in the other quotations) in relation to the boom cylinders, battery and hydraulic oil, and the FM quotation did not include the total of $6,160 for air tickets and resident charge for two Korean repairmen. The FM quotation also bore the same date (31 August 2017) as the August 2017 quotation from Dream Heavy.

93 Reading Mr Khan's report by itself, one would not get the impression that the PVD Machine could not be repaired; that assertion was put more strongly by Mr Khan in his AEIC than in his report.

94 I did not accept that the PVD Machine could not be repaired, given: (a) the series of quotations that Nambu had obtained for the machine to be repaired after Nambu's representatives had inspected the PVD Machine (see [89] above); and (b) the FM quotation, which showed that the manufacturers of the PVD Machine considered that it was capable of being repaired. I am fortified in this conclusion by the opinion of UBTS' damages expert Mr Melvin Lum Kah

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72 Mr Khan's AEIC at pp 19–20; Plaintiff's Closing Submissions ("PCS") at para 265.

73 Mr Khan's AEIC at pp 18 and 73–75; ABOD at pp 538–540.

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Whye ("Mr Lum") that the PVD Machine can be repaired.[74] Moreover, if Nambu truly believed that the PVD Machine could not be repaired, it would have made no sense to incur charges storing it indefinitely.

95 The question remained whether it would be *uneconomical* to repair the PVD Machine. Mr Khan suggested that that would be the case, because the repairs would cost more than the cost of replacing the PVD Machine with one that was equivalent in age and extent of depreciation ("replacement cost"). But this conclusion is premised on the expense of shipping the PVD Machine to Korea to be repaired there, rather than for it to be repaired in Singapore.[75]

96 The first three quotations Nambu put forward (see [89] above) recognise that the PVD Machine could be repaired in Singapore, and indeed, the cost of doing so was quoted for. It was also the opinion of Mr Lum, which I accept, that the PVD Machine can be repaired in Singapore.[76]

97 In his report, Mr Lum used Nambu's January 2017 quotation in the sum of $213,309 (although this was reflected as $213,307 in Mr Lum's report due to arithmetic error) before 10% VAT as a base, from which he made various deductions:[77]

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74 Affidavit of Evidence-in-Chief of Melvin Lum Kah Whye ("Mr Lum's AEIC) at pp 33–34 and 39–40.

75 Mr Khan's AEIC at p 25; Transcript, 21 July 2020, p 65 lines 31–32; p 66 lines 1–4.

76 Mr Lum's AEIC at pp 38 and 45.

77 Mr Lum's AEIC at pp 33–34 and 53–56.

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(a) reducing the amount for boom cylinders to $4,800 on the basis that they could be repaired or overhauled and did not need to be replaced;

(b) excluding the $3,457 for the centre joint set which he considered could be reused;

(c) excluding the $3,086 for the air conditioner which he considered could be reused;

(d) reducing the amounts quoted for the wages of a mechanic, electrician and general worker; and

(e) reducing the administration charge from $25,000 to $500 to allow for sundries.

98 On a part by part basis, he arrived at a total of $142,684 and then reduced that by 20% to accommodate for betterment, yielding a figure of $114,147.20.

99 In its pleadings, Nambu claimed (as an alternative to its claim for replacement of the PVD Machine) $197,460 as the estimated cost of repair (the same figure as that in the FM quotation).[78] Nambu also claimed $126,495 for freight and shipping related costs to and from Korea.[79]

100 I found that the PVD Machine could be repaired in Singapore at a cost below its replacement cost.

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78 SOC at para 7(a).

79 SOC at para 7(g).

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101 Using the FM quotation as a base, I accepted Mr Lum's opinion that only $4,800 should be allowed for boom cylinders, and nothing for the center joint set, or the air conditioner. Mr Lum had inspected the damaged PVD Machine and critically considered whether each item of the proposed repair costs was justified.[80] I decided, however, not to reduce the amounts quoted for workers' wages, on the basis that those aspects of the FM quotation were reasonable.

102 As for the repair management charge for which $20,000 was quoted, the October 2016 quotation (see [82] above)[81] had no such item; the January 2017 quotation had an administration charge of $25,000 (see [86] above);[82] the August 2017 quotation had an administration charge of $180,000 (see [88] above),[83] apparently $15,000 per month for 12 months (which is how Mr Heng understood it).[84] Nambu did not satisfy me that the repairs would have required the payment of an administration charge or repair management charge to Dream Heavy or FM, as distinct from Nambu itself wanting to recover something in that regard from UBTS. Accordingly, I did not allow that charge. Instead, I allowed $500 for sundries as suggested by Mr Lum.

103 Additionally, I allowed the total of $6,160 for air tickets and resident charge for two Korean repairmen, which was set out in the January 2017

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80 Mr Lum's AEIC at pp 53–54.

81 ABOD at pp 118–119.

82 ABOD at pp 141–144.

83 ABOD at pp 158–159.

84 Mr Heng's AEIC at para 17.

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quotation, and the August 2017 quotation from Dream Heavy, but was missing from the FM quotation.

104 On the evidence and submissions in this case, I did not reduce the figures to accommodate for alleged betterment. UBTS did not satisfy me that, in principle, there should be a discount for betterment; or on the evidence as to what betterment would result from repairing the damaged PVD Machine. Mr Lum had simply applied a 20% discount based on what he described as the standard industry practice in Singapore of applying such a discount to repaired vehicles and equipment that are two years or older, and the PVD Machine was some six years old.[85]

105 In *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 ("*Harbutt's*"), a factory was destroyed by the defendants' negligence and it was reasonable for plaintiffs to rebuild a new one. The court allowed the plaintiffs to recover the cost of replacement, without any allowance to the defendants for any benefit to the plaintiffs from having a new factory in place of the old.

106 Lord Denning MR said (at 468): "[The plaintiffs] replaced [the factory] in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account." Widgery LJ said that he did not accept "that the plaintiffs must give credit under the heading of 'betterment' for the fact that their new factory is modern in design and materials" (*Harbutt's* at 473). Cross LJ said that "such benefit as the plaintiffs

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85 Mr Lum's AEIC at pp 34 and 54.

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may get by having a new building and new plant in place of an old building and old plant is something in respect of which the defendants are not, as I see it, entitled to any allowance" (*Harbutt's* at 476). He added that the defendants did not call any evidence to make out a case of betterment on the lines of the plaintiffs having rebuilt the factory with a different and more convenient layout and thereby spent more money than they would have spent had they rebuilt it according to the old plan (if that were allowed by the planning authorities in the first place) (*Harbutt's* at 476).

107 Those propositions apply with greater force to the present case, which did not involve the PVD Machine being rebuilt altogether, but only repaired. I did not consider that Nambu needs to give credit for such "betterment" arising from the replacement of old parts of the PVD Machine by new parts, the consequence of which is that Nambu would still have been out of pocket in having the PVD Machine repaired, so that it could be used again.

108 For repair costs, I thus allowed $197,460 as per the FM quotation, less $22,224 for the replacement of boom cylinders, plus $4,800 for the repair and overhaul of boom cylinders, less $3,457 for the replacement of the center joint set, less $3,086 for the replacement of the air conditioner, less $20,000 for repair management fee, plus $500 for sundries, plus $6,160 for air tickets and resident charge for two Korean repairmen. In total, I allowed $160,153 for repair costs.

109 It was not uneconomical for Nambu to have repaired the PVD Machine. As such, I allowed Nambu's alternative claim for repair costs, and did not allow Nambu's primary claim for replacement of the PVD Machine.

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Loss of use, and storage and relocation charges

110 Nambu claimed for the loss of use of the PVD Machine from 10 September 2016 to judgment, at $12,280 per month.[86] Calculated up to the first day of trial (21 July 2020), that amounted to $564,800,[87] which far exceeded the estimated cost of repairing the damaged PVD Machine, or its replacement cost.

111 In this regard, Nambu said the PVD Machine was worth $308,065.[88] Mr Lum's opinion was that the PVD Machine was worth slightly less at $302,925, *ie*, KRW 252,437,500.[89] Mr Lum also ascribed a figure of KRW 6,875,000 (*ie*, $8,250) as the scrap value of the damaged PVD Machine.[90]

112 Nambu's claim for loss of use could be divided into three periods:

(a) the initial period when the PVD Machine was moved to UBTS' yard and the parties and the insurer's loss adjuster thereafter inspected it;

(b) a subsequent period when the PVD Machine remained in UBTS' yard even after it had been inspected; and

(c) the final period after Nambu took the PVD Machine back, to judgment.

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86 SOC at pp 5–6.

87 Mr Park's AEIC at para 119.

88 SOC at para 6a.

89 Mr Lum's AEIC at pp 34 and 54.

90 Mr Lum's AEIC at pp 34 and 54.

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113 Nambu had intended to use the PVD Machine for a contract with Dongwoon Engineering Pte Ltd ("Dongwoon"), and in the aftermath of the fire Nambu reasonably rented a replacement PVD machine from K-Inc Konstruct Pte Ltd ("K-Inc") for KRW 10,000,000 a month ($12,280 per month).[91]

114 It was common ground that $12,280 per month (the cost of renting a replacement PVD machine) was a reasonable *rate* to use in computing loss of use;[92] but the parties disputed the *period* for which damages for loss of use should be awarded.

115 The PVD Machine was burned on 10 September 2016, and it was inspected at UBTS' yard by the end of September 2016. Mr Park saw the machine together with Mr Yen on the day of the fire, 10 September 2016.[93] The loss adjuster Mr Heng inspected the damaged PVD Machine on 27 September 2016.[94] The next day, 28 September 2016, Mr Park and a director from Nambu Korea, Mr Yoo Soon Dong, inspected the machine; they also met Mr Yen and had a discussion with him.[95]

116 On 12 October 2016, Mr Yen emailed Mr Park to say that UBTS had to bill Nambu for the storage of the damaged PVD Machine, at $900 per month.[96]

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91 ABOD at pp 108–112.

92 Mr Lum's AEIC at pp 47–49; Mr Khan's AEIC at pp 28–29.

93 Mr Park's AEIC at paras 53–55.

94 Mr Heng's AEIC at para 4.

95 Mr Park's AEIC at paras 60–61.

96 ABOD at pp 115–116.

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Mr Yen listed three consecutive monthly periods, from 11 September 2016 (the day after the fire) to 10 December 2016.

117 Mr Park's email reply on 28 October 2016 did not address the matter of storage charges; instead Mr Park sent across a quotation for repairs of the PVD Machine (the October 2016 quotation).[97]

118 Mr Park said in his AEIC, however, that he spoke with Mr Yen and was assured that the email about storage charges was only sent in accordance with UBTS' procedures, and that UBTS' insurers would cover the storage charges, and Nambu need not settle them.[98] I did not accept this.

119 I found that UBTS and its insurers never accepted liability for the damage to the PVD Machine or the attendant consequences. Such an admission is not referred to in any correspondence from Nambu or its lawyers. Moreover, Mr Yen's email of 12 October 2016 about charging Nambu for the storage of the damaged PVD Machine, is an indication that UBTS was not accepting liability. It was also inherently unlikely that Mr Yen or Mr Heng would admit liability, when the insurer had not taken a position on the matter (the insurer's loss adjusters only informed Nambu that its claim was rejected on 20 October 2017: see [72] above), and I accepted their evidence that they never did admit liability.[99] Neither was there any basis to say that UBTS had waived its rights, or that it was estopped from enforcing its rights.

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97 ABOD at pp 115 and 118–119.

98 Mr Park's AEIC at para 62.

99 Transcript, 29 July 2020, p 44 lines 17–21; 30 July 2020, p 36 lines 27–32; p 37 lines 1–7; p 60 lines 9–25; p 61 line 32; p 62 lines 1–10 and 24–28; p 63 lines 21–25; p 65 lines 3–7; p 68 lines 20–23; p 69 lines 1–6; p 79 lines 1–14; p 84 lines 7–10; 4 August

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120 I did not accept that Mr Yen had told Mr Park that Nambu would not have to pay for storage charges ([118] above). This was not mentioned in any correspondence from Nambu or its lawyers on the matter of storage charges. If there had been such an assurance from Mr Yen, Nambu or its lawyers would have mentioned it when UBTS pressed for payment, which culminated in Nambu paying under protest.[100]

121 Nor did I believe that at any time after Mr Yen's email of 12 October 2016, he had told Mr Park that UBTS or its insurers still required the PVD Machine to remain at UBTS' yard.[101] As far as UBTS was concerned, by 12 October 2016 both sides and Mr Heng had inspected the PVD Machine, and Nambu was free to take the PVD Machine back, provided Nambu settled what was due to UBTS for storage, as well as for prior contracts that Nambu had not paid UBTS for.

122 Mr Park, on the other hand, might not have known as early as October 2016 that UBTS and its insurers had finished all the inspections they wished to carry out. This would, however, have been clear to him from Mr Yen's email of 3 January 2017.[102] Mr Yen informed Mr Park that the lease of UBTS' yard at Buroh Crescent was going to end, and Mr Yen said, "[p]lease arrange to take out your PVD Machine by [28 January 2017]." It is clear from that that Nambu

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2020, p 60 lines 9–18; 6 August 2020, p 15 lines 13–17; p 35 lines 31–32; p 36 lines 1–9; p 38 lines 22–25; p 65 lines 27–32; p 66 line 1; p 71 lines 30–31; p 72 lines 1–3; p 83 lines 24–27.

100 ABOD at pp 182–183 and 199–200.

101 Mr Park's AEIC at para 61.

102 ABOD at p 135.

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was free to remove the PVD Machine, and indeed, UBTS asked that this be done by 28 January 2017.

123 Nevertheless, Nambu did not retrieve the PVD Machine. This is peculiar, for by then Nambu had been renting a replacement PVD machine for over three months (since 16 September 2016).[103] It had also provided UBTS with a quotation for repairs in October 2016 (see [82] above)[104]. One would have expected Nambu to wish to retrieve the PVD Machine so that it could be repaired, and Nambu could use it again.

124 Instead, Nambu's attitude seemed to be that it would just leave the damaged PVD Machine with UBTS, and not pay UBTS anything (not even for what was indisputably owing on prior dealings), until UBTS agreed to its demands.

125 Nambu's agreement with K-Inc for the rental of a replacement PVD machine ended after six months, *ie*, on or around 16 March 2017, and Nambu said it was not able to find another replacement thereafter.[105] Accordingly, it gave up the contract with Dongwoon in July 2017.[106] Even in those circumstances, Nambu still did not retrieve the damaged PVD Machine from UBTS to have it repaired.

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103 ABOD at p 108–112.

104 ABOD at pp 115–116 and 118–119.

105 Mr Park's AEIC at para 133.

106 ABOD at pp 261–262 and 265–266.

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126 On 20 October 2017, UBTS' loss adjusters wrote to Nambu to reject Nambu's claim.[107] Yet, Nambu still did not retrieve the PVD Machine to have it repaired.

127 On 16 March 2018, Mr Yen emailed Mr Park to ask when Nambu was going to move the PVD Machine away.[108] Mr Yen said that Nambu would first have to settle full payment inclusive of storage charges. He also asked to hear from Mr Park within 14 days, failing which UBTS would dispose of the PVD Machine without further notice.

128 Mr Yen sent a further email on 3 April 2018 as a final reminder,[109] not having heard from Mr Park in response to his 16 March 2018 email. UBTS gave Nambu another 14 days and said that UBTS had the right to auction the damaged PVD Machine and offset the proceeds of sale against the payment that was outstanding to UBTS.

129 Nambu finally responded through its lawyers on 12 April 2018 to say that the PVD Machine would be removed on 14 April 2018.[110] That did not take place as UBTS would not allow removal until it had received what was outstanding to it. Further correspondence ensued, culminating in Nambu paying a total of $45,090.60 under protest.[111] On 7 July 2018, Nambu finally took the damaged PVD Machine back. In this suit, Nambu only sought to recover

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107 ABOD at pp 162–164.

108 ABOD at p 165.

109 ABOD at p 168.

110 ABOD at pp 171–172.

111 ABOD at pp 182–183 and 199–200.

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$32,282.70 of the $45,090.60 it had paid under protest,[112] recognising that the difference between the figures represents a sum that it owed UBTS on other dealings, unrelated to the storage and relocation of the damaged PVD Machine.

130 In respect of the storage and relocation charges for the damaged PVD Machine, I find that UBTS ought properly to bear the storage charges for the first four months, *ie*, until 10 January 2017. Mr Yen's email of 3 January 2017 asked Nambu to take its PVD Machine back,[113] and I allowed Nambu another week beyond that, to 10 January 2017 (four months since the fire on 10 September 2016). UBTS charged Nambu $900 per month for storage,[114] and accordingly, I required UBTS to refund $3,600 of what Nambu had paid under protest.

131 In similar vein, I allowed Nambu what it had paid Kim Soon Lee Pte Ltd ("Kim Soon Lee") to relocate the damaged PVD Machine, and for two months of Kim Soon Lee's charges for storing the machine. Kim Soon Lee's invoice dated 6 July 2018 and in the sum of $9,790.50 was for those relocation charges and one month's storage.[115] To that I would add another month's storage charges in the sum of $1,016.50 (*ie*, $950 plus 7% GST).[116]. That made a total of $10,807.

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112 SOC at para 6c.

113 ABOD at p 135.

114 ABOD at pp 126–131.

115 ABOD at pp 228–229.

116 ABOD at p 230.

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132 In allowing this two-month period of further storage (from 10 January 2017 to 10 March 2017, with charges based on what Kim Soon Lee billed for a subsequent period), I considered how long it would take to repair the PVD Machine. Mr Khan suggested two and a half months, which he rounded up to three months because rental rates are generally on a monthly basis.[117] However, 24 days of that period were for sea freight to and from Korea. Another three weeks (or 21 days) were for materials and parts to be delivered. Mr Khan put the period of repair itself as one month, whereas Mr Lum said 27 working days would be required, which could be rounded up to one month for computing loss of use.[118]

133 The week from 3 to 10 January 2017 which I allowed for Nambu to retrieve the PVD Machine, and the two-month period of further storage thereafter accommodates:

(a) 21 days for materials and parts to be delivered;

(b) a buffer of 12 more days for the materials and parts to come from Korea (if required);

(c) another month (or 27 days) for the repairs proper to be carried out.

134 From 3 January 2017, if not earlier, Nambu could have taken steps towards having the PVD Machine repaired. It already had a first quotation in October 2016. The machine ought then to have been repaired by 10 March 2017.

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117 Mr Khan's AEIC at p 26.

118 Mr Lum's AEIC at p 47.

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135 In view of the above, I allowed a total of six months' loss of use. I thus allowed Nambu the amount paid to K-Inc for six months' rental of the replacement PVD machine (till on or around 16 March 2017) (see [113] above),[119] *ie*, 6 x $12,280 = $73,680.

Loss of business

136 If Nambu had promptly retrieved and repaired the damaged PVD Machine, it would have had the use of the repaired PVD Machine when it no longer had the replacement PVD machine rented from K-Inc. If so, it could have continued with the contract with Dongwoon, and not suffered any loss of profit in that regard. It could also have continued using the repaired PVD Machine for other projects after the Dongwoon contract.

137 Why then did Nambu not retrieve and repair the damaged PVD Machine?

138 Nambu did not say that this was because it could not afford to pay UBTS to get the PVD Machine back (it eventually did pay, under protest, in July 2018) (see [129] above).[120]

139 Nor did Nambu say that in late 2016 or early 2017, it could not afford to repair the PVD Machine. Mr Kim said that when the PVD Machine was finally retrieved, UBTS did not have enough money to replace it or repair it at that time.[121] This assertion (made in re-examination) was not substantiated by any

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119 ABOD at pp 108–112.

120 ABOD at pp 182–183 and 199–200.

121 Transcript, 28 July 2020, p 65 lines 22–31; p 66 lines 1–2.

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documentary evidence of Nambu's financial position at the time, *ie*, July 2018, but more fundamentally, the relevant time is late 2016 or early 2017. There was no satisfactory explanation why Nambu did not retrieve and repair the damaged PVD Machine then.

140 Indeed, given that Nambu says that its loss of profit from the Dongwoon contract was in the sum of $287,473,[122] it would only have been sensible to proceed with the repair, and save the Dongwoon contract. This is especially since repairing the PVD Machine would have cost less than the amount of lost profits.

141 Nambu also suggested that it could not proceed to repair the PVD Machine because it is the subject of this suit. This is misconceived. After the initial inspections in September 2016, neither side still required to inspect the PVD Machine in its damaged form, nor was the court asked to do so. UBTS' experts did inspect the damaged PVD Machine after September 2016,[123] but that was simply because it was still available for inspection. Nambu cannot justify keeping the damaged PVD Machine lying around "as is", on the basis that it wanted to give UBTS' experts the opportunity to inspect it. Moreover, after UBTS' experts had inspected the damaged PVD Machine (in March 2020), Nambu still did not repair it.

142 From 3 January 2017 at the latest, Nambu was free to repair the PVD Machine so that it could use it. Instead, Nambu left the PVD Machine in its damaged state, and claimed for loss of profit, and loss of use and storage charges

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122 Mr Park's AEIC at para 133.

123 Mr Koay's AEIC at p 9; Mr Lum's AEIC at para 6.

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all the way to judgment. In this regard, I did not allow Nambu compensation for loss of profits, and I only allowed a period of six months for loss of use and storage charges (till around the middle of March 2017) (see [131] and [135] above). Nambu acted unreasonably in not repairing the PVD Machine by then, and cannot hold UBTS responsible for any losses flowing from this.

Conversion

143 I did not find UBTS liable in conversion. UBTS did not act in a manner inconsistent with Nambu's superior possessory title. When UBTS moved the damaged PVD Machine to UBTS' yard, instead of to the Tuas worksite, UBTS was reasonably doing what it considered was safe and convenient in the aftermath of the fire. Nambu did not protest or ask that the damaged PVD Machine be relocated to the Tuas worksite (where it could not then be used, and might get in the way).

Detinue

144 I also rejected Nambu's claim in detinue. It was only on 12 April 2018 when Nambu asked to retrieve the PVD Machine (on 14 April 2018),[124] whereas UBTS had, since 3 January 2017, been asking Nambu to remove it.[125] For the period between 12 April 2018 and 7 July 2018 (when Nambu finally took the damaged PVD Machine back),[126] UBTS was entitled to assert a common law lien, at least in relation to storage charges for the damaged PVD Machine beyond the first four months which I consider UBTS should itself bear: see Re

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124 ABOD at pp 171–172.

125 ABOD at p 135.

126 ABOD at p 198.

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Caveat No CV/21366D lodged by Lim Saw Hak and another [1996] 1 SLR(R) 70 at [14].

145 In any case, even if UBTS were liable in conversion or detinue, Nambu would not get any damages beyond what I awarded in respect of the damage to the PVD Machine and related relief. Had UBTS released the damaged PVD Machine on 14 April 2018 (which is when Nambu asked to retrieve it pursuant to its request made on 12 April 2018) instead of on 7 July 2018 (when Nambu did get it back), Nambu would still have not repaired the damaged PVD Machine and put it to use.

Interest

146 Finally, I also allowed Nambu interest on the sums awarded, from the date of the writ, 6 September 2019, to judgment.

Conclusion and Costs

147 For the above reasons, I found in Nambu's favour in respect of bailment and breach of contract, and awarded Nambu the following, totalling $248,240 (plus interest as mentioned above):

(a) $160,153 for repair costs (see [108] above);

(b) $3,600 which UBTS is to refund Nambu in respect of the first four months of storage of the damaged PVD Machine at UBTS' yard (see [130] above);

(c) $10,807 for Kim Soon Lee's charges for relocating the damaged PVD Machine, and a further two months of storage at Kim Soon Lee's yard (see [131] above); and

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(d) $73,680 for six months' loss of use, based on six months' rental of the replacement PVD machine from K-Inc (see [135] above).

148 After hearing the parties on costs, I awarded Nambu $160,000 in legal costs plus reasonable disbursements to be fixed or taxed, if not agreed. This took into account the costs in respect of UBTS' earlier application to vacate the trial, which costs were reserved.

149 Both parties referred to Appendix G of the Supreme Court Practice Directions ("Appendix G") for guidance on the quantum of costs for a ten-day trial.

150 Nambu asked for costs of $200,000 on the basis of a daily tariff of $20,000 (which is higher than the $17,000 suggested for complex tort or contract cases), without any tapering of the tariff to 80% of the daily rate, for the 6th–10th day of trial (which Appendix G indicates is appropriate).

151 UBTS submitted that if this were regarded as a simple tort or contract case, the tariff in Appendix G would yield a figure of $135,000 ($15,000 per day for the first five days, reducing to 80% of that for the 6th–10th day). If this were regarded as a complex tort or contract case, the figure would then be $153,000 (based on a daily tariff of $17,000 per day, reducing to 80% of that after the first five days). UBTS also cited *Federal Express (Singapore) Pte Ltd v Sun Technosystems Pte Ltd* HC/BC 312/2005 (7 February 2006) where $160,000 was allowed for an 11-day trial in another case involving the transportation of goods. UBTS submitted that the it should not be ordered to pay more than $160,000 in the present case.

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152 Taking into account the work done on post-trial written closing submissions, I considered it reasonable to award the sum of $160,000 as legal costs to Nambu in the present case, bearing in mind that Nambu succeeded on bailment and breach of contract, but did not succeed on conversion or detinue; moreover, I had awarded Nambu only $248,240 when its claims had totalled over $1.2m.

Andre Maniam
Judicial Commissioner

S Magintharan and Benedict Tan (Essex LLC) for the plaintiff;
Jonathan Lim and Gerald Yee (Premier Law LLC) for the defendant.

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