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

[2022] SGHC(A) 33

Civil Appeal No 57 of 2021

Between

Ng Koon Yee Mickey

… *Appellant*

And

Mah Sau Cheong

… *Respondent*

In the matter of Suit No 506 of 2018

Between

Mah Sau Cheong

… *Plaintiff*

And

Ng Koon Yee Mickey

… *Defendant*

Between

Ng Koon Yee Mickey

… *Plaintiff in counterclaim*

And

Mah Sau Cheong

… *Defendant in counterclaim*

JUDGMENT

[Debt and Recovery — Right of set-off]
[Contract — Breach]
[Contract — Contractual terms — Implied terms — Duty to cooperate]
[Contract — Prevention principle]
[Contract — Termination]

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Ng Koon Yee Mickey
v
Mah Sau Cheong

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Appellate Division of the High Court — Civil Appeal No 57 of 2021
Quentin Loh JAD, See Kee Oon J and Chua Lee Ming J
2 November 2021

30 September 2022 Judgment reserved.

See Kee Oon J (delivering the judgment of the court):

Introduction

1 This appeal centres on whether a share purchase agreement ("SPA"), signed between the appellant, Ng Koon Yee Mickey ("Ng"), and the respondent, Mah Sau Cheong ("Mah"), on 13 November 2013, had been validly terminated by Mah. The appellant appeals the decision of the Judge of the General Division of the High Court (the "Judge") handed down orally in *Mah Sau Cheong v Ng Koon Yee Mickey* HC/S 506/2018 (28 April 2021) (the "Judgment"). The Judge found that Mah had validly terminated the SPA and was thereby entitled to two tranches of payments that he had made to Ng pursuant to the SPA. For the reasons set out below, we allow the appeal.

Facts

2 HC/S 506/2018 ("Suit 506") was first commenced by Mah, who brought claims against Ng for sums he had disbursed to Ng under three agreements dated 29 May 2013 (the "Agreements"): (a) S$241,800; (b) RMB 1m (approximately S$209,734); and (c) RMB 2m (approximately S$419,468) (collectively, the "Disbursed Sums"). As the proceedings progressed, Ng eventually conceded that he was liable for the Disbursed Sums, but claimed that his liability should be set off against a sum that Mah owed to him under the SPA (the Judgment at [2]–[3]).

3 Under the SPA, Ng agreed to sell his then-5% shareholding in Enersave International (HK) Ltd ("Enersave International") to Mah. Enersave International was the parent company of Xianda Holdings (HK) Ltd, which in turn owned Xianda (Tianjin Seawater Resources Development Co Ltd) (the "Xianda SPV"). These related companies were corporate vehicles used to carry out the Nangang Project, which concerned the production of desalinated seawater and other types of water products in Nangang (the "Nangang Project") (the Judgment at [5]). The Nangang Project was initially founded by Ng and two other colleagues (the "Founding Members").[1] Sometime in 2011, Mah was approached to invest in the Nangang Project and Mah's initial involvement was therefore to provide funding to it.[2] At the time of the execution of the SPA, Mah held 80% of the shares in Enersave International, whilst Ng held 5% and the remaining 15% was held by the other two founders.[3] Mah's shareholding later increased to more than 90% (the Judgment at [5]).[4] Mah later removed the

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1 Appellant's Case (4 Aug 2021) ("AC") at para 7.

2 AC at para 9; Respondent's Case (3 Sep 2021) ("RC") at para 11.

3 AC at para 16; RC at para 10.

4 Record of Appeal ("ROA") (Vol 3A) at p 32 (para 126).

Founding Members, including Ng, as directors of Enersave International by July to August 2016, and appointed persons related to himself to the board (the Judgment at [27]).

4 As part of the Nangang Project, an operational agreement was required to be executed (the "Operational Agreement"). The contracting parties to the agreement were the Xianda SPV and the Committee of TEDA-Tianjin Economic-Technological Development Area (Nangang Industrial Zone) ("TEDA").[5] Mah acknowledged that he was one of the directors of the Xianda SPV but claimed that he was not involved in the day-to-day affairs and/or operational matters relating to the Nangang Project, or the negotiations, finalising and signing of the Operational Agreement.[6] Unsurprisingly, Ng disputed this and argued that Mah played a key role in the negotiations, finalising and signing of the agreement.[7]

5 Under the SPA, Mah agreed to purchase Ng's then-5% shareholding in Enersave International for RMB 13m, to be paid in three tranches of an initial deposit of RMB 2m (the "Tranche 1 Payment"); a cash payment of RMB 3m (the "Tranche 2 Payment") and a final cash payment of RMB 8m (the "Tranche 3 Payment) (the Judgment at [6]). The conditions of payment are set out at Article 1.2.1 of the SPA:[8]

> 1.2.1 Terms and Conditions of Payment
>
> The above-mentioned purchase price is payable as follows:
>
> a) Initial Deposit

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5 ROA (Vol 3A) at p 34 (para 131).

6 ROA (Vol 3A) at p 34 (para 132).

7 ROA (Vol 3B) at p 36 (para 102).

8 Appellant's Core Bundle (4 Aug 2021) ("ACB") (Vol 2) at p 168.

> The Purchaser has already remitted to the Vendor/ in the amount of Chinese Yuan Two Million (RMB2.0 million) as initial deposit, the Vendor hereby acknowledges receipt of this amount as exhibited in Appendix 1;
>
> b) Cash Payment
>
> Chinese Yuan Three Million (RMB 3.0 million) shall be payable by 18th November 2013 or within one month from the date of signing of the Investment Collaboration Agreement, whichever date is later pertaining to the Nangang Project between XIANDA and the Tianjin Economic-Technological Development Area (hereinafter referred to as "TEDA");
>
> c) Final Cash Payment
>
> Chinese Yuan Eight Million (RMB8.0 million) shall be payable within two month from the Closing Date subject to the execution of the relevant transfer documents by the Parties for the transfer and registration of the Purchase Shares with the relevant authorities in Hong Kong.

6 Article 4.7 gave Mah the "sole discretion" to terminate the SPA if the "Closing Date" did not materialise on or before 24 October 2014, and provided that in the event of termination, the initial deposit (*ie*, the Tranche 1 Payment in Article 1.2.1(a)) and cash payment (*ie*, the Tranche 2 Payment in Article 1.2.1(b)) would be repaid by way of a term loan:

> 4.7 Time shall be of the essence of this Agreement. The Purchaser shall at his sole discretion to terminate this agreement if the Closing Date shall not be materialized on or before 24th October 2014. In the event of termination by the Purchaser, the Initial Deposit and Cash Payment made to the Vendor shall be converted into a Term Loan to be repaid on or before 24th October 2016.

7 The "Closing Date" as stated in Article 1.2.1(c) in respect of the Tranche 3 Payment, and referred to in Article 4.7, is defined in Article 4.1 of the SPA:

> 4.1 The closing shall take place on the day the conditions pertaining to the Nangang Project between XIANDA and TEDA/relevant authorities as follows are obtained: -

> (a) the signing of the Operational Agreement; and
>
> (b) the obtaining of the Approval of the Feasibility Study Report
>
> (hereinafter referred to as the "Closing Date").

8 Mah made the Tranche 1 and 2 Payments to Ng but not the Tranche 3 Payment. Mah had also earlier extended the deadline for the Closing Date from 24 October 2014 to 24 October 2015, and thereafter to 24 October 2016 (the "Deadline") (the Judgment at [9]).

9 The approval of the Feasibility Study Report, as required under Article 4.1(b), was completed in mid-2014 prior to the Deadline. The signing of the Operational Agreement (as required under Article 4.1(a)) only took place on 3 November 2016 after the Deadline (the Judgment at [16]).

10 On 21 October 2016, Mah sent an email to Ng attaching a letter, stating that the SPA would be terminated if the Closing Date did not materialise by the Deadline (the "21 October Letter").[9]

Parties' cases below

11 Mah submitted that he had validly terminated the SPA and sought the return of the Tranche 1 and 2 Payments. Ng responded that Mah had no right to terminate the SPA as the Closing Date had in fact materialised. Even if Mah had such a right, the right had not been properly exercised as Mah did not give him a valid notice of termination. Further and alternatively, Mah had breached his duty to cooperate and was therefore precluded from terminating the SPA. He therefore denied that he was liable to repay the Tranche 1 and 2 Payments.

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9 ACB (Vol 2) at pp 190–191.

12 Ng further submitted that Mah's obligation to make the Tranche 3 Payment had been triggered upon the signing of the Operational Agreement, and therefore counterclaimed against Ng for the Tranche 3 Payment, less any amounts he owed to Mah under the Agreements. In respect of set-off, Ng argued that the defence of legal set-off would operate by law to extinguish Mah's claim. Alternatively, the court's orders for Ng to pay the Disbursed Sums and for Mah to make the Tranche 3 Payment would be set off against each other as a matter of practicality. There was therefore no need to consider whether Mah's claim would be extinguished by equitable set-off; but Ng claimed that he would have been able to show, in any event, that there was a close connection between the Disbursed Sums and the counterclaim such that it would be manifestly unjust for the sums not to be set off against each other.

Decision below

13 The Judge found that Mah had validly terminated the SPA and was thereby entitled to reclaim the Tranche 1 and 2 Payments. First, since the Operational Agreement was signed only after the Deadline, the Closing Date had not materialised by 24 October 2016 and Mah had a right to terminate the SPA. The Judge rejected Ng's contention that Article 4.7, in requiring the Closing Date to "materialise", only meant that the signing of the Operational Agreement" had to be a "practical likelihood" by the Deadline (the Judgment at [18]–[19]).

14 Second, Mah had properly exercised his right to terminate the SPA. The Judge rejected Ng's submission that Mah's purported notice of termination by way of the 21 October Letter was ineffective because Mah's right to terminate the SPA had not arisen at the time, and that Mah did not give notice to terminate thereafter. The Judge held that this case had not been pleaded by Ng. Assuming

that Mah was required to give notice to Ng that he was terminating the SPA, the letter would be deemed to have reached Ng on 26 October 2016 pursuant to Article 4.5, which was after the Deadline (the Judgment at [22]–[23]). Article 4.5 provided that:

> **Any notice**, direction or other instrument aforesaid, if delivered shall be deemed to have been given or made on the date on which it was delivered or [**if] mailed shall be deemed to have been given or made on the third business day following the day on which it was mailed**.
>
> [emphasis added by the Judge]

15 Third, the Judge found that Mah did not breach his duty to take reasonable steps to procure the signing of the Operational Agreement by the Deadline. Even though Mah had fixed the signing of the agreement on a date that was *after* the Deadline, the objective evidence did not show that Mah could reasonably have procured the signing on an earlier date (the Judgment at [26]–[30]).

16 Given that Mah had validly terminated the SPA, it would follow that he was not liable for the Tranche 3 Payment. It would also follow that there was nothing against which Mah's claim for the Disbursed Sums could be set off. The Judge therefore found that Ng was liable to repay Mah the Disbursed Sums under the Agreements, as well as the Tranche 1 and 2 Payments under the SPA.

Parties' cases on appeal

Notice of termination

17 In respect of whether Mah had given Ng notice of termination, Ng submitted that Article 4.7 did not provide for automatic termination of the SPA but instead gave Mah a discretion to terminate it. In order to exercise this discretion, Mah had to specifically communicate to Ng his decision to terminate

the SPA. However, the 21 October Letter did not constitute such valid communication for two reasons. First, the letter did not constitute a clear and unequivocal notice of termination, but was merely an expression of intent. Second, the letter had no effect as it was sent *before* the right to terminate the SPA had accrued. In this regard, Ng submitted that the deeming provision in Article 4.5 could not affect the substantive validity of a notice. He also disputed that the 21 October Letter was sent by registered mail, as there was no factual basis to support this finding. The Judge had also presumed that Mah's notice of termination would take effect upon receipt by Ng, but this was not a foregone conclusion as Mah did not plead that the 21 October Letter took effect from 26 October 2016. Finally, if two identical notices are served through different modes, the receipt of the earlier notice would be taken as the date or time of service.

18 In response, Mah argued that the Judge had rightly found that Article 4.7 gave him the right to terminate the SPA. According to Mah, it followed from such a right that he did not have to give notice of termination. There was also no provision in the SPA that required Mah to issue a notice. Even if, taking Ng's case at its highest, Mah had to exercise his discretion to terminate the SPA, Mah had provided proper and valid notice of termination to Ng by way of his 21 October Letter.[10]

19 Mah further submitted that the 21 October Letter was a valid notice of termination as it clearly and unequivocally sought to effect termination. First, Mah argued that the wording of the 21 October Letter itself made that clear, as it stated that the SPA *shall* be terminated upon the occurrence of a certain event, namely the Closing Date not materialising. Second, a notice would be invalid if

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[10] RC at paras 80–93.

issued prematurely only in cases where (i) there was an express provision in the contract that notice of termination must be given in the event of a default or (ii) a premature notice would cause prejudice to the defaulting party, such as causing him to have less time to remedy the breach. On the facts, there was no requirement for notice to be given under the SPA. Even if the notice had been issued prematurely, no prejudice had been caused to Ng in any event since termination was to be exercised at Mah's sole discretion.[11]

Mah's entitlement to terminate the SPA

20 Ng submitted that the common law prevention principle precluded Mah from terminating the SPA before 3 November 2016 (when the Operational Agreement was signed).[12] The prevention principle had been triggered as Mah had breached his duty to cooperate under the SPA, under which he was obliged to take steps to get the Operational Agreement signed by 24 October 2016. Ng cited the Judge's finding that Mah was required to take reasonable steps to procure the signing of the agreement by 24 October, and submitted that this finding was consistent with the express term in Article 4.2 of the SPA and with case law. Mah had breached this duty as he had taken no steps to ensure the agreement would be signed by 24 October. Ng further argued that any doubt regarding whether the agreement could reasonably have been signed by 24 October should be resolved in favour of Ng, and that an adverse inference should be drawn against Mah as he had committed an egregious breach of discovery obligations.

21 Further or alternatively, Mah could not rely on the lapse of the Deadline to terminate the SPA, as it was his own action that caused the lapse. As it was

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11 RC at paras 102–127.

12 AC at para 84.

Mah's decision to have the signing of the Operational Agreement coincide with the visit of then-Malaysian Prime Minister Najib Razak ("PM Najib"), which rendered the signing of the agreement by 24 October an impossibility, he could not derive any rights flowing from that impossibility which he unilaterally created. Mah's act had therefore set time at large, such that he could not terminate the SPA before 3 November 2016.

22 Finally, Ng submitted that Mah's right to terminate the SPA had not arisen, as the word "materialise" in Article 4.7, "as a matter of plain English", should mean "to make material" or to "come into perceptible existence". If the word had been so interpreted, the Closing Date would have materialised by 21 October 2016 at the latest, when PM Najib confirmed his arrival on 3 November 2016. As the word "materialise" had been inserted by Mah in a provision intended solely for his benefit, applying the *contra proferentem* rule, any uncertainly in its meaning should be construed against Mah.

23 In response, Mah submitted that Article 4.2 did not expressly provide that he had a duty to cooperate and that, in any event, Ng's pleaded case was that such a duty was implied. Even if he had a duty to cooperate, he did not breach such a duty. Mah submitted that he had invested a significant amount of money into the Nangang Project and, therefore, it would make no commercial sense for him to delay the project. Ng's case that Mah had taken no steps to ensure that the Operational Agreement would be signed by 24 October 2016 was inconsistent with the evidence and the Judge's findings of fact. Finally, Mah submitted that the word "materialise" in Article 4.7 should mean to "occur" or "take place", as any other interpretation would be too uncertain and would not represent the parties' intentions at the time the SPA was negotiated and executed. As such, the Closing Date did not materialise by the Deadline.

Set-off

24 Ng argued that, if he succeeded in any of his arguments such that the SPA was not terminated, he would be entitled to the Tranche 3 Payment and the defence of set-off would apply.[13] If, however, Mah succeeded in the appeal, the issue of set-off would not arise.

Issues to be determined

25 The following issues arise for our determination on appeal:

(a) Whether Mah had validly terminated the SPA, which entailed two sub-issues:

(i) Whether Mah had given Ng valid notice to terminate; and

(ii) Whether Mah was entitled to terminate the SPA pursuant to Article 4.7; and

(b) If Mah had not validly terminated the SPA, whether Ng's counterclaim for the Tranche 3 Payment should be set off against Mah's claim for the Disbursed Sums (the "Set-off Issue").

26 We address these issues in turn.

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[13] Appellant's Skeletal Submissions (4 Oct 2021) at pp 12–13.

Whether Mah had validly terminated the SPA

Preliminary issue

27 As a preliminary issue, we consider Ng's submission that the Judge had erred in finding that he did not plead, in his Defence, that Mah had failed to provide notice of termination to Ng.

28 We begin with the parties' pleadings. In Mah's Statement of Claim (Amendment No 1), it was pleaded that:[14]

> 20. By way of a letter dated 21 October 2016 (the "**21 Oct 2016 Letter**"), the Plaintiff issued a letter to the Defendant stating *inter alia* that if the Closing Date (as defined in the SPA and subsequently amended pursuant to the parties' mutual written consent on 21 October 2015) was not materialized on 24 October 2016, the SPA shall be terminated without any further extension.
>
> 21. The Defendant failed and/or refused to respond to the 21 Oct 2016 Letter and the events described at Clause 4.1 of the SPA as conditions for the Closing Date to materialize were not materialized by 24 October 2016.
>
> 22. In the premises, pursuant to Clause 4.7 of the SPA, the Plaintiff terminated the SPA at his sole discretion.
>
> 23. Following the termination of the SPA, and in accordance with Clause 4.7 of the SPA, the initial deposit of RMB 2 million and the subsequent cash deposit of RMB 3 million was converted to a term loan and was to be repaid by the Defendant to the Plaintiff on or before 24 October 2016.

29 In Ng's Defence and Counterclaim (Amendment No 2), it was pleaded that:[15]

> 8B. Paragraph 9 of the SOC is admitted. The Defendant avers that he did not meet the requests in the Plaintiff's letters because the claims therein, which arise from the Agreements

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14 ROA (Vol 2) at p 60.

15 ROA (Vol 2) at pp 68–69 and 71.

had been set-off by an express and/or implied agreement between that parties.

PARTICULARS

…

(l) On or about 3 November 2016, the Operation Agreement was signed. Pursuant to Article 4.1 of the SPA, the Plaintiff (*ie*, Mah) was obliged to pay the Defendant (*ie*, Ng) RMB 8,000,000 within 2 months of 3 November 2016 (subject to any set-off).

(i) The Plaintiff is estopped from relying on Article 4.7 of the SPA to terminate the SPA on the basis that the Operation Agreement was signed after 24 October 2016 *inter alia* because his actions have set time at large.

…

(vi) Further and alternatively, it was an implied term of the SPA that the parties would co-operate with each other to secure the performance of the SPA and that neither the Plaintiff nor the Defendant would, by his own act or default, prevent the occurrence of the Closing Date, thereby preventing performance of the SPA…

(vii) Further and alternatively, the Plaintiff had waived his right to terminate the SPA pursuant to Article 4.7 of the SPA because the Plaintiff allowed time to go by and did not make time the essence again before the Operational Agreement was signed on 3 November 2016.

…

9J. Paragraph 20 of the SOC is denied. The Defendant avers that sometime on or around 21 October 2016, the Plaintiff wrote to the Defendant stating, *inter alia*, that he "shall at his sole discretion terminate the SPA if the Closing Date under the SPA shall not be materialized on or before October 24, 2016" and that "if the Closing Date is not materialized on October 24, 2016, the SPA shall be terminated without any further extension".

9K. Paragraph 21 of the SOC is denied. Paragraph 8B above is repeated.

9L. Paragraphs 22, 23 and 24 of the SOC are denied. Paragraphs 8B above and paragraphs 30 to 33 below are repeated.

30 Ng's case as pleaded, therefore, was that Mah should not be entitled to terminate the SPA because he was estopped from doing so, or that he had

attempted to do so in breach of an implied term to cooperate, or that he had waived his right to do so. He did not plead that Mah failed to provide a proper notice of termination and was therefore not entitled to terminate the SPA.

31 Ng's defence that Mah did not issue a proper notice of termination and was therefore precluded from doing so first surfaced in his opening statement:[16]

> 23. The corollary was that Mah could exercise his right to terminate only upon notice given to Mickey. This makes sense, since Mickey might have no insight into whether or when the Operational Agreement was signed or the Feasibility Study Report approved; and that upon termination Mickey would have become obliged to repay Mah the RMB 5,000,000 advanced earlier. Notice of termination would give Mickey the required clarity and certainty.
>
> 24. A party seeking to exercise an option to terminate must strictly comply with any conditions precedent to its exercise. If a party gives a termination notice **before** his right to issue that notice has accrued, that notice is premature and has no effect.
>
> …
>
> 30. In the present case, clause 4.7 of the SPA is clear: Mah's right to terminate the SPA arose and could be exercised only if the Closing Date has not materialized "*on or before 24 October* [2016]."
>
> 31. But Mah had not given any notice of termination. In the alternative, Mah's purported notice was given *3 days earlier* on 21 October 2016. Mah's right to terminate had not arisen at that time.
>
> [emphasis in original]

32 In our judgment, Ng was entitled to rely on this defence (which the Judge too had, in any event, gone on to consider). The spirit of the regime of pleadings is to ensure that parties are aware of the arguments against them and that neither party would therefore be caught by surprise (see *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and*

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16 ROA (Vol 4A) at pp 133–135.

another matter [2020] 1 SLR 606 at [15]–[17]). In this case, we note that first, Mah had to prove his case that he had validly terminated the SPA, whether by the 21 October Letter or otherwise. Second, the defence that a valid notice of termination had not been issued was raised early in the trial in Ng's opening statement. Third, Mah had addressed this defence in his Reply Submissions for Suit 506,[17] even though he objected to it being raised only in the opening statement. In our view, there is no prejudice to Mah as he could not be said to have been caught by surprise, and no substantial injustice had been caused to him. We therefore allow Ng to rely on this argument on appeal.

Whether Mah had given valid notice to terminate

33 We turn to the issue of whether Mah had given Ng valid notice to terminate the SPA. As stated above, Ng argued that the 21 October Letter was invalid because it was not a clear and unequivocal notice of termination; and that even if it was, the letter had no effect as it was sent prematurely.

34 At the outset, we disagree with Mah's submission that there was an *automatic* right of termination under the SPA and that he did not have to give notice to Ng to terminate it. Whether a contract would be automatically terminated upon the occurrence or non-occurrence of a specified event is dependent on the construction of the contract. For example, in *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1 ("*New Zealand Shipping Co Ltd*"), the builders entered into a contract to construct a steamer for a shipping company. The contract provided that should the builders be unable to deliver the steamer by a stipulated date, the contract would become void, and all moneys paid by the shipping company would be

[17] ROA (Vol 4B) at pp 213–215 (at paras 56–63).

returned. Lord Finlay LC and Lord Atkinson reasoned that, considering the plain wording and natural meaning of the clause, the contract would become void when the stipulated deadline was not met, subject to the principle that a party shall not take advantage of his own wrong (at 8–11).

35 In contrast, Article 4.7 of the SPA gave Mah the sole *discretion* to terminate if the Closing Date did not materialise by the Deadline. On its plain wording, the SPA afforded Mah a *choice* as to whether to terminate the SPA upon the Closing Date not materialising. It would follow that this discretion had to be exercised and communicated to Ng. Nothing in the wording of the SPA suggested that the agreement would be terminated automatically should the Deadline not be met.

36 Mah relied on the 21 October Letter as his notice to Ng that he had terminated the SPA. Ng submitted that the letter was invalid because it was sent before Mah's right to terminate the SPA had accrued. In our view, the substance of Ng's submission was that Mah's termination of the SPA on 21 October 2016 was invalid.

37 In *Afovos Shipping v Pagnan* [1983] 1 WLR 195 ("*Afovos Shipping*"), the plaintiff owners let a ship to the defendant charterers under a charterparty. Clause 5 of the charterparty stated that payment of the hire was to be made in accordance with stipulated conditions, "otherwise failing the punctual and regular payment of the hire … the owners shall be at liberty to withdraw the vessel from the service of the charterers". Clause 31 further provided that "when hire is due and not received the owners before exercising the option of withdrawing the vessel from the charterparty will give charterers 48 hours notice, Saturdays, Sundays and holidays excluded and will not withdraw the vessel if the hire is paid within these 48 hours". On the last day of paying the

instalment for the hire, the plaintiff owners purported to exercise their rights under Clause 31 by sending a notice through their agents to the defendant charterers as follows:

> Owners have instructed us that in case we do not receive the hire which is due today, to give charterers notice as per clause 31 of the charterparty for withdrawal of the vessel from their service.

38 The House of Lords held that the notice given was invalid as it had been issued before the charterers had breached their obligation to pay the hire. Lord Hailsham (with whom the rest of the House agreed) explained his reasoning as follows (at 199):

> … Both the grammatical meaning of clause 31 and the policy considerations underlying the contract require that the moment of time at which the 48 hours' notice must be given did not arise until after the moment of time at which, apart from the clause, the right of withdrawal would have accrued. … The notice can only be given "when hire is due and not received," which cannot arise before the time postulated by the answer given to the first question (ie, the time when the right of withdrawal would have arisen under the charter) (whatever that answer may be), and notice can only be given when there is (or apart from the clause 31 would be) already in existence, an "option" capable of exercise "withdrawing the vessel from the charterparty," and that option can only be exercised after the arrival of the same point of time.

39 The notice given by the plaintiff owners in *Afovos Shipping* was similar to that given by Mah in the 21 October Letter, in that it indicated their intention to exercise the option under the contract (in *Afovos Shipping*, to withdraw the vessel) if the stipulated condition (payment of the hire) remained unfulfilled at the point when the right to exercise such option arose. However, the House of Lords considered that the "grammatical wording" of the relevant clause, *as well as* the policy considerations surrounding the 48 hours' notice, were such that notice could only be given after the right to withdraw the vessel had arisen.

40 In *Wardley v Datin Chong Mooi Lan and another (administratrix and administrator of the estate of Dato Tong Lee Hwa, deceased)* [1993] 1 SLR(R) 469 ("*Wardley*"), the appellant Wardley agreed to sell a property to one Dato Tong Lee Hwa or his agreed assignee. The court found that cl 29 of the Law Society's Conditions of Sale 1981 ("Society's Conditions") applied to the sale of the property. Clause 29(2) of the Society's Conditions provided that:

> *If the sale shall not be completed on the date fixed for completion either party may on that date or at any time thereafter (unless the contract shall first have been rescinded or become void) give to the other party notice in writing to complete the transaction in accordance with this condition* but such notice shall only be effective if the party giving the same at the time the notice is sent is either ready, able and willing to complete or is not so ready, able and willing by reason of the default or omission of the other party to the contract.
>
> [emphasis added]

41 The court found that the notice served by Wardley was premature and ineffective, as Wardley served his notice to complete before the date fixed for completion had passed. Wardley served his notice on 8 December 1984, which was also the date fixed for completion. At that point, his right to serve the notice had not arisen and he was therefore not entitled to serve the notice to complete (at [14]). The court reasoned as follows (at [14]):

> … To our mind, *the provision of sub-cl (2) of cl 29 is very clear.* The commencement part of sub-cl (2) provides for a contingency, namely: if the sale shall not be completed on the date fixed for completion, and *only on the occurrence of such contingency, does the right of either party (to the contract) to give to the other the notice to complete, which is contained in the ensuing part of that subclause, arise. …* In our opinion, this is the proper construction of sub-cl (2). *The right of the appellants to serve the notice to complete under sub-cl (2) of cl 29 would only arise, if, as provided in sub-cl (2), the sale is not completed on 8 December 1984.* At the time when the appellants served the notice to complete, the date fixed for completion had not passed and the event that the sale was not completed on the date fixed for completion had not occurred.
>
> [emphasis added]

42 The court in *Wardley* thus construed cl 29(2) of the conditions and found that the right to serve the notice to complete would arise only if the sale were not completed on the stipulated date. Prior to the passing of the date fixed for completion, any notice served would be ineffectual.

43 In *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 ("*Maredelanto*"), a ship was chartered to proceed to Haiphong to load a cargo. Clause 11 of the charterparty provided that: "Should the vessel not be ready to load (whether in berth or not) on or before July 20, 1965, charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading". On 17 July, the charterers purported to cancel the charterparty on grounds of force majeure, though on appeal, they argued that they were entitled to do so under Clause 11. The majority of the Court of Appeal for England and Wales ("EWCA") found that they were not entitled to cancel the charterparty on 17 July pursuant to Clause 11. The majority held that the charterers were given an option, for their benefit, and that this option would be exercisable only when the condition was fulfilled, *ie*, if the vessel was not ready to load on 20 July. Megaw LJ (with whom Davies LJ agreed) reasoned as follows (at 208):

> It might perhaps be permissible to give the charterers' construction to the words of the clause, though I think that it would properly be described as a bold construction, if so to do would make the clause a substantially more sensible instrument for carrying out the general purpose for which it was introduced. *But I think that counsel for the owners is right in his submission that the bold construction - the reading in of the words which are not there does not have that effect. It involves reading in also a thought which was not present to the minds of the parties and which in my view is not necessary to give the clause sensible legal and practical effect.* If the charterers are confident that the vessel is going to miss her cancelling date, and for some reason are minded to put an end to the charterparty before that date has arrived, there is nothing

> whatever to prevent them from asking the owners to agree that the charterparty should be cancelled. That does not require clause 11. … Without any forced construction of the clause, the charterers can, if they are confident of the non-arrival of the vessel by the cancelling date, go ahead and make whatever arrangements they wish in anticipation of exercising their option under the clause when the cancelling date arrives. Of course, if they prove wrong in their forecast of the vessel's arrival, and if the vessel in fact, after all, makes the cancelling date, the charterers will be in trouble if they have already made other arrangements. But that is not a good ground for giving a bold interpretation to the clause. … *No conceivable harm would have been done to them if they had waited until July 20, and then invoked the cancelling clause. The bold construction is called for by the charterers, not because the natural construction leads to practical difficulty, but in order to try to save themselves from the consequences of their own error …*
>
> [emphasis added]

44 The above cases thus demonstrate two key points. First, in determining when a right to exercise an option arises, the court's primary concern is with the construction of the contractual clauses in question. Based on the wording of the clauses in each of the above cases, such a right could only be exercised after the occurrence or non-occurrence of certain specific events. Any notice that was given prior to when such a right had accrued was deemed to be premature and invalid. This was the case even if the notice, like that in *Afovos Shipping*, was conditional upon the non-occurrence of the specified event. Second, in construing the relevant clauses, the courts took into account the context of each contract. In *Afovos Shipping*, the House of Lords considered the policy considerations in relation to the 48 hours' timeframe in deciding whether the notice given could constitute a valid notice of withdrawal. In *Maredelanto*, the court similarly considered whether the "natural construction" of the contract would lead to practical difficulty or result in "conceivable harm" to the charterers, if they were not allowed to cancel the charterparty prior to the stipulated date.

45 In our judgment, the above cases are equally applicable to the question of whether Mah's termination of the SPA was valid. It is apparent from the wording of Article 4.7 (as amended by the deadline extensions) that Mah's right to terminate the SPA only arose *after* 24 October 2016, if the Closing Date did not materialise by then. On the facts, Mah's termination of the SPA on 21 October 2016 was invalid because the specified event (*ie*, the Operational Agreement not being signed by 24 October 2016) had not occurred. Therefore, Mah's termination of the SPA on 21 October 2016 was invalid. Consequently, the 21 October Letter had no effect since it was nothing more than notice of an invalid termination.

46 In any event, the 21 October Letter was premature. The notice of termination could be given only after a valid termination of the SPA. As stated above, Mah's right to terminate the SPA only arose *after* 24 October 2016. Consequently, Mah's right to terminate the SPA arose only at that time, and any notice given prior to that was ineffectual.

47 As for the context of the SPA, requiring Mah to give notice to Ng only after the Deadline would not cause any prejudice to him. In fact, the Judge had found (and we agree) that Mah was in the driver's seat in the negotiations for the signing of the Operational Agreement. He was therefore the party to the SPA who had the requisite first-hand information in relation to the signing. Like the charterers in *Maredelanto*, there was nothing precluding Mah from getting Ng to agree to an earlier termination date, if Mah was certain that the Operational Agreement would not be signed by the Deadline. There is no reason to read Article 4.7 in a manner that would allow for early termination, in order to give it legal or practical effect. Further, given Mah's role in the negotiations, it would have been reasonable for Ng to believe that Mah was still working towards the signing of the OA, and that the 21 October Letter merely evinced an intention

to terminate which Mah might not necessarily follow through on. As such, with reference to the wording of Article 4.7 and the context of the SPA, we are of the view that the 21 October Letter, having been issued before 24 October 2016, was premature and invalid.

48 The Judge was further of the view that pursuant to Article 4.5, Ng would be deemed to have received the 21 October Letter on 26 October 2016, which was after the Deadline had passed. In this regard, Article 4.5, which we have reproduced at [14] above but repeat here for convenience, provided that:

> Any notice, direction or other instrument aforesaid, if delivered shall be deemed to have been given or made on the date on which it was delivered or if mailed shall be deemed to have been given or made on the third business day following the day on which it was mailed.

49 Ng argued that the Judge was not entitled to make the assumption that the 21 October Letter had been sent to him by registered mail, as this factual premise was unsupported by any evidence and rested only upon Mah's bare assertion. This was relevant as the deeming provision in Article 4.5 only applied to a notice that had been mailed.

50 We agree with Ng that Mah had not proven that the 21 October Letter had been sent to him by registered mail. The evidence showed that, on 21 October, Ms Ayu emailed Ng, stating that:[18]

> Dear Mickey,
>
> I am sending this on behalf Mr Mah Sau Cheong. Kindly acknowledge receipt by return email and the same would also be delivered to you via registered post.

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18 ROA (Vol 3A) at p 136.

Ms Ayu then enclosed the 21 October Letter in the said email. However, there is no evidence that the 21 October Letter was in fact mailed to Ng *via* registered post, and Ms Ayu had not been called as a witness. We also agree with Ng that the issue of whether Mah had mailed the 21 October Letter had not been put in issue, either in the pleadings, opening submissions or during the trial. Thus, in our view, the Judge was not entitled to assume that the letter had been sent to Ng *via* mail, and Article 4.5 therefore could not assist Mah.

51 Assuming, *ex hypothesi*, that Article 4.5 had been applicable, its effect would have been that Ng would be deemed to have *received* the mailed copy of the 21 October Letter on 26 October 2016. However, with respect, the deeming provision has no application where the 21 October Letter was invalid because Mah's right to terminate the SPA had not accrued as of 21 October 2016. Article 4.5 deemed the 20 October Letter as notice given on 26 October 2016; however, the letter remained notice of an invalid termination.

52 For completeness, we note that Ng's arguments focus on the validity of the notice of termination, but Ng also argues that there was merely an expression of intent at best. In substance, Ng contends that there was no decision to terminate and thus he has also challenged the termination decision itself. In our view, Ng has conflated the arguments on termination and notice of termination, which engage different considerations. Be that as it may, we have found that notice of termination was required in this case, and even if notice was not required, as we have explained above, the termination would still have been premature on the facts and thus invalid to begin with.

53 Putting aside the questions of whether the termination itself was premature and whether the notice to terminate was valid, we proceed further to

determine the issue of whether Mah was entitled to terminate the SPA. The parties argued this issue at length during the hearing before us.

Whether Mah was entitled to terminate the SPA

54 Ng's case was that Mah was precluded from terminating the SPA as the prevention principle had been triggered, owing to the breach of his duty to cooperate. Further or alternatively, Mah could not rely on the lapse of the Deadline to terminate the SPA as it was his act of getting the signing to coincide with PM Najib's visit that caused the lapse.

55 We begin by examining the applicable legal principles in relation to the prevention principle.

Prevention principle

(1) The general position in English law

56 As noted by Professors Goh Yihan SC, Lee Pey Woan and Tham Chee Ho in "Contract Law" (2020) 21 SAL Ann Rev 403 ("*Contract Law (SAL Ann Rev)*"), the prevention principle is generally applied in the construction context. In a recent case of *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744 ("*North Midland Building*"), the EWCA considered how the prevention principle came to be developed in the 19th Century, highlighting the cases of *Holme v Guppy* (1838) 3 M&W 387 ("*Holme v Guppy*") and *Dodd v Churton* [1897] 1 QB 562 ("*Dodd v Churton*") (at [10]–[12]):

> 10 In the 19th Century, the courts concluded that it was wrong in principle for an employer to hold a contractor to a completion date, and a concomitant liability to pay liquidated damages, in circumstances where at least a part of the subsequent delay was caused by the employer. Thus, in *Holme v Guppy* (1838) 3 M&W 387, the defendant failed to give possession of the site for 4 weeks following execution of the

> contract. Parke B found that there were clear authorities to the effect that "if the party be prevented by the refusal of the other contracting party from completing the contract within the time limited he is not liable in law for the default…".
>
> 11 Similarly, in *Dodd v Churton* [1897] 1 QB 566, where the employer ordered extra work which delayed completion. Lord Esher MR said:
>
> > "… where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and accordingly a well-recognised rule has been established in cases of this kind, beginning with *Holme v Guppy*, to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract."
>
> 12 As a result of these decisions, construction contracts began to incorporate extension of time clauses, which provided that, on the happening of certain events (which included what might generically be described as 'acts of prevention' on the part of the employer), the date for completion under the contract would be extended, so that liquidated damages would only be levied for the period after the expiry of the extended completion date. Such clauses were not, as is sometimes thought, designed to provide the contractor with excuses for delay, but rather to protect employers, by retaining their right both to a fixed (albeit extended) completion date and to deduct liquidated damages for any delay beyond that extended completion date.

57 In *North Midland Building* itself, the defendant employer and the claimant contractor entered into an agreement, which contained a clause providing that, where there was a delay caused by an event for which the contractor was *not* responsible, and such delay was concurrent with another delay for which the contractor *was* responsible, that delay would not be taken into account when calculating any extension of time to the completion date that would be given to the contractor (cl 2.25.1.3(b)). The court found that cl 2.25.1.3(b) was unambiguous and allocated the risk of concurrent delay to the contractor, to which the parties were entitled to agree. The clause therefore could not be struck down or rendered inoperable by the prevention principle.

58 In *Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 ("*Trollope*"), Lord Pearson (with whom Lord Diplock, Lord Guest and Lord Cross agreed) endorsed this section of Lord Denning MR's decision in the Court of Appeal (at 607):

> It is well settled that in building contracts — and in other contracts too — when there is a stipulation for work to be done in a limited time, if one party by his conduct — it may be quite legitimate conduct, such as ordering extra work — renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.

59 In *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC), the High Court considered *Dodd v Churton*, *Holme v Guppy*, *Trollope* as well as *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1, and derived several propositions in relation to the prevention principle, including that "[a]ctions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date" (at [56]).

60 The prevention principle thus came to be developed in the context of construction disputes. Specifically, the principle was invoked in relation to the question of whether time would be set at large if the employer's act of prevention had caused a delay, such that the employer could no longer insist on the contractually stipulated date for completion; and relatedly, whether the employer would still be entitled to claim liquidated damages. This position has also been helpfully summarised thus in *Chitty on Contracts* (Huge Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) ("*Chitty on Contracts*") (at para 39-115):

> Construction contracts almost invariably stipulate a period or date for commencement and/or completion. The contractor must be afforded the opportunity to carry out the work within the stipulated period. Any act of prevention, such as the ordering of variations or late access to working areas, will release the contractor from the fixed period unless the contract provides machinery for adjustment of the time period. The major consequence of time becoming "at large" is that by operation of the so-called "prevention principle" the employer thereby loses its ability to rely upon any liquidated and ascertained damages clause in the contract. The prevention principle is based on the notion that a promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing. *In a building contract, acts of prevention (such as variation instructions) do not have to amount to breaches of contract in order to trigger the application of the prevention principle. However, for the act relied upon to amount to an act of prevention, it must actually prevent the contractor from carrying out the works within the contract period.* Thus, in *Adyard Abu Dhabi v SD Marine Services* it was held that where there were concurrent causes of delay (one the contractor's responsibility and the other the employer's) the prevention principle does not operate because the delay would have occurred anyway absent the employer's delay event happening.
>
> [emphasis added; footnotes omitted]

61 The prevention principle has also been applied in a narrower fashion in a separate line of authorities, in circumstances where a party *had* allegedly committed a breach of a term of the agreement. In these cases, that party was himself the reason for non-fulfilment of a condition under an agreement, and an issue arises as to whether he would be entitled to claim a benefit under the agreement or to avoid his obligations under it.

62 In *Roberts v The Bury Improvement Commissioners* (1870) LR 5 CP 310 ("*Roberts*"), the plaintiff contractor was contracted to erect buildings for the defendant commissioners according to certain plans and drawings. The commissioners sought to determine the contract on the basis of a contractual term that gave them the right to do so should the contractor fail to "exercise due diligence and make such due progress as would enable the works to be

effectually and efficiently completed at the time stipulated". The majority of the court found that the commissioners' failure to issue instructions within a reasonable time to the contractor, such that the contractor was unable to begin his work, would amount to a breach of an implied term to do their part within a reasonable time. As the delay had been occasioned by their own breach, the commissioners could not determine the contract. It is "a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself … and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract" (*Roberts* at 325–326).

63 In *New Zealand Shipping Co Ltd*, the House of Lords upheld the decision of the Court of Appeal that the builders of a steamer were not precluded from alleging that the contract was void when the stipulated deadline for construction could not be met, as the builders were prevented by causes beyond their control from completing construction (see [34] above). Lord Finlay LC explained his decision as follows (at 8):

> Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or nonperformance of covenants by the lessee. It has always been held that the lessee could not take advantage of his own act or default to avoid the lease, and the expression generally employed has been that such proviso makes the lease voidable by the lessor, or void at the option of the lessor. The decisions on the point are uniform, and are really illustrations of the very old principle laid down by Lord Coke (Co. Litt. 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about. In the present case the builder was in no way responsible for the non-completion within eighteen months, and there is no reason why clause 12 should not be interpreted according to the natural meaning of the words so as to render the contract void.

64 In *Alghussein Establishment v Eton College* [1988] 1 WLR 587 ("*Alghussein*"), the House of Lords considered that it is "well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the other party" (at 591). This principle applied whether a party was seeking to take advantage of his own wrong to obtain a benefit under a continuing contract or to avoid a contract and thereby escape his obligations (at 594). On the facts in *Alghussein*, the respondent landlords entered into an agreement with the appellants' predecessor in title, who later assigned their rights under the agreement to the appellants. The agreement was for the grant of a 99-year lease of land on which a development was to be erected. Under the agreement, the tenants were required to use their best endeavours to complete the development. However, cl 4 of the agreement provided that if the development remained incomplete by a specified date for any reason due to the wilful default of the tenants, the lease should forthwith be granted and completed. The House of Lords found that despite the wording of cl 4, there was no clear express provision in the agreement to exclude the presumption that it was not the intention of the parties that either should be entitled to rely on his own breach to obtain a benefit. Their Lordships upheld the decision of the court below that the tenants, who were in wilful default resulting in the development not being completed by the specified date, could not rely on cl 4 to insist on the grant of a lease to them.

65 Citing *Roberts*, *New Zealand Shipping Co Ltd* and *Alghussein*, para 6-145 of *Keating on Construction Contracts* (Stephen Furst and Sir Vivian Ramsey gen eds) (Sweet & Maxwell, 11th Ed, 2021) ("*Keating*") states thus:

> Where one party has failed to perform a condition of the contract, the other party cannot rely on its non-performance if it was caused by its own wrongful acts. … To attract the principle that a party to a contract is not permitted to take advantage of its own breach of duty, the duty must be one that

> is owed to the other party under the contract. A duty, whether contractual or non-contractual, owed to a stranger to the contract does not suffice. The principle is probably a rule of construction and not an absolute rule of law. It applies to a party seeking to obtain a benefit under a continuing contract on account of its own breach as much as to a party who relies on its own breach to avoid a contract and thereby escape its obligations.
>
> [footnotes omitted]

66 Along similar lines, in *Chitty on Contracts*, Professor Ewan McKendrick commented on this characterisation of the prevention principle as follows (at para 15-113):

> **Party cannot rely on their own breach**
>
> It has been said that, as a matter of construction, unless the contract clearly provides to the contrary it will be presumed that it was not the intention of the parties that either should be entitled to rely on their own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under it. This presumption applies only to acts or omissions which constitute a breach by that party of an express or implied contractual obligation, or (possibly) of a non-contractual duty, owed by them to the other party. Breach of a duty, whether contractual or non-contractual, owed to a stranger to the contract will not suffice. However, such a "principle of construction" appears to be somewhat different in nature from the principle that a document will be construed against the grantor. It may therefore be that it is better regarded as depending on an implied term of the contract in question or as one illustration of a more general principle that "[a] man cannot be permitted to take advantage of his own wrong."
>
> [emphasis in original; footnotes omitted]

67 This line of cases and the academic texts make it clear that, in order to trigger the prevention principle, the party seeking to avoid the agreement or obtain a benefit under it must have committed a breach of duty as against the other party.

(2) The position in Singapore law

68 The prevention principle appears to have been endorsed only fairly recently by the Singapore courts.

69 The prevention principle was first explicitly recognised by the Singapore courts in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 ("*Evergreat Construction*"), where VK Rajah J (as he then was) explained the principle as follows (at [51]):

> In essence, even if the parties expressly provide that the contract shall *ipso facto* determine upon the happening of a certain event, such a provision is to be construed subject to the principle that no man can take advantage of his own wrong, so that one party may not be allowed to rely on such a provision where the occurrence of the event is attributable to his own act or default; *Chitty on Contracts* at para 22-054. This principle is also referred to as the "*prevention principle*" and is wedded to notions of fair play and commercial morality. It offends all sensible norms of commercial intercourse to allow a party in breach of its contractual obligations to rely on its very breach to either evade responsibility or, even more farcically, to assert that the other contracting party must also willy-nilly accept or sustain the consequences of that breach.

70 Rajah J further held that, in order to invoke the prevention principle, it "must be shown that the contractual right or benefit that a party is asserting or claiming is a direct result of that party's prior breach of contract". As the principle "seeks to prevent the contract breaker from seeking an 'advantage arising from his default", it follows that the "relevant breach, the factual consequences flowing from the breach and the advantage the contract breaker is seeking to raise must be identified" (*Evergreat Construction* at [52]).

71 The prevention principle was subsequently considered and applied by the High Court in *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385 ("*Yap Boon Keng Sonny*"). Prakash J (as she then was)

accepted that there was a "legal principle that a contractor's obligation to complete the works under a construction contract within a prescribed period of time is premised on the requirement that he is not delayed by reason of any 'acts of prevention' committed by either the employer or his agent". She considered that an act of prevention is one which "operates to prevent, impede or otherwise make it more difficult for a contractor to complete the works by the date stipulated in the contract", citing Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 3rd Ed, 2004) ("*Chow on Construction Contracts*") at p 401. The "legal consequence of an act of prevention is that the date for completion originally stipulated in the contract ceases to be the operating date for the completion of the works". In addition, the "employer's right to claim or deduct liquidated damages is lost since there is no longer a valid date for completion from which such damages can be calculated" (at [34]).

72 In that case, the plaintiff homeowner signed a memorandum of agreement ("MOA") with the first defendant, a design and build contractor, for the latter to design and construct a semi-detached house. The plaintiff claimed that the completion was delayed, to which the first defendant argued that time had been set at large by virtue of the plaintiff's acts of prevention. Prakash J found that the plaintiff homeowner's actions prevented the works under the MOA from being completed by the stipulated date. The homeowner's decision not to work with the recommended subcontractor and the amount of time taken to find a substitute was the main cause of the delay. Whilst the homeowner was entitled to find a substitute, he must have realised that his decision had timing implications. As such, time had been set at large and the first defendant had a reasonable time after the deadline to complete the works and handover the property (at [40]–[41]).

73 The definition of an act of prevention adopted in *Yap Boon Keng Sonny* was thereafter applied in *Chua Tian Chu and another v Chin Bay Ching and another* [2011] SGHC 126 ("*Chua Tian Chu*") (at [62]). Andrew Ang J considered that when an employer or a purchaser had performed acts of prevention, in the absence of an extension of time clause in the agreement, the contractual time for completion would no longer be binding. Following from this, he similarly considered that the right to claim liquidated damages under the contract for any delay occasioned is lost as there would no longer be a fixed completion date from which damages may be calculated (at [63]). He explained the rationale of the prevention principle as follows (at [60]):

> The equitable remedy afforded by the prevention principle is derived from the well established legal maxim that no man shall take advantage of his own wrong. Setting time at large ensures that whoever "prevents a thing from being done shall not avail himself of the non-performance he has occasioned": H Broom, *A Selection of Legal Maxims, Classified and Illustrated* (8th Ed) at p 235. More recently, in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, Lord Denning MR sitting in the Court of Appeal held as follows (at 607):
>
> > It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – *it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated.* He cannot claim any penalties, or liquidated damages for non-completion in that time.
>
> [emphasis in original]

74 In that case, Mr Chua, one of the purchasers of a property, entered into a sale and purchase agreement with the defendants, including one Mr Chin. The defendants were the developers and the vendors of the property. The sale and purchase of the property was delayed, giving the purchasers a *prima facie*

contractual entitlement to liquidated damages. Ang J found that Mr Chua had impeded Mr Chin's role as the developer of the property by appointing independent design and carpentry contractors for interior décor and carpentry works beyond that provided for under the agreement. His conduct was, at minimum, in part responsible for the delay occasioned. Ang J therefore found that time had been set at large (at [96]–[97]).

75 In *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] 4 SLR 455, the court emphasised that the delay in question must have resulted in a delay in completion of the works before time would be set at large (at [24]). The court made reference to *Percy Bilton Ltd v Greater London Council* [1982] 1 WLR 794 ("*Percy*"), and explained the rationale for its decision as follows (at [28]):

> Lord Fraser [in *Percy*] made it quite clear, therefore, that if no delay in completion is proven, the general rule applies and time is not set at large. The reason for the consistent affirmation of the requirement that there must be a failure to complete by the specified date is evident. While the principle of time being set at large originated in the idea that liquidated damages for delay *in completion* should not be imposed where the person claiming those damages contributed to that delay, there is no reason to extend that principle to situations where there is a mere delay in the progress of the works which cannot, by definition, give rise to a claim to or deduction of liquidated damages. In claiming or deducting liquidated damages, the employer would not be taking advantage of his own wrong because his conduct was not proven to have caused completion of the works to be delayed.
>
> [emphasis in original]

76 Most recently, in *Fundamental Investors Pte Ltd v Palm Tree Investment Group Pte Ltd* [2020] 4 SLR 1328 ("*Fundamental Investors*"), the High Court found that the application of the prevention principle should not be limited to contractual claims of a specific nature (at [134] and [135]). The court distinguished two definitions of an act of prevention at [136]:

> … In [*Yap Boon Keng Sonny*] at [34], an act of prevention was defined as an act which "operates to *prevent, impede, or otherwise make it more difficult* for a contractor to complete the works by the date stipulated in the contract" [emphasis added]. A narrower definition was adopted in [*Evergreat Construction*], where Rajah J held (at [52]) that "[i]n order to invoke this principle it must be shown that the contractual right or benefit that a party is asserting or claiming is a direct result of the party's prior *breach of contract*".
>
> [emphasis in original]

77 In this regard, the authors of *Contract Law (SAL Ann Rev)* considered *Fundamental Investors* and noted that Rajah J in *Evergreat Construction* had relied on the "common law" version of the prevention principle; whereas Prakash J in *Yap Boon Keng Sonny* had applied the "equitable" version of it, which was a "broader equitable notion of prevention" (at para 13.99). At para 13.100 of the same article, the authors note:

> On a more general note, although the point was not considered in *Fundamental Investors*, there may be a further question as to how the "equitable" and "common law" versions of the prevention principle should interact with each other. Historically, the contexts in which the "equitable" and "common law" prevention principles operated appear to have been distinct. *The former was principally concerned with the question whether the exercise of a contractually stipulated power to require payments of fixed sums of money by way of liquidated damages due to failures to complete contracted-for works in accordance with the contractual deadline might be barred, with more time given to the promisor to perform.* However, *the latter common law principle was principally concerned with the true construction of contractual terms providing for the termination of the contract upon the non-performance of some contractually required performance by a contracting party.* So, instances where both principles might simultaneously be in play might not be commonplace.
>
> [emphasis added]

78 We note, however, that apart from *Chua Tian Chu* and arguably also *Fundamental Investors*, there does not appear to be any other case authority that expressly recognises the prevention principle as affording an "equitable

remedy". In *Yap Boon Keng Sonny*, Prakash J did not refer to the prevention principle in those terms. For that matter, the textbook cited by the learned judge, *Chow on Construction Contracts* (see [71] above), did not make any such reference either. Nevertheless, we are conscious that in his latest edition of the same textbook, Chow Kok Fong (see Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 5th Ed, 2018) adopts the statement of Ang J in *Chua Tian Chu* and states that the court had considered it to be an "equitable remedy".

79 Before us, counsel for the respective parties did not venture any discussion of the juridical basis of the prevention principle in their submissions. In particular, counsel for Ng did not seek to rely on the "equitable" version of the prevention principle. In substance, his submissions are premised on the "common law" version of the prevention principle that was adopted in cases such as *Evergreat Construction*, even though *Chua Tian Chu* was also cited among the authorities in support of his arguments. Be that as it may, the nuanced distinctions (if any) of the "equitable" or "common law" versions were not argued before us. As such, it is inadvisable and unnecessary for us to delve into further discussion of the juridical basis of the prevention principle for present purposes. The question as to whether the "equitable" conception of the prevention principle was correctly recognised in *Chua Tian Chu* is perhaps best left for consideration and clarification (if appropriate) in a suitable case in future, where the court might have the benefit of hearing full arguments before arriving at a considered decision.

80 From our survey of the precedent cases set out above, the prevention principle has been applied in different contexts, extending beyond the sphere of building and construction contracts. The principle rests on the underlying notion

that a party cannot insist on his contractual rights when he had himself caused the non-performance of a contractual event.

81 We further agree with the observations made by the EWCA in *BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548 at [31]:

> Although there has been a certain amount of academic discussion as to whether the principle has the status of a rule of law which is imposed upon the parties to a contract almost regardless of what they have agreed, it is now clear as a matter of authority that the application of the principle can be excluded or modified by the terms of the contract and that its scope in any particular case will depend upon the construction of the relevant agreement.

82 The application of the prevention principle can thus be excluded by an express provision to the contrary or by the parties' intentions as revealed by the express contractual terms (see also *Petroplus Marketing AG v Shell Trading International Ltd* [2009] 2 Lloyd's Rep 611 at [17]).

(3) Operation of the prevention principle in this case

83 Mah does not dispute that the prevention principle is recognised under Singapore law and that a duty to cooperate may be implied as a term of the SPA. Ng's case is that by the operation of the prevention principle, Mah was precluded from relying on the fact of the Operational Agreement not having been signed by the Deadline to terminate the SPA. In support of this argument, Ng relies, *inter alia*, on Rajah J's decision in *Evergreat Construction*, adopting the principle which may be distilled from authorities such as *Roberts*, *New Zealand Shipping Co* and *Alghussein* as well as academic texts such as *Keating* and *Chitty on Contracts*, that a party cannot take advantage of their own breach as against the other party. Given the context of the present facts, we agree that this characterisation of the prevention principle would potentially be applicable.

Mah would not be able to avoid his obligations under the SPA if the non-fulfilment of the condition (the signing of the Operational Agreement) was attributable to his own breach of the SPA.

84 In this case, there are no express provisions in the SPA which precluded the application of the prevention principle. Even though the SPA gave Mah the sole discretion to terminate the SPA if the Closing Date did not materialise by the stipulated date, nothing in the agreement indicated the parties' intention to allow Mah to do so *even if* the Closing Date did not materialise because of Mah's own breach. Therefore, we are of the view that the prevention principle would potentially apply in this case.

85 Having found thus, the question before us is whether Mah had committed a breach of the SPA and was the cause of the Operational Agreement not having been signed by the Deadline, such that he would be disentitled from relying on Article 4.7 to terminate the SPA.

Whether Mah had an implied duty to cooperate

86 In order for the prevention principle to operate, it would have to be shown, as stated in *Evergreat Construction*, that the contractual right or benefit that Mah was asserting or claiming was a direct result of his prior breach of contract. The relevant wrong which Ng seeks to rely on is the breach of an implied duty to cooperate. Ng's case is that Mah breached his duty to cooperate as he did not take any steps to get the Operational Agreement signed by 24 October 2016. As such, he should be precluded from relying on the non-fulfilment of the condition to terminate the SPA. We begin with the legal principles in relation to whether a duty to cooperate should be implied and if so, the scope of such duty.

(1) Legal principles

(A) BASIS FOR IMPLYING A DUTY TO COOPERATE

87 The principles in relation to an implied duty to cooperate are not entirely settled. In *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 ("*The One Suites*"), the Court of Appeal observed *obiter* (at [44]):

> … Indeed, although most courts are in agreement that the seminal decision with regard to this particular duty [on the part of the parties to cooperate] is that of the House of Lords in *Mackay v Dick* (1881) 6 App Cas 251, the precise legal *basis* might be debatable (given the different views expressed in the case itself). The precise content and scope of that duty have also not been considered by this court, although it has been considered in the Singapore High Court in a few cases (most notably and (relatively) recently by V K Rajah J (as he then was) in [*Evergreat Construction*]. Since [*Evergreat Construction*], there have also been developments across the Commonwealth (including Singapore) with regard to the doctrine of *good faith*. Indeed, one key issue is what the *relationship* is (if any) between the duty on the part of contracting parties to cooperate on the one hand and the doctrine of good faith on the other. …

88 In relation to the question of whether a duty to cooperate should be a term implied in law or in fact, the differences between them have been set out by the Court of Appeal in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 ("*Ng Giap Hon*"). As highlighted in *Ng Giap Hon*, the implication of a term in law "would entail implying the same term in the future for all contracts of the same type", and this involves broader policy considerations. As such, the court noted that "caution should be exercised on the part of the court" before implying a "term implied in law" (at [46]). The UK Supreme Court in *Geys v Societe Generale, London Branch* [2013] 1 AC 523 similarly considered at [55]:

> In this connection, it is important to distinguish between two different kinds of implied terms. First, there are those terms which are implied into a particular contract because, on its

> proper construction, the parties must have intended to include them: see *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 1 WLR 1988. Such terms are only implied where it is necessary to give business efficacy to the particular contract in question. Second, there are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, *but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it*: see *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, [1957] 2 WLR 158; *Liverpool City Council v Irwin* [1977] AC 239, [1976] 2 All ER 39, 74 LGR 392.
>
> [emphasis added]

89 Thus, terms implied in fact are "implied into a particular contract in order to give effect to the intention of the parties to the particular contract in the light of the express terms of the contract, commercial common sense and the factors known to both parties at the time of entry into the contract" (*Chitty on Contracts* at para 16-005). In contrast, terms implied in law are implied as a "necessary incident of a definable category of contractual relationship" (see Lord Bridge in *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 307). The authors of *Chitty on Contracts* note that "many such terms have become standardised for particular classes of contract, so that it is somewhat artificial to attribute them to the unexpressed intention of the parties to a particular contract in dispute" (at para 16-005).

90 As noted in *The One Suites*, the implication of a duty to cooperate can be traced back to the case of *Mackay v Dick* (1881) 6 App Cas 251 ("*Mackay*"). In *Mackay*, Lord Blackburn reasoned that (at 263):

> I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no

> express words to that effect. What is the part of each must depend on circumstances.

91 In our judgment, a duty to cooperate is a term that is implied in fact and not in law. Given the myriad factual situations in which a contract could be said to have a provision requiring both parties to "concur in doing" something to render the contract effectual, we do not think there is a "definable category of contractual relationship" in which such a term can be implied as a "necessary incident". Further, whether a duty to cooperate should be implied is dependent on the obligations imposed on each party in each particular contract, the intentions of the parties at the point of entering into the contract, and whether such a duty had to be implied to give the contract efficacy. These principles have been consistently applied in precedent cases (see [95]–[104] below). The inquiry is therefore a fact-specific one, rather than one to be imposed in every contract in a particular class on the basis of wider policy considerations.

92 We note that Lord Blackburn in *Mackay* appears to suggest that the duty to cooperate is a "general rule" that would apply to a class of contracts in which "both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing". In a recent decision of the Supreme Court of Victoria in *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201 ("*Adaz*"), the court appeared to consider the duty as one to be implied in law (affirmed by the same court in *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd* [2021] VSCA 69 at [108]). However, the court reasoned that "'[n]ecessity' is the rationale for [its] existence and the circumstance which must be 'demonstrated' for [it] to be operative" (*Adaz* at [116]), and did not find that it should be a term implied in law on the basis of wider policy considerations. In contrast, Coomaraswamy J in *Tan Chin Hoon and others v Tan Choo Suan (in her personal capacity and as executrix of the estate of Tan Kiam Teon, deceased) and others and other matters* [2015] SGHC

306 ("*Tan Chin Hoon*") seemed to consider it as a term to be implied in fact, as he analysed whether it was necessary in the business sense to imply that term so as to give the contract efficacy, and that the parties would have affirmed the existence of this duty had it been suggested to them at the point of entering into the agreement (at [145]).

93 In our view, Lord Blackburn's statement in *Mackay* only identifies the general features of a case where a duty to cooperate would be implied, without going so far as to set out a category of cases to which such a duty would operate by default. We agree with the commentary in Edwin Peel, *Treitel on The Law of Contract* (Sweet & Maxwell, 15th Ed, 2020) (at para 6-065):

> As will be seen below, the defining feature of terms implied in law is that they are implied into all contracts of a particular type. By contrast, terms are implied in fact on the basis of the circumstances of individual contracts. Nevertheless, the same, or similar, circumstances may be repeated and it is on this basis that there is some value in noting some of the leading examples of terms which may be implied in fact, *bearing in mind that it does not follow that the courts will always imply the terms in question just because the case before them shares the same broad features.* Thus, the courts may imply a term that the parties will "co-operate" to ensure performance where they have agreed that "something shall be done which cannot effectively be done unless both concur in doing it"; similarly, that one party will not do anything "of his own motion" to put an end to any state of circumstances on which the performance of the contract depends. Where the contract confers rights on one party subject to the consent of other, the court may imply a term that such consent must not be withheld arbitrarily or unreasonably, and where a contract is subject to a condition precedent, a term may be implied that neither party must do anything to prevent the occurrence of the event, or that one party must use reasonable efforts to bring the event about.
>
> [emphasis added]

94 In reaching the conclusion that a duty to cooperate must be a term implied in fact, we also recognise the caution sounded by the Court of Appeal in *Ng Giap Hon* to imply "terms implied in law" with circumspection; as well

as the observations made by the Court in *The One Suites* as to the uncertainties that still surround the application of this duty, including its interaction with the doctrine of good faith, which has, in the same case, been rejected as a term to be implied in law.

(B) WHEN A DUTY TO COOPERATE MAY BE IMPLIED

95 As for when such a duty may be implied as well as the scope of such duty, the authors of *Chitty on Contracts* cited Lord Blackburn in *Mackay*, and stated that (at para 16-026-3):

> … the duty to co-operate and the degree of co-operation required is to be determined, not by what is reasonable, but by the obligations imposed – whether expressly or impliedly – upon each party by the agreement itself, and the surrounding circumstances.

96 We agree with the observations above. First, the implication of a duty to cooperate must accord with the intention of the parties and the bargain struck between them. This is a fact-specific inquiry, dependent on factors such as the parties' understanding of their contractual obligations at the point of entering into the contract, including those revealed by the contract's express terms.

97 In *Mackay* itself, the parties entered into a sale and purchase contract for a digging machine, subject to a condition precedent that the seller demonstrate to the buyer via a test that the machine was functioning adequately. Lord Blackburn held that there was an implied duty that the buyer was to cooperate in enabling a fair test to be done. Having failed to cooperate, the buyer could no longer call upon the seller to remove the machine on the ground that the test had not been satisfied. He would therefore have to keep the machine and pay for it (at 264). Similarly, in *Evergreat Construction*, the plaintiff was the main contractor for a construction project, while the defendant was the subcontractor

appointed by the plaintiff. Disputes arose between the parties and they agreed to resolve their differences by engaging an independent assessor. Rajah J found that the plaintiff had an obligation to cooperate with the defendant in facilitating the assessment process.

98 In contrast, in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, the court found that no duty to prevent the fulfilment of an agreement could be implied. In that case, the respondent Cooper introduced prospective purchasers to the appellants for the purchase of their properties. The contract between the parties provided that, if a party introduced by Cooper should buy the properties for at least a certain sum, each of the two appellants would pay a commission to Cooper on the completion of the sale. However, no such sale eventually took place. Cooper argued that, as the proposed purchasers were and remained willing and able to buy the properties for the minimum price, the appellants breached their implied duty to "do nothing to prevent the satisfactory completion of the transaction so as to deprive the respondent of the agreed commission" by declining to close the offer. The House of Lords rejected this argument and reasoned that the proposed implied term did not accord with the parties' intentions and the express terms of the contract (at 117–118):

> The matter may be tested in this way. If such an implied term must be assumed, then this amounts to saying that when the owner gives the agent the opportunity of earning commission on the express terms thus stated, the agent might have added, "From the moment that I produce a duly qualified offeror, you must give up all freedom of choice and carry through the bargain, if you reasonably can, with my nominee," and the vendor must reply, "of course; that necessarily follows." *But I am by no means satisfied that the vendor would acquiesce in regarding the matter in this light.* … The owner is offering to the agent a reward if the agent's activity helps to bring about an actual sale, but that is no reason why the owner should not remain free to sell his property through other channels. The agent necessarily incurs certain risks, e.g., the risk that his nominee cannot find the purchase price or will not consent to terms reasonably proposed to be inserted in the contract of sale.

> *I think, upon the true construction of the express contract in this case, that the agent also takes the risk of the owner not being willing to conclude the bargain with the agent's nominee.* This last risk is ordinarily a slight one, for the owner's reason for approaching the agent is that he wants to sell.
>
> [emphasis added]

99 Similarly, the Court of Appeal in *Bee See & Tay v Ong Hun Seang and others (trustees of Zion Gospel Mission Ltd) and another appeal* [1997] 1 SLR(R) 469 ("*Bee See & Tay*") concluded that based on the parties' understanding at the time of entering into the agreements, there was no basis to imply a duty to cooperate. In that case, the plaintiffs acted as trustees for and on behalf of a company in the purchase of properties from the first to fourth defendants (the "vendors"). The plaintiffs claimed the refund of deposits forfeited by the vendors for non-completion of the sale and purchase agreements, on the basis that there was an implied term that the vendors would cooperate with them to obtain planning approval for change of use, but the vendors had failed to do so.

100 The court noted that the agreements were not conditional upon approval for change of use being obtained (*Bee See & Tay* at [54]). The parties had entered into the agreements on the basis that the properties were sold as residential properties, and the vendors were entitled to require that the plaintiffs complete the purchases on that basis (at [57]). As such, the court could not imply any term that the vendors would cooperate with the plaintiffs to obtain planning approval. The court stated (at [58]):

> … There is simply no room to imply any term, whether in fact or in law, that the vendors would co-operate with the respondents in getting planning approval for change of use. Such a term would go against the very tenor of the contracts, which was that the properties were sold "as is", and without any proviso or condition as to approval for change of use being obtained. … It is one thing to imply a term or condition for business efficacy, or as an incident of the contract. It is quite

> another to imply a term to the effect that the vendors would do something which they have bargained that they would not do. The facts in this case speak for themselves.

101 Second, where a duty to cooperate is implied, the scope of such a duty is again dependent on the contractual terms and the context of the case. The principle in *Mackay* that a party would have to do "all that is necessary to be done" should be understood to be limited as such. The following cases illustrate the application of this principle.

102 On the facts in *Tan Chin Hoon*, the parties reached an oral agreement to compromise their disputes (the "Compromise"). The Compromise was subject to a condition precedent that the Attorney-General ("AG") must consent to the terms of the settlement; however, the AG declined to grant his consent and thus the condition was unfulfilled. The plaintiffs alleged that one of the defendants ("TCS") had breached an implied duty to cooperate to obtain the AG's consent to the Compromise. Coomaraswamy J found that a duty to cooperate could be readily implied into the Compromise between the parties, as it was required to give the agreement efficacy, and the parties would have affirmed the existence of such a duty if it had been suggested to them at the point of entering into the Compromise. The implied duty "entails each party doing no more than that which is reasonable in all the circumstances" (at [149]). On the facts, TCS did not breach the implied duty to cooperate, as the duty extended "only to her taking reasonable steps to provide to the AG relevant information which the AG, a neutral third party, required", and did not require her to do all that was reasonably within her power to *persuade* the AG to give his consent (at [160]).

103 In *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014, the court held that "in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a

limited degree – *to the extent that is necessary to make the contract workable*" [emphasis added] (at 1018). On the facts, the relevant contract between the sellers and buyers contained a term providing that payment could be made against signed confirmation by the buyers' shipping agents that the oil tanks being sold were at the disposal of the buyers. The buyers' agents informed the sellers that they would not act until written instructions were received from the buyers; however, the sellers misunderstood that the agents were refusing to act at all and did not approach the agents thereafter. As the contract had not been performed, the sellers brought an action for damages against the buyers for breach of contract, alleging that they had breached an implied duty to "do nothing to prevent or obstruct the performance of the condition of payment". The court found that there was an implied duty that the buyers had to instruct the agents, as the contract would otherwise be unworkable, and that this had been done. However, removing any misunderstanding between the sellers and the buyers' agents would be "quite beyond the reach of implied contractual obligation"; and the court "cannot … exact a higher degree of co-operation than that which can be defined by reference to the necessities of the contract" (at 1018).

104 Although the precise scope of the implied duty is to be determined on the facts of each case, it can be observed from the cases that the scope of such duty would be limited by the express terms of the contract, as well as what is necessary to give the contract efficacy, and is not meant to impose an onerous obligation on the parties to the agreement. This conclusion accords with the Court of Appeal's holding in *The One Suites* that where there is an implied term to use reasonable endeavours, the steps that must be taken to satisfy that obligation would depend on all the facts and circumstances of the case itself (at [29]). The Court of Appeal also reiterated that, where relevant, the Court is to

have regard to the express terms of the contract itself to determine the scope of such an obligation (at [43]).

(2) Application to the facts

(A) IMPLICATION OF DUTY TO COOPERATE AND SCOPE OF SUCH DUTY

105 On the facts, we find that Mah did have an implied duty to cooperate. It is well-settled that the following steps apply in determining if a term is to be implied in fact (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp*") at [101]:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

106 Applying the first step of the test in *Sembcorp*, there was a gap in the SPA in relation to the obligations of each party, and in particular that of Mah. At the material time, the parties would have assumed that they had the common goal of getting the Operational Agreement signed. According to Mah, he had insisted that the pre-conditions, being the signing of the Operational Agreement and the obtaining of the approval of the Feasibility Study Report, be included in the SPA because the Nangang Project "was not moving forward as expeditiously as [he] was told", and that the shares in Enersave International were "effectively worth nothing" until the Nangang Project materialised. It

would therefore make no "commercial sense for [him] to acquire the shares from [Ng] and/or for [Ng] to 'walk away' from the company as a shareholder and the Nangang Project before the said [p]roject kicked off".[19] As for Ng, he averred that he did not have any concerns about the signing of the Operational Agreement being made a pre-condition for the Tranche 3 Payment. To him, it was "almost a formality" as the agreement had to be executed before the Xianda SPV could operate the desalination facility and the salt-making plant that were being constructed under the Nangang Project. Thus, if the agreement were not signed, "Mah's investment in building the Nangang Project would go to waste as he will not be able to reap the profits from the Nangang Project". Further, Mah thought it would "require a great calamity or blunder of massive proportions" for the agreement not to be signed.[20] Given both Mah's and Ng's descriptions of the state of affairs at the material time, it would seem that both parties had understood that they had a common goal in achieving an early signing of the Operational Agreement, and that there was no necessity to specify obligations on each party in the SPA.

107 As for the second step of the test in *Sembcorp*, it was necessary in the business or commercial sense to imply a term to cooperate to give the SPA efficacy. As noted at the outset, the SPA was signed on 13 November 2013 (see [1] above). The evidence showed that Mah was involved in the Nangang Project from that point, despite his attempts at trial to show that he had minimal involvement. In the course of cross-examination, Mah acknowledged that he had approached the Malaysian embassy in China, to push for an investment

19 ROA (Vol 4A) at p 35 (para 134).

20 ROA (Vol 3B) at p 34 (para 97).

cooperation agreement to be signed at the China-Malaysia Economic Summit ("Summit") held on 4 October 2013:[21]

> Q. Mr Mah, there was an investment cooperation agreement signed in this summit in 2013; you agree to that, Mr Mah?
>
> A. Yes.
>
> Q. You say you had no role in the Nangang Project becoming one of the eight projects for which investment cooperation agreements were signed at this summit in 2013; is that correct?
>
> A. Yes, I've got no role in that in the sense that, okay, all I did was go to the Malaysian embassy and that's it. I qualify by saying that.
>
> Q. Okay.
>
> A. (Inaudible) -- if it was one of eight economic, it was not my doing.
>
> Q. So what did you say when you approached the Malaysian embassy? Is this in China, the Malaysian embassy in China?
>
> A. Yes. Yes.
>
> Q. All right. So you approached them prior to the summit; am I correct?
>
> A. In September 2013.
>
> Q. And who did you meet from the Malaysian embassy?
>
> A. I met with the ambassador.
>
> Q. What's his name, sir?
>
> A. I think his name is Iskandar.
>
> Q. And what precisely did you say to His Excellency Iskandar?
>
> A. I told him about the Nangang Project.
>
> Q. As a result of this conversation, do you believe that that resulted in the Nangang Project becoming one of the eight projects in this China-Malaysian Economic Summit?
>
> A. I don't know. What I know is the ambassador sent a commercial officer down to Tianjin and persuaded them, to tell

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[21] ROA (Vol 3E) at pp 45–46 (Notes of Evidence ("NEs") (15 Sep 2020) p 42 line 4 to p 43 line 15).

> them that this is going to be part of the signing ceremony between the President Xi and Prime Minister Najib.

108 The evidence also revealed that Mah had signed the investment agreement with TEDA on behalf of the Xianda SPV at the Summit on 4 October 2013, in his capacity as one of the Xianda SPV's directors, even if the ceremony was merely a ceremonial one as he claimed:[22]

> Q. If you look at the picture in the middle, it appears that you had signed the investment collaboration agreement with TEDA; is that correct, sir? On 4 October 2013?
>
> A. Yes, the agreement was signed in Tianjin. Yes.
>
> Q. You were the one who signed on behalf of Xianda; is that correct, sir?
>
> A. I don't think so. Not that I can remember, really. Don't forget the agreement was signed in September, dated 28 August 2013 and, what do you call, the exchange of documents on this particular day, which is 4 October 2013.
>
> Q. I see. So you are actually saying that the agreement was already signed prior to 4 October 2013, this investment collaboration agreement?
>
> A. Yes.
>
> Q. And then there is a ceremonial signing, if I may call it that, on 4 October 2013?
>
> A. Yes.
>
> Q. And you appear to be the person who signs at this ceremonial signing, as witnessed by the leaders of China and Malaysia who can be seen in the background of this photograph at page 246; is that correct, sir?
>
> A. Yes.
>
> Q. In what capacity were you representing Xianda?
>
> A. As one of the directors.

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22 ROA (Vol 3E) at pp 49–50 (NEs (15 Sep 2020) at p 46 line 4 to p 47 line 5).

109 When cross-examined as to why he had signed the agreement on behalf of the Xianda SPV at the Summit, Mah testified as such:[23]

> Q. All right, but in 2013 for the investment collaboration agreement, wasn't Mr Victor Wee the chairman then?
>
> A. Yes, he was.
>
> Q. Why didn't he sign? Why wasn't he present to sign on behalf of Xianda at that ceremonial signing?
>
> A. Because I was the one who went and appealed to the Malaysian embassy at that time, 2013, when the Government of Tianjin refused to sign the investment agreement. As I already repeated, two or three occasions they were -- at the last-minute was pulled out. So I was the one who did it. And the people there know me. Victor never went to the Malaysian embassy. That was my first trip to the Malaysian embassy and after checking with (inaudible) that's how it all happened. Otherwise, the investment agreement would not have been signed too.
>
> Q. All right.

110 It can be seen, therefore, that Mah's involvement in the operation of the Nangang Project was crucial, from as early as 2013 when the SPA was entered into. Mah was not merely an investor in the project. Applying the third step of the test in *Sembcorp*, it was therefore necessary to impose a duty to cooperate on him in order to give the SPA efficacy.

111 As regards the scope of Mah's implied duty, it should be noted that despite his role as a director of the Xianda SPV, he remained an investor in the project and the SPA accorded him sole discretion to terminate the agreement should the pre-conditions not be met. Thus, Mah did not have the obligation to ensure that the Operational Agreement would be signed by the stipulated deadline (or the deadlines which he had earlier extended), but had a duty to make reasonable efforts to achieve signing by the Deadline, and certainly not to

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[23] ROA (Vol 3E) at p 59 (NEs (15 Sep 2020) at p 56 lines 5–22).

hinder or prevent the signing of the Operational Agreement. We turn to the next question of whether Mah had breached this implied duty to cooperate.

(B) WHETHER MAH BREACHED THE IMPLIED DUTY TO COOPERATE

112 The evidence showed that Mah played a significant role in determining when the Operational Agreement would be signed, even though he attempted, when giving his evidence at trial, to distance himself from the negotiations. Mah's evidence was that his involvement in the process was limited to sending a letter to PM Najib and having "discussion[s] with [his] people".[24] He admitted during cross-examination to having reached out to some contacts, including his cousin who was a minister under PM Najib's government, but claimed that that was the extent of his involvement.[25] Mah also insisted that he did not participate in any negotiations with the Chinese counterparts as he could not speak Mandarin well, and that he was merely consulted when required and updated on the progress of the Nangang Project at internal meetings.[26]

113 Despite Mah's repeated attempts to insist otherwise, the evidence clearly showed that he was heavily involved in the negotiation process. He participated in internal discussions and attended at least one high-level negotiation meeting with TEDA. Even if he did not conduct the negotiations with the TEDA representatives himself, he nevertheless had some control over the process.

114 In a set of minutes for a meeting held on 19 May 2016 and attended by the "Full EXCO", including Mah, it was recorded that there were "four shortlisted COA issues which [were to] be discussed with Wang Sheng during

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24 ROA (Vol 3E) at p 91 (NEs (15 Sep 2020) at p 88 lines 15–25).

25 ROP (Vol 3F) at pp 80–82 (NEs (16 Sep 2020) at p 77 line 17 to p 82 line 18).

26 ROA (Vol 3A) at pp 36–37 (paras 136–137).

his visit to Malaysia end of May".[27] For clarity, "COA" in these minutes refers to the Operational Agreement,[28] and Wang Sheng was the head of TEDA.[29] These were issues stated to be holding up the signing of the Operational Agreement. The minutes also recorded that the target date for the signing of the Operational Agreement was end of June.[30] Mah was cross-examined on this, but claimed that he did not play an active role in the negotiations:[31]

> Q. Let's turn the page quickly to 1115. Matter number 2 on the agenda for this meeting, "The four shortlisted issues that will be discussed with Wang Sheng during his visit end of May". Why was the head of TEDA going to Malaysia, was it specifically just to meet with all of you, Xianda, alone?
>
> A. I think they had some other meetings too, but they specifically want to check up on our credentials.
>
> Q. So there were four issues, right, for discussion, which were effectively holding up the signing of the COA; is that correct, Mr Mah? They are listed out in --
>
> A. Yes, that is what is stated here, lah.
>
> Q. Okay, I take it you aren't disputing that you attended this meeting?
>
> A. Yes.
>
> …
>
> Q. Going back to timing and the COA's timing, page 1154. The target date for COA is at the end of 25 June. We know that the head of TEDA is going to KL to meet with you in May. And what you wanted to discuss with the head of TEDA were these four outstanding issues. Is that correct, Mr Mah?
>
> A. Yes.
>
> Q. Then why do you say you have no role in negotiations for the COA, broadly speaking, from your affidavit, save for writing a letter?

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27 ROA (Vol 5D) at p 122.

28 ROA (Vol 3E) at p 72 (NEs (15 Sep 2020) at p 69 lines 2–3).

29 ROA (Vol 3F) at p 136 (NEs (16 Sep 2020) at p 133 lines 12–13).

30 ROA (Vol 5D) at p 121.

31 ROA (Vol 3F) at pp 145–146 (NEs (16 Sep 2020) at p 145 line 1 to p 146 line 18).

> A. I actually -- I have no active role in this. Even right up to here I am just like the two leaders meeting. Don't forget he is leading a delegation. I will have Cai Wei, Cheng Jew Kien and a few other people there and then they will, amongst themselves, they will talk. As far as I'm concerned, as I said, my Mandarin is -- I'm ashamed to say that my Mandarin is very bad. I'm not proud of this. I cannot communicate with them. That is it. I can say "hello" and all these things, that's all. Not good enough for business talk.

115 However, it could not be seriously disputed that the May 2016 meeting was a high-level meeting between the two leaders and that discussions in respect of the Operational Agreement had been held during that meeting. In an email dated 31 October 2016 sent from Eveline Chuah (the Xianda SPV's Financial Controller) to Mah, she enclosed a copy of the Xianda SPV's reply to Nangang Utility on issues relating to the Operational Agreement (the "Reply"). It was stated in the Reply, that a meeting had been held between Wang Sheng and Mah in May 2016, at which there was a "breakthrough" in the negotiation process.[32] The same Reply stated that, in accordance with an agreement between the "two leaders" (*ie*, Mah and Wang Sheng), the Xianda SPV presented a draft Operational Agreement to the Nangang Management Committee.[33] To this, Mah insisted that the meeting in May 2016 was merely a "courtesy call" between the two heads and that he did not participate in the negotiation process.[34] Even if Mah's team conducted much of the substantive negotiations in Mandarin, as he claimed, it remains the case that Mah attended the meeting as the Xianda SPV's head to try to overcome the impasse and resolve the outstanding issues standing in the way of the signing of the Operational Agreement.

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32 ROA (Vol 5K) at p 231 (para I(1)).

33 ROA (Vol 5K) at p 3345; ROA (Vol 3F) at p 138 (NEs (16 Sep 2020) at p 135 lines 2–8).

34 ROA (Vol 3F) at pp 136–138 (NEs (16 Sep 2020) at p 133 line 16 to p 138 line 11).

116 It is also apparent from the evidence that Mah was actively involved in internal discussions, which can be seen from several emails adduced by Ng. Whilst the chain of email correspondence was not complete, it was sufficient to show that Mah had given directions and input. For example:

(a) In an email sent from Cheng Jew Kien ("Cheng"), the Xianda SPV's Chief Operating Officer,[35] to Mah dated 3 August 2014, Cheng provided Mah with information in relation to the Nangang Project. Mah replied to Cheng on the same day, thanking him for the updates and stating that they should "have a serious thought of the exclusivity and see how to ensure we do not lose this exclusivity". He emphasised that "[t]here must never be 2 networks and similarly let us strategies [*sic*] on how best to proceed".[36]

(b) In an email sent from Michael Mah ("Michael") (Mah's son and the Xianda SPV's Corporate Development Director) on 11 March 2015 titled "What is stalling our negotiations?", Michael set out various strategies and concerns in relation to the Xianda SPV's negotiating position. On the same day, Mah replied to the email thread stating:[37]

> Michael I agree with you that besides Technical this should be an important agenda next Monday for us to strategies [*sic*] our next move. I am clear that we must have our own baseline and will not put in further capital unless we have an agreement with the government in writing on the Guaranteed Off Take. Let us discuss on how best to present it to the Gov't. and also on all the points raised.

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35 ROA (Vol 3A) at p 35 (para 135).

36 ROA (Vol 3D) at p 77.

37 ROA (Vol 3D) at p 82.

> The idea of trying to secure Cao Fei Dian by all of you to help us in the negotiation is good. Let us discuss.
>
> …

(c) In an email dated 21 July 2016 sent from Cheng to Mah (amongst others), in relation to a document titled "Xianda's Preliminary Feedback", he stated that:[38]

> Mr Mah,
>
> Reference to your suggestion given via SMS yesterday, I have checked the latest revision i.e. Rev. 5 (both English and Chinese version of Rev. 5 are attached here) and confirm that Rev. 5 is already worded in the same manner as per your suggestion:
>
> > We propose that both parties can reach the agreement the river water supply in the Zone is only defined as the source for sanitary water and the industrial water supplied by Xianda is the main industrial water source for enterprises in the Zone while the water supplied by Tianjin Nangang Industrial Zone Water Co, Ltd (hereinafter referred to as "Nangang Water Co. Ltd.") are the backup industrial water source for enterprises in the Zone (only allowed to provide backup industrial water when Xianda's facilities and equipment are under check or repair or other reasons cause the inability of water supply by Xianda) in order to ensure safe and steady water supply in the Zone.
>
> …

117 Mah's claims that his skills in Mandarin prevented him from being involved in the negotiations are therefore also entirely unconvincing. Mah himself acknowledged that documents were regularly translated for him.[39] Although Mah denied that his approval was necessary for the Operational

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38 ROA (Vol 3D) at p 94.

39 ROA (Vol 3F) at p 134 (NEs (16 Sep 2020) at p 131 lines 2–4).

Agreement to have been signed, he admitted that it would have to be discussed with him:[40]

> Q. Would you have allowed for the signing of the COA without your approval, Mr Mah?
>
> A. I don't say with or without my approval. I would say we would have a discussion before everything is agreed upon.

118 Although not determinative, multiple news articles published after the signing of the agreement on 3 November 2016 showed that Mah was seen as the lead of the Xianda SPV and the propeller of the Nangang Project. Ng exhibited an article dated 4 November 2016 published by a Malaysian news publication, The Star, which reported Mah stating that he had "stayed put here to see through all the preparations" for the Nangang Project for "the past two years"; and that the project was "one of his private projects in China".[41] Mah denied giving this interview.[42] In the course of cross-examination, Mah was further referred to another article from the website of China Daily, in which it was reported that:[43]

> Mah Sau Cheong, chairman and CEO of Xianda Resources, said that his company will expand its engagement in the Chinese mainland by enhancing investment, increasing technology transfer, strengthening the responsibility of environment protection and engaging in corporate social responsibility.
>
> "Nangang is a world-class petrochemical industrial zone in the collaborative development plan of Beijing-Tianjin-Hebei region. We have the equipment and capability to design, build and operate the project and are capable of ensuring quality," said Mah.

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40 ROA (Vol 3F) at p 118 (NEs (16 Sep 2020) at p 115 lines 16–20).

41 ROA (Vol 5L) at p 121.

42 ROA (Vol 5E) at p 56 (NEs (15 Sep 2020) at p 53 lines 19–24).

43 ROA (Vol 5L) at pp 122–123.

Mah again insisted that he did not make these comments to the press.[44] His evidence, however, is unbelievable.

119 The evidence therefore showed that Mah was significantly involved in the negotiation process and was influential in determining when the Operational Agreement could be signed.

120 On 19 October 2016, there were five purported "sticking points" that remained unresolved. However, based on an email sent from the Xianda SPV's in-house legal counsel Luke Li to the leadership of the Xianda SPV (including Mah), he stated that they had "communicated with Nangang on the content of the operation agreement" on 19 October and that "[m]ost of the terms [had] been basically agreed".[45] Mah conceded that the agreement could have been signed earlier if he had not "held out" on its signing on account of these points, and that doing so was to his own commercial advantage:[46]

> Q. Turn the page to 2589. That is that email from Luke Li, your in-house legal counsel. It says: "Dear leaders, On the 19th, we communicated with Nangang on the content of the operation agreement. *Most of the terms have been basically agreed.*" I will stop right there. Mr Mah, surely you should have known that most of the terms for the operation agreement had basically been agreed on the 19th. This surely would have been very important news to you?
>
> A. No, not really. Seriously. To me the terms has always been -- I mean, fact of the matter up till now, the supplementary agreement is not signed, it is already proof of the fact.
>
> …
>
> Q. Can I take it, at least as of 19 October these were the five primary issues that was holding up the signing of the COA between Xianda and TEDA, as of the 19th at least.

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44 ROA (Vol 3E) at pp 60–62 (NEs (15 Sep 2020) at p 57 line 1 to p 59 line 6).

45 ROA (Vol 3I) at p 26.

46 ROA (Vol 3F) at pp 121–123 (NEs (16 Sep 2020) at p 118 lines 5–19 and p 119 line 25 to 120 line 23).

> A. These are the five. There are a few more.
>
> *Q. And if there weren't these sticking points, can you agree that you would have otherwise signed the COA much earlier?*
>
> *A. Yes, without all these sticking points, we would have signed much, much earlier, yes, that's true.*
>
> Q. And these five issues, you were holding out for TEDA to agree to these five -- to your asks in respect of these five issues because they would be commercially advantageous to Xianda; am I correct?
>
> A. No, I don't think because -- yes -- I won't say it is commercially advantageous to Xianda, I say these are the things that has to be inside there in the agreement itself. These are the basic laws. Exclusivity -- you cannot afford to have two desalination plant there. Sorry, if I already go on and explain again. *You asked me to say that I'm holding out for my own special commercial, in a way, it is yes, okay.* Not just for myself to survive, yes. These are not unreasonable demands…
>
> [emphasis added]

121 We accept that some of the "sticking points" such as the questions of exclusivity and off-take pricing might appear off-hand to be valid concerns. However, the five "sticking points" did not appear to be insurmountable as there were ongoing discussions as to possible viable solutions. There was also no evidence led as to what impact these "sticking points" might foreseeably have had on the profitability of the Nangang Project if they were not resolved. More importantly, the Operational Agreement was eventually signed despite these points remaining ostensibly unresolved. It is undisputed that the Operational Agreement did not contain all the terms that the parties were meant to agree on, as they had intended to sign a further supplementary agreement thereafter, although this was ultimately never signed.[47] This further points towards the conclusion that the Operational Agreement could in fact have been signed earlier, particularly since most of the terms appear to have been agreed between the parties prior to the Deadline (see also [128] below).

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47 ROA (Vol 3F) at pp 157–158 (NEs (16 Sep 2020) at p 154 line 18 to p 155 line 1).

122 We turn to the evidence specifically in relation to Mah's involvement in arranging for former PM Najib's attendance at the signing of the Operational Agreement. It is undisputed that Mah signed and sent the invite to PM Najib on 5 October 2016. On 21 October, Mah was informed that PM Najib would be travelling to Tianjin on 3 November. On the same day, after PM Najib's visit was confirmed, Mah sent the 21 October Letter to Ng. By 21 October, therefore, Mah must have known that by fixing the signing of the Operational Agreement on 3 November so that PM Najib could witness the signing, the Deadline would necessarily be breached.

123 Mah claimed that he had merely extended an invitation to PM Najib on behalf of the Xianda SPV and that he "did not make any subsequent follow ups or arrangements for the former [PM's] attendance at the signing ceremony".[48] However, the evidence showed that Mah's claim was patently untrue.

124 In an email dated 9 October 2016, the subject of which is "Letter to Tianjin Foreign Affairs Office drafted on behalf of the Embassy- revised after conference call discussion", it appears that a lawyer engaged by the Xianda SPV was drafting a letter to the Tianjin Foreign Affairs Office on behalf of the Malaysian Embassy.[49] The email was addressed to Mah (amongst others), although Mah claimed that he had no knowledge of this correspondence.[50] In the draft letter attached to the email of 9 October 2016, it was stated that:[51]

> As you know, Mr. Najib bin Abdul Razak, Prime Minister of the federal government of Malaysia, will visit China at the end of this month to conduct active dialogue with senior Chinese officials on bilateral economic and trade cooperation. During his

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48 ROP (Vol 3A) at 37 (para 141).

49 ROP (Vol 5G) at p 116.

50 ROP (Vol 3F) at pp 74–80 (NEs (16 Sep 2020) at p 71 line 1 to p 77 line 9).

51 ROA (Vol 5G) at pp 140–147.

> visit to China, the prime minister will visit Tianjin to carry out relevant activities.
>
> …
>
> We sincerely hope that during the prime minister's visit to Tianjin, the two sides can make substantial progress in the project, sign the construction and operation agreement, and start the construction of the project as soon as possible after signing the agreement, so as to promote the Malaysia China friendship and bilateral economic and trade cooperation to a new level!

There is evidence therefore that Mah was involved in or was, at the very least, aware of or privy to, discussions with the Malaysian embassy to capitalise on PM Najib's visit and did not merely send the invitation letter.

125 Further, in an email dated 21 October 2016, the Malaysian embassy had asked for input in relation to talking points for PM Najib's visit. Cheng replied on 25 October with the brief background, details and status of the negotiation of the Operational Agreement. On 27 October, Cheng sent suggested talking points to the embassy. On 29 October, Cheng sent a further email, asking for an initiative in relation to biodiesel to be added to the suggested "talking points" for PM Najib. On 30 October 2016, Cheng then sent an email to Mah, stating:[52]

> Mr Mah, in your conversation with Minister Dato Mah you can let him know we have asked embassy to put in this biodiesel initiative in the talking points, and embassy has confirmed they will.

This correspondence between Cheng and Mah again showed that Mah's involvement did not end with the sending of the invitation letter to PM Najib.

126 There is sufficient evidence that the parties worked towards having the Operational Agreement ready for signing by PM Najib's visit. For example, a

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52 ROP (Vol 5K) at pp 160–164.

meeting was held on 13 October 2016 between representatives from the Nangang Public Utilities Bureau and the Xianda SPV. The meeting minutes stated that:[53]

> The above is the preliminary communication opinions of Nangang on the feasibility study report provided by Xianda. Nangang will modify the reply according to the consensus reached by both parties at the meeting, and confirm with Xianda again before final report to the superior leaders. In Nangang's opinion, in addition to the consensus reached by both parties, there are also the following reserved questions worthy of attention: 1) routing fee and pipe network fee, 2) sales guarantee, 3) tax policy. These three problems cannot be solved at Nangang level. It is suggested that Xianda upgrade the problem as soon as possible.
>
> In addition, Xianda also mentioned the visit of the Prime Minister of Malaysia.
>
> Xianda expressed that the Malaysian government has always paid great attention to this project. *Signing the operation agreement as soon as possible is the requirement of the Malaysian government. The investment agreement of this project is signed under the witness of the leaders of the two countries, which is of great significance to the economic and trade development of the two countries.* Xianda has the determination and confidence to continue this project, and hopes that Nangang government will understand the difficulties of Xianda and give strong support. On the occasion of the prime minister's visit, we will vigorously promote the signing of the project operation agreement, so that the project can be started as soon as possible, realize the water supply to Nangang Industrial Zone, contribute to the economic development of Tianjin, and compose a new colorful movement to promote the development of bilateral economic and trade relations between China and Malaysia.
>
> *Director Jiang thinks that the two weeks before the prime minister's visit is too short for signing the operation agreement. He suggests that only the Framework of Operation Agreement and Memorandum of Understanding should be signed.*
>
> The two sides scheduled to hold their next meeting next Wednesday (October 19).
>
> [emphasis added]

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53 ROP (Vol 3D) at p 214.

127 This exchange showed that PM Najib's attendance had placed some pressure on the negotiations for the Operational Agreement, as the parties were working toward having the signing take place on the day of the PM's visit, which the meeting attendees understood to be taking place in two weeks.

128 Further, Christina Zhang (the personal assistant to one of one of the SPV's directors, Cai Wei) sent an email on 19 October 2016 to Mah, enclosing Cai Wei's message to one Wang Jun Ming (whom Mah described as the "number two" in TEDA).[54] In the message, Cai Wei reported that following the meeting on 19 October, the "result [wa]s that *most of the terms ha[d] been agreed by both parties*" [emphasis added]. This, Cai Wei suggested, "laid the foundation" for PM Najib to witness the signing of the Operational Agreement during his visit to Tianjin.[55]

129 As such, once the signing of the Operational Agreement had been set for the date of PM Najib's visit, it was impossible for the agreement to be signed any earlier. Mah was therefore responsible for creating a *fait accompli* with the signing date.

130 Considering the evidence in its entirety, including Mah's significant involvement in the negotiation process, we conclude that Mah had rendered the signing of the Operational Agreement by the 24 October Deadline an impossibility by getting PM Najib to witness the signing, ostensibly for better leverage.

131 We make a general observation, based on our review of the evidence on record, that Mah did not appear to be a candid or forthcoming witness, such that

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54 ROA (Vol 3F) at p 143 (NEs (16 Sep 2020) at p 140 lines 18–22).

55 ROA (Vol 5I) at p 10.

it was unclear what his true intentions or motivations were. We have highlighted at several points in this judgment that Mah's evidence was simply unbelievable. Further, Mah testified that he wanted to leverage PM Najib's visit to get the Operational Agreement signed,[56] and that the presence of the former PM was "used as a reason and was a catalyst for the signing of the Operational Agreement to take place".[57] However, during cross-examination, Mah had testified that he had already made up his mind to terminate the SPA:[58]

> Q. Your Honour, whilst I get to that, and I do apologise, Mr Mah. On 21 October there is a confirmation from Prime Minister Najib -- from the embassy that Prime Minister Najib is coming on 3 November, and on that same afternoon you cause Ayu to send the defendant these letters; is that a coincidence, Mr Mah?
>
> A. Yes, I would think partially coincidence and partially we are talking about the letter, yes, it is a coincidence. I mean it is a coincidence that I asked her to send the letter, yes. I mean, I had already made up my mind that I will send it, but it happens to be on the same day.
>
> …
>
> Q. So in the morning there is a confirmation from the Malaysian embassy that PM Najib is coming, and in the afternoon you signed these letters to the defendant, the ones at tab 237 and 238. Do you have an explanation, Mr Mah?
>
> A. Yes. As far as the – let's go with the sale and purchase agreement first. As far as the sale and purchase agreement is concerned, the deadline was up already on 24 October. That is the final – 24 October 2016, that is the final date. There is no extension for that date and that is the final date for me and that's why this thing had to go out. I will say -- I won't say by chance, but the extension is on 21 October, I think to 21, what you call, 21 2016 -- 21 October 2015 to 2016, but the main thing is 24 October 2016 is the final date which will stand firm and which the defendant should know because he has been given three years for the whole thing, for, what you call, for the condition precedent to be signed.

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56 ROP (Vol 3F) at p 80 (NEs (16 Sep 2020) at p 77 lines 13–16).

57 ROP (Vol 3A) at p 36 (para 138).

58 ROA (Vol 3F) at pp 113–116 (NEs (16 Sep 2020) p 110 line 16 to p 113 line 4).

132 Mah's evidence was illogical. If he had intended for PM Najib's attendance to act as a catalyst for the Operational Agreement to be signed, and this was in fact achieved, there appears to be no reason why he still insisted on pulling out of the SPA. The reasonable inference is that Mah was intent on recovering his investment outlay and avoiding the Tranche 3 Payment. Mah testified that the Nangang Project never took off and that "until now nothing has been done".[59] In any event, Mah's conduct had made it impossible for the Operational Agreement to have been signed by the Deadline.

133 For the above reasons, we conclude that Mah had breached his implied duty to cooperate under the SPA.

Whether the Closing Date had materialised

134 For completeness, Ng argued that the Closing Date would have "materialised" if the signing of the Operational Agreement was imminent and had "come into perceptible existence". On that basis, Mah's right to terminate the SPA did not arise.

135 In our view, the Judge had rightly rejected Ng's submission that the Closing Date would have "materialised" as long as it had "come into perceptible existence". The Judge held that the word "materialise" did not indicate that there only needed to be a "practical likelihood" of such events occurring, and that on a contextual reading of Articles 4.1 and 4.7, Mah's right to terminate the SPA would arise if the signing of the Operational Agreement and the approval of the Feasibility Study Report were not obtained or did not take place by the Deadline (the Judgment at [18]). There is no basis to adopt Ng's reading of the term "materialise", whether on a plain reading of the term or reading it in context of

[59] ROA (Vol 3E) at pp 53–54 (NEs (15 Sep 2020) at p 50 line 15 to p 51 line 8).

the SPA. In fact, Article 4.1 specifically stated that the Closing Date shall take place on the day that the following were "obtained": the "*signing* of the Operational Agreement" and the "*obtaining* of the Approval of the Feasibility Study Report".

Conclusion on Mah's entitlement to terminate the SPA

136 As such, we find that Mah had not validly terminated the SPA and had not given valid notice to terminate. In addition, he had breached his duty to cooperate with Ng to obtain the signing of the Operational Agreement. By the operation of the prevention principle, Mah was thus precluded from relying on the non-fulfilment of that condition under Article 4.7 of the SPA to terminate the agreement. It thus follows that the SPA had not been validly terminated and Mah was liable to Ng for the Tranche 3 Payment.

Set-off issue

137 This brings us to the issue of whether Ng's counterclaim for the Tranche 3 Payment should be set off against Mah's claim for the Disbursed Sums. Ng can rely on his claim for the Tranche 3 Payment both as a defence of set-off against Mah's claim, as well as a counterclaim, pursuant to O 18 r 17 of the Rules of Court (2014 Rev Ed).

138 The law in relation to the defence of set-off has been set out in *Inzign Pte Ltd v Associated Spring Pte Ltd* [2018] SGHC 147 at [72]–[74]):

> 72 A legal set-off involves a debt or liquidated sum due from the plaintiff to the defendant that is capable of being liquidated or ascertained with precision at the time of pleading: [*Singapore Civil Procedure 2018* vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2018)] at para 18/17/4…
>
> 73 An equitable set-off may apply whether the amount is ascertained or not, so long as the cross-claim arises from the

> same transaction as the plaintiff's claim or is closely connected with it such that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into account the cross-claim: *Pacific Rim Investments Pte Ltd v Lam Seng Tiong & another* [1995] 2 SLR(R) 643 at [35]. …
>
> 74 Set-off by judgment arises under the Court's inherent jurisdiction to set-off cross-liabilities which have been established by judgments, leaving one single liability for the balance sum: *Longyuan-Arrk (Macao) Pte Ltd v Show and Tell Productions Pte Ltd and another suit* [2013] SGHC 160 at [66]. …

139 We agree with Ng that his counterclaim for RMB 8m satisfied the requirement of being a sum that is capable of being ascertained with precision at the time of pleading, and that he was therefore entitled to a legal set-off against Mah's claim. Set-off by judgment similarly applied. We therefore do not have to decide on whether Ng was entitled to an equitable set-off.

140 In the present case, the sum owing under Ng's counterclaim exceeded the Disbursed Sums for Mah's claim. Thus, Mah's claim would be dismissed, and Ng was entitled to judgment for the balance of his counterclaim after the set-off. We are mindful, however, that the extent to which Ng's RMB 8m counterclaim is set off by Mah's claim for the Disbursed Sums is not a matter of simply deducting the Disbursed Sums from RMB 8m. Two issues arise for consideration. The first is the date on which Mah was entitled to receive the Disbursed Sums, from which interest should be awarded. The second issue stems from the fact that the Disbursed Sums comprise sums in Singapore dollars ("SGD") as well as RMB (see [2] above). This gives rise to the question of *when* the SGD portion of the Disbursed Sums (*ie*, S$241,800) ought to be converted to RMB and set off against Ng's counterclaim for RMB 8m. This question matters because, as observed in Charles Proctor, *Mann on the Legal Aspects of Money* (Oxford University Press, 7th Ed, 2012) at para 8.20, "the date with reference to which the set-off is effected can, of course, have a significant

impact on the amount payable, because exchange rates between the relevant currencies may have fluctuated between the date on which the respective liabilities were incurred" (cited in *Haribo Asia Pacific Pte Ltd v Aquarius Corporation* [2021] SGHC 278 ("*Haribo*") at [241]).

141 We did not hear submissions from the parties on either of these issues, and, thus, we do not propose to make any finding on them. Instead, we highlight them for the parties to consider and attempt to reach a resolution in respect thereof. In this regard, the relevant principles are set out by Lee Seiu Kin J in *Haribo* at [240]–[255]. If the parties are unable to agree, we grant them liberty to write in to seek our clarification on these two issues *only*.

Conclusion

142 For the above reasons, we allow the appeal. Having regard to the parties' written costs submissions, we fix the costs of the appeal at $35,000 (all-in) to be paid from Mah to Ng. As for the costs of the trial, we order Mah to bear Ng's costs of $130,000 with reasonable disbursements. The usual consequential orders apply.

Quentin Loh
Judge of the Appellate Division

See Kee Oon
Judge of the High Court

Chua Lee Ming
Judge of the High Court

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