Chai Cher Watt (trading as Chuang Aik Engineering Works) *v* SDL Technologies Pte Ltd and another appeal
[2011] SGCA 54

Case Number	: Civil Appeals Nos 233 of 2010 and 10 of 2011
Decision Date	: 17 October 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Hee Theng Fong and Leong Kai Yuan (RHT Law LLP) for the appellant; Kenny Chooi Yue Wai, David Kong Tai Wai and Kelvin Fong Kai Tong (Yeo-Leong & Peh LLC) for the respondent.
Parties	: Chai Cher Watt (trading as Chuang Aik Engineering Works) — SDL Technologies Pte Ltd

Commercial Transactions – sale of goods – breach of contract – effect of breach – section 13 Sale of Goods Act

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 348.]

17 October 2011 Judgment reserved.

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

Introduction

1 This is an appeal against the decision of the trial judge ("the Judge") in *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd* [2010] SGHC 348 ("the Judgment").

2 The proceedings below involved claims by Chai Cher Watt (trading as Chuang Aik Engineering Works) ("the Appellant") against SDL Technologies Pte Ltd ("the Respondent") for breaches by the latter in respect of two separate contracts to supply the former a drilling and boring machine ("the Drilling Machine") and a lathe machine ("the Lathe Machine") (hereafter referred to as "the Drill Contract" and "the Lathe Machine Contract", respectively).

3 We would like to note at the outset, that, after considering all the relevant evidence, we agree with the Judge's reasoning and decision with regard to the Lathe Machine (see the Judgment at [20]–[21]). Indeed, counsel for the Appellant, Mr Hee Theng Fong ("Mr Hee"), himself candidly admitted – correctly, in our view – that the Appellant's arguments with regard to its claim for breaches of the Lathe Machine Contract were weak. Hence, this part of the appeal fails. As for the Appellant's claim for alleged breaches of the Drill Contract, this will be dealt with subsequently in greater detail.

Facts

4 The salient facts of this appeal are as follows. In August 2007, the Appellant approached the Respondent's sales representative indicating his interest in purchasing a boring and drilling machine with a boring depth of 4 metres. Parties then entered into the Drill Contract on 21 August 2007, on, *inter alia*, the following terms:

Payment terms: 30% Deposit upon confirmation.

50% Subsequent payment by Cheque or T/T to SDL Technologies after machine inspection at manufacturer plant and before shipping to Singapore.

20% Balance payment upon delivery and commissioning.

The Drill Contract also provided a list of specifications of the Drilling Machine, including the fact that it would be 11 metres in length. As required under the Drill Contract, the Appellant then paid 30% of the purchase price as a deposit on 22 August 2007.

5 In March 2008, the Respondent's technical and service manager, He Jian Qin ("Xiao He"), approached the Appellant with a drawing of the Drilling Machine ("the First Drawing"), which showed the Appellant where to dig a cavity in the floor for the purposes of installing an L-shaped oil tank for the Drilling Machine, and its dimensions thereof. This First Drawing was a schematic drawing, consisting of line markings, numbers, mandarin notations and a table at the bottom right hand corner.

6 After comparing the First Drawing with floor plans of the factory in which the Appellant intended to store the Drilling Machine ("the Factory"), the Appellant came to realise that a cavity could not be dug in the proposed location due to the presence of a beam in the ground. Hence, further discussions with Xiao He were conducted and at the Appellant's suggestion, parties finally decided to (i) substitute the L-shaped oil tank with a customised square one and (ii) move the oil tank from adjacent to the Drilling Machine to in front of it. The square oil tank was eventually installed on or about 14 July 2008.

7 On 19 August 2008, the Drilling Machine was delivered to the Appellant and uncrated in the presence of the Appellant's foreman, Chai Kok Yong, but it was not inspected. On 20 August 2008, the Appellant acknowledged receipt of the Drilling Machine by signing a delivery order. However, on 23 August 2008, when the Appellant inspected the Drilling Machine, he noted that some parts of it appeared old and of poor quality. This caused him to engage the services of SGS Testing & Control Services Pte Ltd ("SGS") to carry out an inspection of the Drilling Machine for the purpose of determining if it was new.

8 According to the Appellant's evidence, it was only after SGS's inspection on 1 September 2008 that he discovered the Drilling Machine was 13.5 metres in length as opposed to 11 metres as stated in the Drill Contract. [note: 1] Pursuant to its inspection, SGS also issued a report dated 9 September 2008, which concluded that the Drilling Machine was "in refurbished condition". Displeased, the Appellant made complaints to the Respondent.

9 In reply, the Respondent forwarded to the Appellant a letter dated 29 August 2008 written by the manufacturer of the Drilling Machine explaining as follows: [note: 2]

(a) That the Drilling Machine was purchased by the Respondent from the manufacturer on 31 August 2007; and

(b) That the length of the Drilling Machine was 13.5 metres in length and not 11 metres as the manufacturer had incorrectly informed the Respondent when the contract between them was created.

10 On 9 October 2008, the Appellant wrote to the Respondent via their solicitors, rejecting the Drilling Machine.

The claim

11 In his Statement of Claim (Amendment No 1), the Appellant alleged, *inter alia*, that it was either an express or implied term of the Drill Contract that the Drilling Machine was to be "newly manufactured" and therefore the Respondent was in breach for delivering a used and/or reconditioned and/or refurbished machine. Alternatively, the Appellant claimed that the Respondent was in breach for failing to deliver a Drilling Machine that conformed to the specifications set out in the Drill Contract and so sought the following reliefs:

(a) The return of deposits paid pursuant to the Drill Contract;

(b) Damages for losses suffered by reason of the Respondent's breach of the Drill Contract; and

(c) Interest on the aforesaid at the rate of 5.33% per annum, calculated from the date of the writ until the date of judgment.

The Drilling Machine

12 A great number of arguments centring on both law and fact were canvassed by parties before this court. In essence, however, the main (and closely related) issues in this appeal can be summarised as follows:

(a) Firstly, does s 13 of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("s 13") apply to the facts of the present appeal? If not, then what would the applicable legal principles under the common law be?

(b) Secondly, what result ought to follow from applying the relevant legal principles to the facts of the present appeal?

13 As is evident from the statement of these two issues, the focus of the first is on the law, whereas the second is on the facts. Looked at in this light, both issues comprise one larger – and holistic as well as integrated – inquiry. It is also significant to note that the second issue is, at least in the context of the present appeal, not an easy one and, as we shall see, in fact poses more difficulties than the first.

Does s 13 apply?

14 The provision itself reads as follows:

Sale by description

13. —(1) Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description.

(2) If the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.

(4) Paragraph 4 of the Schedule applies in relation to a contract made before 18th May 1973.

15 On this issue, it was argued by counsel for the Respondent, Mr Kenny Chooi ("Mr Chooi"), that the Appellant had made no mention of s 13 in the course of pleadings or in trial. Therefore, allowing the Appellant to raise this "new" point at such a late stage would prejudice the Respondent since it had neither led evidence on this point, nor made the relevant submissions in the proceedings below. [note: 3]

16 We disagree with Mr Chooi's submission. The fact that s 13 was the operative governing provision in the proceedings below was clear from the Judge's decision at [7] of the Judgment, where he stated:

> I first consider the issue of whether the plaintiff is entitled to reject the Drilling Machine. *It is trite law that in order to repudiate the Drill Contract, it would be necessary for the plaintiff to establish that the defendant had breached a condition of the contract or breached a warranty the consequence of which was to deprive the plaintiff of substantially the whole benefit of the Drill Contract*. [emphasis added]

The Judge then proceeded to consider the effect of s 13(1), which imposes an implied condition that the goods will correspond with their description in a contract of sale by description. Finally, at [8] of the Judgment, he observed as follows:

> ***The Drill Contract and the Lathe Contract insofar as they contain specifications are contracts of sale by description within the meaning of s 13 of the Sale of Goods Act*** : see *Chuan Hiap Seng (1979) Pte Ltd v Progress Manufacturing Pte Ltd* [1995] 1 SLR(R) 122. Where the contract contains a detailed description of the goods, minor discrepancies between the delivered goods and their description may entitle the purchaser to reject the goods: *Arcos Ltd v E A Ronaasen & Son* [1933] AC 470 at 479. In certain cases, in the absence of detailed commercial description, goods having considerable discrepancy from their described characteristics would nevertheless fall within s 13(1): *Benjamin's Sale of Goods* (Sweet & Maxwell, 8th Ed, 2010) at para 11-019. Thus, where a contract for a new Singer car was made, it was not satisfied by the delivery of a second hand model: *Andrew Bros Ltd v Singer & Co Ltd* [1934] 1 KB 17. Also, a contract for a one-year-old second-hand reaping machine which had been used to cut only 50 acres, was held not to have been performed by a very old machine which had been mended: *Varley v Whipp* [1900] 1 QB 513. [emphasis added in bold italics]

Indeed, a close perusal of the Record of Appeal for this particular case demonstrates that the focus in trial centred around various specifications of the Drilling Machine which were embodied—or, more accurately, described—in the Drilling Contract.

17 With respect, therefore, Mr Chooi's submission is not well founded. In our view, it was clear that whether there had indeed been a sale by description was a central issue below. Even assuming (taking the Respondent's case at its highest) that there was no literal reference to s 13 in the court below, it is clear that the parties had proceeded on the basis that the case concerned the sale of goods by description within the meaning of s 13. The Respondent could not persuade us that the Appellant's legal arguments based on s 13 before this court had been sprung on them.

The application of s 13 to the facts

18 We now turn, therefore, to apply s 13 to the relevant facts of the present proceedings. However, before proceeding to do so, it is apposite to state briefly what the legal effect is if there is

a breach within the meaning of s 13 in general and subsection (1) thereof in particular.

19 Under s 13(1) of the Sale of Goods Act ("the Act"), it is an "*implied condition*" that the goods will "correspond with the description". The fact that the wording of s 13(1) classifies every description of the contract categorically as a *condition* is of crucial significance. Indeed, it shows that the Act focuses on the classification of contractual terms as conditions or warranties (see also s 11(2) of the Act and the definition of "warranty" in s 61(1) of the Act) instead of the nature and consequences of a breach of such terms. This approach is in fact mirrored in the principles of the common law– specifically, in the *condition-warranty approach* elaborated on by this court in *RDC Concrete v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [97]–[98]. Put simply, under both the Act as well as at common law, once a contractual term is classified as a "condition", it must be strictly complied with. A breach of it, no matter how small, and regardless of the consequences, will entitle the innocent party to treat the contract concerned as discharged.

20 This is an important point because, with respect, the Judge's reference at [7] of the Judgment (reproduced above at [16]) to a breach depriving the innocent party of substantially the whole benefit of the contract confuses the condition-warranty approach under common law and the Act with a rather different test under the common law, namely, the *Hongkong Fir* approach that was based on the classic formulation by Diplock LJ in the oft-cited English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at [66] (For more details on this test, see *RDC Concrete*, especially at [99]–[100]). In our view, the *Hongkong Fir* approach has no relevance to the present appeal. Instead, under the condition-warranty approach embodied in s 13, any breach of any of specifications in the Drill Contract by the Respondent would, subject to the *de minimis* principle (discussed below at [22]), entitle the Appellant to elect to treat the contract as discharged, and hence succeed in this part of its appeal.

21 As a closing word on this point, we refer to the following extract from a leading textbook on the sale of goods, *Benjamin's Sale of Goods* (8th Ed, Sweet & Maxwell, 2010) at paras 11-018–11-019 that, in our view, summarises the position on s 13:

> **11-018 Failure of goods to "correspond with description": first type of case**. As previously stated, goods have been held not to correspond with their description in two types of case. The first type comprises cases where although the goods are substantially what is required, there is some small discrepancy from the contract particulars. Most of the decisions involve commercial disputes relating to unascertained or future goods, and the discrepancy may appear quite small in such cases. Thus in *Arcos Ltd v E A Ronaasen & Son* there was a contract for staves of half an inch thick. Only about 15 per cent conformed with this requirement, but the rest were nearly all less than nine-sixteenths of an inch thick. Despite a finding that the goods were commercially within, and merchantable under, the contract specification, and that they were reasonably fit for their purpose (which was the making of cement barrels), the buyers were held entitled to reject, Lord Atkin saying that "if the seller wants a margin he must, and in my experience does, stipulate for it". The packing of goods may also form part of their description. Thus in *Re Moore & Co and Landauer & Co* there was a contract for 3,000 tins of Australian canned fruit packed in cases of 30 tins. The seller supplied a substantial number in cases containing only 24 tins, though the total number of tins was correct. It was held that the buyer could reject the whole consignment. An exception is only made in cases of "microscopic deviation".Overseas sales where there are special stipulations as to mode and date of shipment, *etc*. can be treated under this head also, on the grounds that the extra requirements are part of the description. In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* Lord Wilberforce thought some of the older cases "excessively technical and due for fresh examination in [the House of Lords]", and at best was prepared to accept them as relating to "unascertained future goods

(e.g. commodities) as to which each detail of the description must be assumed to be vital". The famous decision in *Bowes v Shand*, that goods can be rejected because shipment was not completed within the specified period, has however been reaffirmed by the House of Lords in the leading case of *Bunge Corp v Tradax Export SA* and is still clearly valid. It is presumably to be brought within the exception to which Lord Wilberforce referred. It should be noted that remedies for defects in *quantity* are more specific and separately dealt with in s.30 of the Act. They do not normally, therefore, involve the application of s.13 unless only damages are claimed.

11-019 Second type of case. The second type comprises cases where in the absence of detailed commercial description the goods supplied are to be regarded as not being the goods ordered in a much more general sense. Here the cases have stressed, and hence required, a more considerable discrepancy; though it should be noted that their context is often that of holding an exemption clause inapplicable where the goods supplied are of a different kind. Thus a contract for common English sainfoin seed was not performed by delivery of giant sainfoin; a contract for a new Singer car was not satisfied by delivery of a second-hand model; a contract for a second-hand reaping machine new the previous year, and only used to cut 50 acres, was not performed by delivery of a very old one which had been mended. Consumer cases are more likely to figure in this group than in the first. Thus it has been held that a contract for a "Herald, convertible, white, 1961, twin carbs." was not performed by delivery of a vehicle consisting of parts of two cars, one part manufactured earlier than 1961, welded together. In a New Zealand case, it was held that a contract to sell a pure bred polled Angus bull could be treated as discharged for breach when the bull (which had been inspected and bought at an auction) proved to be "a bull in name only and useful as such for no purpose, though its carcase may be of value".

[emphasis in original]

22 It is also apposite at this juncture to refer to the *de minimis* rule that qualifies the strict application of s 13. The rule has been statutorily enshrined in s 15A of the Act, which reads as follows:

Modification of remedies for breach of condition in non-consumer cases

15A. —(1) Where in the case of a contract of sale —

(a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a condition implied by section 13, 14 or 15; but

(b) the breach is so slight that it would be unreasonable for the buyer to reject them,

then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

(3) It is for the seller to show that a breach fell within subsection (1)(*b*).

What this provision seeks to do is to limit the right to reject goods for breach of condition in non-consumer cases where the breach is slight and/or technical. As observed in *Benjamin's Sale of Goods* at para 12-025:

> Secondly the new section only applies to breaches of the *implied* terms as to description, quality, fitness for purpose and conformity with sample laid down in ss.13, 14 and 15 of the Act. It does not apply to *express* terms, *e.g*. as to time; and it is furthermore excluded by express or implied contrary intention ... Where the term is not a condition or a warranty but an intermediate or an innominate term the test for treating the contract as discharged will remain the "nature and consequences" test, which may bar doing so though the breach is more than "slight". Its main application is likely to be in connection with s.13, under which conformity with description is an implied condition, thus triggering off s.15A, and where cases lay down a strict duty regarding such conformity. It will at any rate initially create uncertainties in the law, though the provision that the burden of proof is on the seller to establish that the exception applies will help in resolving these. [emphasis in original]

23 We now turn to each of the arguments mounted by Mr Hee in support of the contention that the Respondent had breached a s 13 condition. Of these, only a few were apparently persuasive, and it is to these that our attention now turns.

Discrepancy in length of the Drilling Machine

24 It is an objective and, more importantly, undisputed fact that the Drill Contract referred to the length of the Drilling Machine as *11* metres, whereas the Drilling Machine that was in fact supplied was *13.5* metres in length (the stipulation as to length, we might add, is, in our view, an integral and important ingredient of the identity of the Drilling Machine under the Drill Contract). Hence, there was *prima facie* a breach by the Respondent of a condition under s 13, which, as explained above, would entitle the Appellant to succeed in the present appeal.

25 The Respondent sought, in this regard, to argue that this discrepancy in length made no difference in so far as the operation of the Drilling Machine was concerned and that the Appellant's workshop could easily accommodate a machine that was 13.5 metres in length. [note: 4] Indeed, from a technical perspective it would appear that the Drilling Machine had to be 13.5 metres in length in order for it to be able to carry out the Appellant's stipulated requirement of boring up to 4 metres in depth (see [4] above). [note: 5] However, such an argument is, in our view, legally irrelevant in the context of the present appeal. If the *Hongkong Fir* approach were applicable, then the argument might have had more traction since the Respondent could then argue that this particular breach had not deprived the Appellant of substantially the whole benefit of the contract it was intended the latter should have. However, this is not the legal situation that is before this court. The contractual term specifying the length of the Drilling Machine is, as already noted, a *condition* and any breach of it, regardless of the consequences, entitles the Appellant to elect to treat the Drill Contract as discharged (see also the position at common law pursuant to the legal principles set out in *RDC Concrete* at [97]).

26 It should also be noted that this was *not* a situation where the *de minimis* principle operated. In particular, the difference in the length of the Drilling Machine was some *2.5* metres (or approximately *8.2 feet*). This was by no means a discrepancy that was merely *de minimis* in nature.

27 We note that the Respondent had also sought to argue that the length of 11 metres was not a "description" within the meaning of s 13 as the only specification allegedly sought by the Appellant was that the Drilling Machine have a boring depth of 4 metres. [note: 6] We are unable to accept this argument as the Drill Contract itself clearly describes the Drilling Machine as having a length of 11 metres.

28 However, the Respondent had a second string to its legal bow. Mr Chooi argued that, in any event, the Appellant *knew* of the discrepancy in length and had, therefore, *waived* its right to rely upon the breach as entitling it to treat the Drill Contract as discharged. [note: 7] The relevant provision here is s 11(1) of the Act which states as follows:

> **11**. —(1) Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may *waive the condition*, or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated. [emphasis added]

29 In making this submission, Mr Chooi relied heavily on [17] of the Judgment where the Judge states as follows:

> The plaintiff next averred that in the Drill Contract specification, the Drilling Machine was described as 11m long, but the delivered Drilling Machine was 13.5m long. Sometime in March 2008, the defendant provided the plaintiff with a copy of the first foundation drawing for the defendant to prepare the floor base for the Drilling Machine. This first foundation drawing revealed that the length of the Drilling Machine was 13.5m rather than 11 metres. *From this, the defendant discovered that they had made an error in the Drill Contract where they had inserted a length of 11m. By way of correction, the defendant then told the plaintiff of this error*. *The defendant's evidence* is *that the plaintiff then proceeded to measure the floor space of the Factory and told the defendant that there was more than enough space to accommodate the Drilling Machine*. *The plaintiff denied that the defendant had pointed out this error to him based on the first foundation plan although he admits having received it*. He also denied having measured the floor space and telling the defendant that there was space to accommodate the 13.5m-long Drilling Machine. ***In any event*** *, it is undisputed that the Factory floor space can accommodate the Drill Machine of 13.5m*. *The plaintiff proceeded to propose amendments to the foundation plans to relocate the floor base*. He then proceeded to prepare the floor base. *Finally, upon delivery of the Drilling Machine, he accepted the delivery and installation of the Drilling Machine*. ***In these circumstances I find that he had by conduct signified his knowledge of the correct length of the Drilling Machine and his agreement to the correction*** . [emphasis added in italics and bold italics]

30 At this juncture, some preliminary observations with respect to the Judge's analysis ought to be made. Firstly, we note that the fact that the Factory floor space was sufficient to accommodate the Drilling Machine is not, in and of itself, relevant to the issue of waiver. This is because it does not impact any of the key elements of waiver that had to be established by the Respondent, *viz*, knowledge by the Appellant coupled with his acceptance of the Drilling Machine of increased length. The Judge himself appeared to acknowledge this, as seen by his conclusion on this issue (highlighted in bold italics in the paragraph cited above). Yet, it still appears that he relied on the Factory floor space being large enough to accommodate the Drilling Machine when arriving at his decision (*cf* his use of the phrase "[i]n any event", above). If that were the case, then his decision on this issue of waiver would, with respect, be undermined to a very significant extent.

31 Secondly, the mere acceptance of delivery of the Drilling Machine *per se* could not, in our view, constitute waiver on the part of the Appellant. There must still be knowledge by the Appellant of the breach of contract that coincides with his acceptance of delivery. Unfortunately, how and when this knowledge arises is not clear from the Judge's analysis. In fact, in our view, based on the evidence before us, it would appear that the Appellant had no such knowledge at all, as the Drilling Machine was received by *his employee* from the Respondent. All the Appellant did was to initial acknowledgement of receipt. This was followed shortly thereafter by his rejection after he discovered the breach (see [7]–[10] above).

32 Thirdly, although the Respondent emphasised in the court below that the Appellant must have had knowledge because the former had *communicated directly* to the latter the discrepancy in length through its representative, we believe that it is significant that the Judge chose to focus instead on the Respondent's *other* main plank of argument, *viz*, that the Appellant had waived his rights to rescind the Drill Contract based on the discrepancy in the length of the Drilling Machine, as a result of conduct which "signified his knowledge of the correct length of the Drilling Machine and his agreement to the correction" (see the Judgment at [17], quoted above at [29]). Also, we note that the Judge, in his analysis, merely *describes* both parties' arguments and makes no clear finding of fact as to whether there was such direct communication between parties. We would also add that the testimony that Mr Chooi referred us to (which was also mentioned in the trial below), [note: 8] in support of the Respondent's argument in relation to this point of direct communication, is, in itself, ambiguous at best.

33 At this particular juncture, it bears observing that the law on waiver is a complex concept, not least because the term has been used by the courts in different senses. A useful summary of the law on waiver may be found in the following observations by Lord Goff of Chieveley in the House of Lords decision in *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 397–399:

> It is a commonplace that the expression "waiver" is one which may, in law, bear different meanings. In particular, it may refer to a forbearance from exercising a right or to an abandonment of a right. Here we are concerned with waiver in the sense of abandonment of a right which arises by virtue of a party making an election …. In all cases he [the innocent party] has in the end to make his election not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right ... or sometimes by holding him to have elected to exercise it. ... But of course an election need not be made in this way. It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms ... Moreover it does not require consideration to support it, and so it is to be distinguished from an express or implied agreement, such as a variation of the relevant contract, which traditionally requires consideration to render it binding in English law… generally, ... it is a prerequisite of election that the party making the election must be aware of the facts which have given rise to the existence of his new right … I add in parenthesis that, for present purposes, it is not necessary for me to consider certain cases in which it has been held that, as a prerequisite of election, the party must be aware not only of the facts giving rise to his rights but also of the rights themselves, because it is not in dispute here that the owners were aware both of the relevant facts and of their relevant rights. ... Election is to be contrasted with equitable estoppel, a principle associated with the leading case of *Hughes v. Metropolitan Railway Co* [(1877) 2 App Cas 439] ... There is an important similarity between the two principles, election and equitable estoppel, in that each requires an unequivocal representation, perhaps because each may involve a loss, permanent or temporary, of the relevant party's rights. But there are important differences as well. In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. His election has generally to be an informed choice, made with knowledge of the facts giving rise to the right. His election once made is final; it is not dependent upon reliance on it by the other party. On the other hand, equitable estoppel requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation. No question

> arises of any particular knowledge on the part of the representor, and the estoppel may be suspensory only. Furthermore, the representation itself is different in character in the two cases. The party making his election is communicating his choice whether or not to exercise a right which has become available to him. The party to an equitable estoppel is representing that he will not in future enforce his legal rights. His representation is therefore in the nature of a promise which, though unsupported by consideration, can have legal consequences; hence it is sometimes referred to as promissory estoppel.

For more details, reference in this regard may also be made to the High Court of Australia decision of *Sargent v ASL Developments Limited* [1974] 131 CLR 634 especially at 641–642 (which was cited by this court in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [30]), as well as to the very helpful article by Professor Carter (see J W Carter, "Waiver (of Contractual Rights) Distributed" (1991) 4 JCL 59).

34 Applying the concept of waiver to the facts of the present appeal, it is clear that the focus of the parties was on the issue of *election* as opposed to *estoppel* (hence, the corresponding focus on the issue of the Appellant's knowledge). As to what knowledge is relevant, it would appear that the party waiving his right should at least have knowledge of the facts giving rise to those rights. (Note, however another view espoused in *Peyman v Lanjani* [1985] 2 WLR 154, that there must be knowledge of the *existence* of contractual rights themselves, at least in so far as they are express contractual rights, though this decision has been critiqued by The Hon Mr Justice K R Handley, in *Estoppel by Conduct and Election* (Thomson/Sweet & Maxwell, 2006), especially at para 14-015). Accordingly, the burden is on the Respondent to furnish clear and objective evidence to demonstrate that the Appellant did, in fact, have knowledge *that the Drilling Machine was 13.5 metres instead of 11 metres*.

35 In addition to his reliance on [17] of the Judgment (see above at [29]), the Respondent also proffered a number of specific arguments in an attempt to establish the existence of such knowledge (some of which were, not surprisingly, related to [17] of the Judgment). In this regard, his first argument was that that the First Drawing which the Appellant had viewed (see [6] above) clearly illustrated the actual length of the Drilling Machine. [note: 9] In our view, this cannot be the case. The drawing in itself was not at all clear (see [5] above). Indeed, the Appellant would have had to study the drawing in some detail and analyse the various distances with reference to a table in order to work out the actual length of the Drilling Machine. This is a far cry from the drawing itself stating clearly what the length of the Drilling Machine is.

36 For the Respondent's second argument, it reiterated its position in the court below that the Appellant had to have had the requisite knowledge since the Respondent's representative had communicated the discrepancy to it. [note: 10] As noted above (at [32]), we do not find this argument persuasive. More specifically, however, there was one further (and related) argument which needs to be considered, *viz*, the Respondent's claim that it had only realised there was an error in the stipulation of the length of the Drilling Machine in the Drill Contract when it received the First Drawing. Assuming that this was indeed the case, and bearing in mind the fact that the Respondent was the vendor of the Drilling Machine, we would have thought that the Respondent should have conveyed this error to the Appellant immediately *in writing*. An oral communication of such an important condition of the contract, would, in these circumstances be insufficient even if, as Mr Chooi asserted, the Respondent and the Appellant were in the practice of dealing informally with each other. As noted above at [24], the specification as to length of the Drilling Machine forms an important term of the Drill Contract. Any deviation from the description thereby warrants notification in writing to ensure that the Appellant's attention is directed to the error.

37 In his third argument on the issue of knowledge, Mr Chooi focused on the Judge's observations that the Appellant had "proceeded to propose amendments to the foundation plans to relocate the floor base" and that the Appellant had "then proceeded to prepare the floor base" (see the Judgment at [17], reproduced above at [29]). Such preparation included marking out on the floor the locations of the holes that would have to be dug in order to install the Drilling Machine. This, Mr Chooi argued, demonstrated that the Appellant was aware that the actual length of the Drilling Machine was 13.5 metres. [note: 11] However, in our view, this argument is, with respect, neither here nor there as the markings could have equally been made on the premise that the Drilling Machine was 11 metres in length.

38 At this point, we pause to note that it was not clear whether the Judge, at [17] of the Judgment, was making reference to preparation of the floor base for the purposes of *installation of the Drilling Machine into the Factory Floor*, or to preparation work specifically relating to the *oil tank* used to run the Drilling Machine, which also involved digging a small cavity in the floor for its installation. If, however, the Judge was referring to the latter and not the former, we would note that it was not disputed by parties that the Appellant had wanted to re-position the customised oil tank (which was two metres in length) from beside the Drilling Machine to in front of it (see above at [6]). Such a repositioning would have necessitated an increase in the overall length of space required to accommodate all the equipment (*viz*, the customised oil tank and the Drilling Machine) as an integrated whole.

39 On this point, Mr Chooi sought to argue that the Appellant would have to study the First Drawing to ensure there was sufficient space in the Factory to accommodate the change. In so doing, he must have discovered the actual length of the Drilling Machine. [note: 12] We find this argument to be tenuous. As stated above at [35], the diagram was not easy to understand. We also accept as plausible the Appellant's counterargument to the effect that he proposed the repositioning operating on the assumption that the machine was 11 metres and not 13.5 metres. In a contract for the sale of goods by description, the purchaser is entitled to rely on the specifications set out in the relevant contract.

40 In the final analysis, having carefully considered all the relevant evidence, it appears that, whilst the Respondent's version of events with regard to this particular issue is by no means untenable, the Appellant's (contrary) version of events is *at least equally probable*. In the circumstances, we find that the Respondent has not been able to discharge its burden of proof with respect to this particular aspect of its case and therefore hold that the Appellant had *not* waived its rights in respect of the Respondent's breach of the condition in the Drill Contract with regard to the length of the Drilling Machine.

Whether or not the Drilling Machine had been refurbished

41 In light of our reasoning above, we find it unnecessary to embark on an analysis of Mr Hee's second argument that pertains to whether or not the Drilling Machine was refurbished. However, we will pause to note in passing that if this question were to be answered in the positive, then the Respondent would be in breach of the Drill Contract for failure to deliver a new machine which was contemplated by the parties to the sale and purchase contract given the strict nature of a condition (here, pursuant to s 13).

Inspection by the Appellant?

42 Finally, we note, albeit only in passing, that there was at least one other issue that could have

been – but was not – raised by the Appellant. This was the requirement that the Drilling Machine be inspected by the Appellant at the manufacturer's plant, which inspection never took place (see [4] above). We would have thought that, in the nature of things, such a term would be a *condition* of the contract, the breach of which would have entitled the Appellant to rescind the contract. However, as the Appellant has not pursued this point, we say no more about it. In any event, even if the argument had been raised successfully, it would have made no difference to the result of the present appeal in light of our findings above.

Conclusion

43 In the circumstances, the appeal is allowed in part inasmuch as it relates to the Respondent's breach of the Drill Contract. The Appellant is thus entitled to refunds of the sums paid in respect of the Drilling Machine and damages for their losses suffered due to the breach. In this regard, the matter is remitted to the Judge to determine the precise sums to be awarded. However, the appeal fails in so far as the Appellant's claim for breaches of the Lathe Machine Contract is concerned.

44 Finally, each party is to bear its own costs both here as well as in the court below. There will be the usual consequential orders.

[note: 1] Record of Appeal ("RA") Vol 3 (Part 1), p 376 at para 26.

[note: 2] RA Vol 3 (Part 1), pp 411–414.

[note: 3] Respondent's Skeletal Arguments, p 1 at para 4, pp 2–4 at para 6.

[note: 4] Respondent's Case ("RC"), pp 163–165 at paras 493–496.

[note: 5] RC, p 165 at para 498.

[note: 6] RC, p 166 at para 500.

[note: 7] RC, pp 167–168 at paras 503–509.

[note: 8] RC, p 172 at paras 520, 522 and 524.

[note: 9] RC pp 176–178 at paras 534–542.

[note: 10] RC pp 171–176 at paras 517–533.

[note: 11] RC pp 169–171 at paras 510–516.

[note: 12] RC pp 180–185 at paras 545–555.

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