ATS Specialized Inc. (trading as ATA Wind Energy Services) *v* LAP Projects (Asia) Pte Ltd [2012] SGHC 173

Case Number : Suit No 559 of 2011

Decision Date : 17 August 2012

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Danny Chua Chok Wah and Walter Ferix Justine (Joseph Tan Jude Benny LLP) for the plaintiff; Tan Poh Ling Wendy and Fu Simin Charmaine (Stamford Law Corporation) for the defendant.

Parties : ATS Specialized Inc. (trading as ATA Wind Energy Services) — LAP Projects (Asia) Pte Ltd

Contract – Formation – Offer and Acceptance

Contract – Formation – Certainty

Contract – Formation – Consideration

17 August 2012

Belinda Ang Saw Ean J:

Introduction

1 The present suit arises from debts owing from the defendant to the plaintiff for a set of trucking carriages. The sole issue before me is whether there was a tripartite set-off agreement reducing the quantum of this debt between the following parties: the plaintiff, ATS Wind Energy Services ("ATS"), its associate company, ATS International Service, Inc. ("ATSI"), and the defendant, LAP Projects (Asia) Pte Ltd ("LAP"). I found that there was no agreement and I now deliver full grounds for my decision.

2 ATS is a company incorporated in the USA. It is a wholly-owned subsidiary of Anderson Trucking Services, which also wholly owns ATSI. ATS and ATSI are independent companies although it became quite clear over the course of the trial that ATS and ATSI had some common interests in Asia, and communicated with each other. ATS and ATSI's primary business is in freight and carriage of goods.

3 ATSI's interests in Singapore included its non-exclusive agency with LAP Distribution Pte Ltd, now known as LAP Global Services Pte Ltd ("LAP Global"). Although this non-exclusive agency ("the Agency Agreement") was for two years from 2007, ATSI considered this non-exclusive agency to have continued until 31 May 2011. However, LAP contended that the Agency Agreement ceased in 2009. In any event, for present purposes, business cooperation in Asia between ATSI, LAP and LAP Global ceased by 31 May 2011.

Events leading to this action

4 ATS's claims under this action arise from a separate agreement entered into on 8 March 2011

for the provision of trucking services to LAP to carry machine parts from Houston, Texas to Ralls Wind Farm, Ralls, Texas ("the March 2011 Contract"). Pursuant to the March 2011 Contract and between 21 April 2011 and 12 May 2011, ATS conducted twenty-two such carriages and duly invoiced LAP. The March 2011 Contract provided for payment within 15 days. [note: 1] It is undisputed that the balance sums owing under the March 2011 Contract are US$325,781.40 (not including interest).

5 On 27 May 2011, ATS's director, Gene Lemke ("Lemke") sent a chaser e-mail to LAP's Managing Director, Than Chung Kiat ("Than") demanding payment for the outstanding sums. LAP's Finance Director, Foo Ha Sing also know as Joseph Foo ("Foo") responded to this e-mail four days later, stating that LAP would need a further two weeks to pay. Lemke's firm reply on the same day was to say that this was not acceptable. On 2 June 2012, Foo sent an e-mail, titled "ATS statement for SanyLap, 05/25/11", to Lemke setting out a table which included payables by ATSI to LAP Global. [note: 2] He wrote in this e-mail: [note: 3]

> The current sum due from LAP to ATS is current and we intend to offset the amount. Kindly confirm the amount and we will offset accordingly when we make the payment to ATS.

Foo deposed that this constituted LAP's proposal to offset the accounts between ATS and LAP and ATSI and LAP's affiliate, LAP Global.

6 Lemke responded on 3 June 2012 explaining that ATS and ATSI were separate companies and that the issues and payments owed to different entities should not be mixed. [note: 4]

7 There was no further written response from LAP. Than claimed that he had a telephone conversation with ATSI's Vice-President, Joe Goering ("Goering"), and in this conversation had proposed the set-off arrangement in Foo's e-mail; that Goering had agreed to the proposal, and that Goering would speak to Lemke. This conversation was disputed by Goering. It was not disputed that Goering and Lemke spoke to each other and they recognised that an offset agreement would be a good way to settle accounts. Lemke e-mailed Foo and Than on 4 June 2011 with the following: [note: 5]

> After further discussion with Joe, let's just keep this simple: LAP cuts a check for the difference between what LAP owes ATS and ATS (*sic*) owes LAP. Ling will discuss with you in the upcoming meeting. In the meantime we will audit the numbers you presented.

The "upcoming meeting" that was referred to in Lemke's e-mail was the meeting of 6 June 2011 called by one Ling Lit Kwong ("Ling") to resolve outstanding ATSI's matters with LAP Global. [note: 6]

8 I interrupt the narration of the chronology of events to explain briefly that ATSI set up a Singapore subsidiary, ATSI Projects Services (Asia) Pte Ltd ("ATSI Asia"), on 28 September 2010 as part of its business strategy in Asia. This restructuring of its Asia business required the examination of the nature of the overall business relationship between ATSI and LAP Global and LAP. Since May 2011 onwards, there were ongoing discussions between Ling, who was ATSI Asia's Managing director, and LAP's representative, Than, on various matters including the viability of a one-year agency with ATSI. When that proposal was rejected by Than who preferred to work with ATSI on a "case-to-case bases [*sic*] in the future", [note: 7] the discussions turned to the process of unravelling the business relationship arising from the Agency Agreement which started in 2007 and, according to ATSI, ceased on 31 May 2011. [note: 8] This included the settlement of all outstanding accounts and the return of ATSI's brochures, promotional materials, corporate gifts, unused bills of lading and any other materials

belonging to ATSI. There was one other important matter. LAP Global had previously arranged shipments from China to USA of products manufactured for General Electric in China, but it continued to do so after 31 May 2011. Thus ATSI raised a further issue, which was contested by LAP's Foo, in relation to unapproved issuance of ATSI's house bills of lading for GE shipments after cessation of business relations ("the GE issue").

9 Returning to the chronology of events, Ling, on behalf of ATSI, set up a meeting with Than on 6 June 2011 ("the 6th June meeting") to discuss "all outstanding matters" from the Agency Agreement. Ling, Foo and one Sebastian Goh attended this meeting. The topics discussed at this meeting were recapped in Ling's e-mail dated 4 July 2011. [note: 9]

10 In June 2011, Karen Ong (going by Karen's e-mail address Karen@lapd.com.sg, she was presumably from LAP Distribution now known as LAP Global) and ATSI's import and export coordinator, Sarah Meidl ("Meidl"), began working on the total amounts payable to LAP ("AP") and receivable to both ATS and ATSI ("AR"). On 14 June 2011, Meidl sent an e-mail to Than (at e-mail address ckthan@lapd.com.sg), Foo (at email address joseph.foo@lap-group.com) and Karen (at e-mail address karen@lapd.com.sg) and copied to Goering, Ling, Lemke and one Romelle Anfinson. In this e-mail, titled "ATS/LAP – Account overview & Offset Proposal 6/14/11", she included a list of all open items with the necessary documentation and proposed an offset of US$179,078.96 which sum was payable by LAP to ATS. In the penultimate paragraph of this e-mail, she wrote: [note: 10]

> To reiterate we are requesting an offset in which the remaining balance then owed to us from LAP would be $179,078.96. We are holding firm that LAP either provides us a written commitment of the offset and remaining balance due via wire transfer by 6/17/2011 or confirms a face to face meeting with Mr Ling to resolve taking pla [*sic*] no later than 6/20/11.

11 This offer expired on 20 June 2011 without response from LAP. Just before expiration (midday 20 June 2011 Minnesota time), Meidl sent a "deal sweetener" with figures re-adjusted to reflect a lower offset figure of US$166,636.16. [note: 11] Goering then sent an informal e-mail dated 21 June 2011 to LAP's Than and Jim Than reminding them of the expiration of the offset agreement offer, and urging them to "engage and assist in settling the below outstanding matter". [note: 12] Than e-mailed back on the same date to affirm their commitment to resolving the outstanding issues between ATS and LAP. [note: 13] However, as Foo was on compassionate leave at the time, there was no further response on the figures from Foo until 8 July 2011. By this time, Goering had sent a further four e-mails relating not only to the outstanding payables and receivables, but also to unauthorised bills of lading relating to GE shipments (*ie*, the GE issue) and the Sany issue of an overbilling of US$56,730 in relation to ATS's March 2011 Contract. Foo's reply of 8 July 2011 showed that he wanted to contra what ATSI owed to LAP Global with what LAP was required to pay ATS. In his view, the Sany issue was an overbilling by ATS which LAP did not want to pay. As such, the Sany issue would affect the full offset sum.

12 On 12 July 2011, ATSI sent a formal letter to LAP. It is to be noted that Goering raised the matter of compensation for the unauthorised issuance of house bills of lading after 1 June 2011 in respect of GE shipments from China to USA in his letter dated 12 July 2011. [note: 14]

13 On 13 July 2011, Ling sent an e-mail to Than, Foo and Sebastian Goh entitled "LAP Final Notice", proposing a final meeting on 18 July 2011 to resolve all issues arising from the Agency Agreement and the possible related set-off for the March 2011 Contract. [note: 15] Foo counter-proposed a later date. [note: 16] Goering replied on 15 July 2011 with the proviso that he now believed

"that the commercial efforts of ATSi [*sic*] to settle these matters direct with LAP has failed", and asking for a written commitment to settle all issues arising from the Agency Agreement by the close of the proposed meeting. [note: 17] Foo replied on 16 July 2011 to affirm that LAP had "the intention to resolve the outstanding issues with ats [*sic*]" pending ATS's reply to points raised by LAP. [note: 18] Goering's replied on 17 July 2011 asking for clarification as to what these points were. When no reply was forthcoming, Goering wrote on 18 July 2011 in response to Foo's 8 July 2011 e-mail. He clarified that: [note: 19]

(a) There was an issue of discontinuance of the use of ATSI's house bills of lading;

(b) That there was no agreement on the Sany issue and its inclusion in the set-off agreement; and

(c) There were three payments due: one from LAP to ATS for the March 2011 Contract, one from LAP to ATSI which included payment on unauthorised bills of lading, and one from ATSI to LAP for payments outstanding under the Agency Agreement.

Goering also reiterated his opinion in his previous e-mail that "our attempts [at settlement] have failed" and that his clarifications had already been made and the repetition of the same were "redundant in nature".

14 Foo wrote back on 20 July 2011 with the following responses: [note: 20]

(a) Denying ATSI's allegations that LAP had issued unauthorised bills of lading and averring that LAP had acted in ATSI's interests at all times as an agent;

(b) That LAP had highlighted to ATS the Sany issue but the failure to resolve it was from ATS's end; and

(c) That all lists of AR due to ATSI from LAP had already been given to Ling, and reiterating his position in his 8July 2011 e-mail that LAP could only accept the full offset sum which reflected LAP's position on the Sany issue (*ie*, LAP's refusal to pay the overbilling).

15 From a financial standpoint, Foo said he would prefer all financial numbers are set off. The outstanding sum due to ATS was more "current" than the sum owed from [ATSI]. Given the "hostile" situation, LAP would only accept full offset sum.

16 A final meeting took place on 26 July 2011 at 10 a.m. at LAP's office in Maxwell House ("the 26th July 2011 meeting"). It was attended by Ling, Foo, Than, and Sebastian Goh. The issue of payments owing, the GE issue and the Sany issue were all discussed at length. Meeting minutes were produced via e-mail on the same date. [note: 21] The content of this e-mail is not disputed, nor the fact that the parties were unable to come to a final agreement on the figures for settlement or set-off. During this meeting, the parties also discussed whether the three issues discussed were discrete or related issues. In relation to the figures for set-off, Ling proposed a payment of US$92,437.62 "for closure". LAP maintained that there was a billing discrepancy in the Sany issue, and that the figures for set-off would not be resolved by the end of the meeting. Ling explained that ATSI had no right to interfere with LAP's and Sany's billings and invoices as ATSI was a stranger to the March 2011 Contract. Ling then proposed to "have the main numbers (AR/AP) settled and to review the 'LAP-SANY" [*sic*] dispute separately and… to again settle the difference amicably". The minutes recorded

that this proposal was rejected. Foo responded to this part of the e-mail, stating that he wished "to put on record that it is our intention to resolve everything in one go". After this meeting, talks between the parties broke down.

17 Thereafter, ATSI duly commenced arbitration proceedings against LAP Global pursuant to the Agency Agreement in the United States. Counsel for ATS, Mr Danny Chua ("Mr Chua"), informed the court that LAP Global did not participate in the arbitration and that ATSI obtained an award against LAP Global on 23 February 2012.

18 ATS filed this action on 3 October 2011, claiming the full sum of US$325,781.40. LAP proceeded to pay ATS the sum of US$95,348.44 (with interest) on 15 March 2012. This sum was returned to the LAP and when LAP gave instructions to its lawyers to re-tender the payment, ATS instructed its lawyers to again reject this sum. M/s Joseph Tan Jude Benny LLP for ATS wrote: [note: 22]

> Your client would appreciate that our client has consistently maintained that there was never any full and final settlement in regards to the various issues between ATSS and LAP Projects and ATSI and Lap distribution.
>
> Should your client re-tender payment of the USD95,348.44, we have been instructed that our client will have it transmitted back to your client, less banking chargers.

Plaintiff's case

19 The plaintiff claimed the full sum of US$325,781.40 for the March 2011 Contract. ATS claimed that there was never a set-off agreement, even though both ATS and ATSI had initially thought that a set-off would be the best way of squaring the accounts not only between the plaintiff and defendant but also between ATSI and LAP Global. Mr Chua on behalf of the plaintiff claimed that ATS had maintained consistently that the dealings between LAP and ATS and the dealings between ATSI and LAP Global were separate throughout June and July when the parties were in talks for set-off. The settlement of all three issues (the GE issue, the Sany issue, and the issue of payments owing) were necessary before there could be any agreement. In particular, it was the plaintiff's case that the figures for set-off were necessary to any agreement. Given that there were no figures agreed to, the plaintiff claimed that there could not have been an agreement.

Defendant's case

20 The defendant's case was that there was tripartite set-off agreement between ATS, ATSI and LAP. Counsel for the defendant, Ms Wendy Tan ("Ms Tan"), submitted that there was already an in principle agreement for the contra of the accounts receivables and accounts payables thus leaving the parties to finalise the figures to give effect to this underlying agreement to offset. [note: 23] Put another way, there was a meeting of the minds in the form of a common understanding that there would be a set-off in principle and that figures for these set-off could be audited at a later date. If the figures for the set-off could not be worked out, then the disputed figures would be adjudicated by the court. [note: 24] On the first day of trial, 16 April 2012, the defendant's dropped the Sany issue *ie*, that there was no overbilling in the sum of US$56,730. The defendant accordingly averred that the amount claimable by the plaintiff is US$92,437.62, the amount due to ATS after set-off.

21 The defendant's primary pleaded case was that this tripartite set-off agreement was concluded through a series of e-mails dated 2, 3 and 4 June 2011 between Lemke and Than. The pleadings were amended on the second day of the trial, 17 April 2012. The defendant pleaded that any of these

three e-mails was enough to constitute offer and acceptance, and in the alternative, Lemke's e-mail of 4 June 2011 stating that they should cut a cheque for the difference between the sums owed by ATSI to LAP and the sums owed by LAP to ATS was an offer accepted by LAP's act of starting to calculate the figures for set-off. LAP further claimed that ATS and ATSI acted as a single unit during the process leading to agreement, such that the acceptance of ATS was taken on behalf of both ATS and ATSI. This was clear from the way LAP's Foo and Than consistently referred to ATS and ATSI interchangeably as "ats" or "ATS group" in their e-mail correspondence.

Issues

22 The parties agreed that the only issue was whether there had been a set-off agreement between the three parties, namely, ATS, ATSI and LAP. I should mention that throughout the course of proceedings, no specific distinction was made between LAP and LAP Global. For present purposes, LAP represented LAP Global. Thus, the principal question is whether the plaintiff can claim the full amount as claimed in the Statement of Claim (US$325,781.40) or whether the entitlement is only US$92,437.62 (or some other figure).

Observations

23 At the outset, I note that there are three different situations in which a debt may be paid to a third party. The first is where a creditor requests his debtor to pay a third party. The second is where the creditor has made a legal assignment of his debt to the third party. The third situation is where a contract between the creditor and debtor states that the debt shall be paid to the third party. This case concerns the third situation. As such, the requirements of contract formation – offer and acceptance, certainty of terms, and consideration – must all be met by the parties alleged to be part of the agreement.

24 The defendant's pleaded that the tripartite set-off agreement was concluded through a series of e-mails dated 2, 3 and 4 June 2011. The correct approach to find a contract from the correspondence is based on the intentions of the parties objectively ascertained (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40] ("*Tribune Trust*")). Notwithstanding this trite principle, the witnesses were questioned on their subjective intentions forgetting that evidence which is no more than the assertion of one party's subjection intention, unexpressed to the other, is inadmissible.

25 If the words used in the document are clear and self-evident to reveal their meaning, is that the end of the matter, or can the court properly be asked to consider further evidence? The correct approach to construe the existence of a contract from correspondence is succinctly summarised by the English Court of Appeal in "*The Good Helmsman*" [1981] 1 Lloyd's Rep 405 ("*The Good Helmsman*").

26 Lord Justice Ackner sets out three principles which he described as "well-settled" (at 414):

> (1) The Court is usually not concerned with the parties' actual intention but only with their manifested intention. It does not peer into the minds of the parties but must be content with external phenomena. Accordingly, the Court looks at what the parties said or did and then considers objectively whether this has resulted in a concluded contract. A contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine they were finally settling the terms of the agreement by which they were to be bound. (Per Lord Selborne in *Hussey v Horne-Payne*, (1874) 4 AC 311 at p 323.)

(2) Words must be understood in their plain and ordinary sense, but where they are to be understood in a special sense extrinsic evidence is admissible to prove that special sense. Thus evidence may be called to explain technical terms of science or art, to explain contemporary meanings of the words of an ancient document and to translate a document in a foreign language.

...

(3) Although when a contract is alleged to be contained in letters the whole correspondence should be looked at, yet if once a definite offer has been made and accepted without qualification, and it appears that the letter of offer and acceptance contains all the terms agreed on between the parties at the date of the acceptance, the complete contract then arrived at cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at (see *Perry v Suffields Ltd*, [1916] 2 Ch D. 187).

27 In similar language Lord Justice Watkins V.C. and Lord Justice Walker concurred with the third principle. Lord Justice Watkins said (at 416):

If a contract is alleged to be contained in a document or in one of a series of documents or letters exchanged between the parties it is impermissible, as the law stands, to take account of what is contained in subsequent documents and letters as an aid to construing that document. It is equally impermissible to take account for that purpose of any other kind of subsequent statement or conduct of the parties. The authorities for these principles are firstly *Perry v Suffields* Ltd.,[1916] 2 Ch.D. 187, in which Lord Cozens-Hardy approved a statement of Mr Justice North in *Bellamy v Debenham* (1890) Ch.D. 481, in these terms;

> Though when a contract is alleged to be contained in letters the whole correspondence should be looked at, yet if once a definite offer has been made and accepted without qualification, and it appears that the letters of offer and acceptance contain all the terms agreed on between the parties at the date of the acceptance, the complete contract then arrived at cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot without the consent of both get rid of the contract already arrived at,

Secondly, *Wickman Machine Tools Sale Ltd v Schuler AG* [1973] 2 Lloyd's Rep 53; [1974] AC 235, where it was re-affirmed that subsequent conduct cannot be used as an aid to construction of a document. Further it is laid down that the parties cannot be heard to say with what intention they spoke, wrote or acted – see *Readon Smith Line v Hansen-Tangen*, [1976] 2 Lloyd's Rep 621; [1976] 1 W.L.R 989.

... Once the point is reached at which the binding acceptance of an offer, that is to say the agreement, is found, an impenetrable curtain comes down which totally obscures all subsequent events.

28 The alternative argument raised by Ms Tan was the existence of an implied agreement to contra accounts. She submitted that this implied agreement was to be inferred from the e-mails and conduct of the parties citing *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 ("*Rabobank v Motorola*") in support of her proposition. That case concerned an alleged tripartite set-off agreement but the present action is distinguishable on the facts. The legal principles enunciated in

Rabobank v Motorola do not assist the defendant's case. The Court of Appeal made several observations in the context of implying a contract: First, there is the common law rule that contracts are not to be lightly implied, and that the court would not imply a contract unless it is necessary to do so (at [38] of the Judgment). Second, to imply a contract, the court must be satisfied that the parties intended to create legal relationship. Hence, the facts and circumstances supporting the existence of an implied contract have to be examined like in the case of an express contract, and this means that the legal elements required for the formation of a contract, *viz*, offer and acceptance, consideration, intention to create legal relations, and certainty of terms, must be satisfied (see [43] and [46] of the Judgment). Third, the existence of offer and acceptance may be implied from conduct (see [47] and [50] of Judgment). Four, *Tribune Trust* is an example of a case where the court considered the question whether a contract may be inferred from correspondence and contemporaneous conduct of the parties in the absence of an express written agreement. However, and more importantly, this "inference" that an agreement has been entered into by conduct is not the same as the legal principles applicable to the question of whether a contract or agreement came into existence from the exchanges of correspondence (at [26]-[27] above).

29 Whilst the idea of a contra of accounts receivables and accounts payable was first broached by Foo, the history of the developments narrated above showed that it was often LAP's side that seemed to be dragging its feet and frustrating ATSI's initiatives to meet thereby leading to meetings being rescheduled to later dates.

30 Even if for the sake of argument that there was as alleged an existing set-off agreement on 4 June 2011, it was still necessary to complete this tripartite set-off agreement by offer and acceptance of a final balance figure by the three parties.

Offer and Acceptance

31 The pleaded case in the Defence was that three e-mails, sent on 2, 3 and 4 June 2011, constituted an offer and acceptance. These were three different possible offers:

(a) Foo's e-mail of 2 June 2011 offering to set off the account receivables and account payables ("AR/AP") amongst the various entities. Lemke's e-mail of 4 June 2011 was ATS's and ATSI's acceptance of LAP's offer;

(b) Than's phone call to Lemke on 3 June 2011 proposing a set-off agreement. Lemke's e-mail of 4 June 2011 was ATS's and ATSI's acceptance of LAP's offer; and

(c) Lemke's e-mail of 4 June 2011 offering to "keep things simple" by cutting a cheque for the difference between the AR/AP. This was accepted by LAP's conduct, *viz*, their working with ATS's Meidl to finalise the figures and implement the set off.

32 I found that none of these three possibilities were an offer and acceptance for the reasons set out below.

The 2nd June 2011 e-mail from LAP

33 Foo wrote in the 2 June 2011: "we intend to offset the amount". [note: 25] This e-mail was to answer Lemke's chaser for payment. In short, Foo told Lemke that LAP was not going to pay ATS and that he wanted to set-off against ATSI's indebtedness. I found that this 2 June 2011 e-mail was clearly an expression of intention to offset pending confirmation of the quantum. I disagreed with Ms Tan's reading of this 2 June 2011 e-mail: she read it as an offer to contra accounts involving three

companies. [note: 26]

34 In any event, there was a clear rejection of this 2 June 2011 e-mail from ATS on 3 June 2011. Lemke's e-mail response was brief. He wrote: [note: 27]

> ATSI and ATS are two different companies and hence the payables/receivables should be treated as separate issues.

35 The words used were clearly stating that Lemke was not agreeable to the proposal for set-off, and he rejected the proposal. Lemke confirmed this during cross-examination: [note: 28]

> Q: No, no, no. On 3rd of June itself, it is within a day that you changed your mind. Okay, 2nd of June, there was an e-mail from Joseph to say they would like to do this offset. Your response initially was no. Very soon thereafter, you sent an e-mail and you said yes.
>
> A: That again, *my initial rejection* was because that is not a normal way to conduct business. It was only after further consultation with Joe that we agreed it could be a potential solution.
>
> [emphasis added]

36 Lemke's evidence that his main concern was the "blending or crossing… [of] lines between the business units" [note: 29] was entirely consistent with the way ATS and ATSI were structured; although they were both subsidiaries of the same parent company, they kept their accounts separate. The only reason why their interests might have converged is that Lemke left it to Goering to look into the idea of an offset since the latter through Ling was negotiating with Than and Foo following the cessation of the business relationship between ATSI and LAP Global and LAP on 31 May 2011. I saw this as merely a practical step to move things along, as both Lemke (ATS) and Goering (ATSI) were based in the United States and would not have been able to conduct face-to-face meetings with LAP's representatives. Goering was copied in Lemke's e-mail of 4 June 2011 because what was under discussion was a tripartite agreement requiring all three parties be informed of the progress of negotiations, and *not* because Lemke was speaking on behalf of Goering and ATSI.

37 An offer is terminated by rejection. It is trite law that an offer that has been rejected cannot lead to a binding agreement through a purported subsequent acceptance by the party to whom the offer was given. Given that the offer had already been rejected on 3 June 2011, the e-mail of 4 June 2011 could not have constituted an acceptance of the offer.

The 3rd June phone call

38 Whether there was a phone call from Than to Goering was disputed. Than gave evidence that he had phoned Goering to propose a set off of the AR/AP between "ATS Group" (a description coined by the defendant that referred to ATS and ATSI [note: 30]) and LAP. As Ms Tan clarified, Than "basically reiterated a proposal to have a contra of the accounts between the three companies." [note: 31]

39 Goering gave evidence that it was Lemke who called him, and not Than. He testified on cross-examination: [note: 32]

> Q: … Now when did you first find out that there was a proposal by Lap Projects to have a contra

arrangement of the accounts receivables and accounts payables between ATS, ATSI and LAP projects?

A: I was first approached by Gene Lemke on or about the 3rd of June. I believe it was the afternoon of the 3rd of June to ask if I would agree to assist due to the accounts receivables billing which (inaudible) of LAP to ATS Specialised.

40 Lemke corroborated this evidence on cross-examination. He was certain that a conversation took place between Goering and him as directors of ATSI and ATS respectively to discuss matters involving LAP. Lemke answered in the negative when asked whether Goering was the one who had persuaded him to accept a set-off agreement, testifying instead that this had come up in the natural course of their conversation as a possible solution to ATS's problem with accounts receivable from LAP. [note: 33] I found that this was inconsistent with the notion that Than had made an offer to Goering, who then communicated his acceptance through Lemke.

41 Instead, Lemke's evidence was entirely consistent with Goering's testimony on cross-examination that this conversation was primarily an internal one intended to work out a way of getting LAP to pay ATS's outstanding invoices. When asked what Lemke had told him, Goering answered: [note: 34]

It wasn't very specific. Rather it was a very direct---we're having a problem. I am struggling with being paid by LAP. Is there anything you can do assist [*sic*] where you consider in putting a certain---an offset because you are using--- used an excuse for not giving this result.

42 I found Goering to be a credible witness. Like Lemke, he answered frankly, even when not favourable to his case. For example, when asked if Lemke had told him during this telephone conversation that he was not agreeable to a set-off, Goering's reply was a straightforward "no". [note: 35] I also found Lemke a credible witness. He gave straight and forthright answers during cross-examination, even when they were not entirely favourable to him. For example, when asked if he had told LAP that the offer for a set-off was dependent upon the provision of additional information, he agreed without demur that he had not expressly told LAP this. [note: 36]

43 By contrast, Than's testimony on the stand was garbled and incredibly uncertain. Moreover, his answer contradicted LAP's pleaded case that a contract came into existence on 4 June 2011. It was: [note: 37]

Q: When did the set-off agreement come into existence?

A: I call personally to Joe on the 3rd---on the 3rd of---e-mail when---3rd of June when I received, er, from June.

44 I believed Lemke's and Goering's version of events that the conversation had taken place between Lemke and Goering rather than between Than and Goering. What is clear is that 3 June 2011 would have been the first time that Goering would have heard of LAP's proposal as he was not copied in the e-mails of 2 and 3 June 2011. There was some indication in the e-mail correspondence that a phone call did take place. However, this conversation was not between Goering and Than but between Than and Ling. On 3 June 2011, Than e-mailed Ling and prefaced his e-mail with the words "as per our telcon". [note: 38] However, in this e-mail, Than made explicit reference to Foo's communication with Lemke but made no reference to his own communication with Goering. If Than

had indeed called Goering, this would have been a material fact which Than would have included in this e-mail. Instead, I found that this e-mail clearly pointed to two things:

(a) Foo was negotiating with Lemke on the set-off issue in relation to what was owed to ATS (not ATSI) for the March 2011 contract and Goering had yet to be included in these negotiations; and

(b) The GE issue was still outstanding, a fact which Than acknowledged and which Than promised to have Foo work on in addition to the set-off for the outstanding AR/AP.

45 Even taking LAP's case at its highest, *viz*, that Than called Goering, I found that this was not necessarily an offer. Than deposed: [note: 39]

> After I received Gene Lemke's said e-mail of 3 June 2011, I called Joe Goering and told him it *made sense* for there to be a contra of the AR/AP between the ATS Group and LAP Projects. Joe Goering agreed with me and said he would speak to Gene Lemke about it.
>
> [emphasis added]

At best, Than was simply trying to persuade Goering that it would be a good idea to do the set-off arrangement without a firm offer at hand and in anticipation that Goering would discuss further with Lemke.

46 Even if this telephone call constituted an offer, I found that Lemke's e-mail of 4 June 2011 did not constitute an acceptance on behalf of ATSI. ATS and ATSI were two different entities with two very different interests. ATS was concerned about getting paid on the March 2011 Contract. By contrast, ATSI's issues with LAP Global (represented by LAP) were a lot more complex. An e-mail was sent out on 3 June 2011 from Ling on behalf of ATSI which referred to "outstanding matters" [emphasis added] between ATSI and LAP. [note: 40] Ling specifically called attention to the GE issue in the 3 June 2011 e-mail, asking for the forwarding of documents by LAP to ATSI so that ATSI could receive payment due from GE. When Ling concluded this e-mail asking for a meeting on 6June 2011 to be held to resolve these issues, he was clearly also referring to the GE issue and not merely the issue of set-off. This was acknowledged by Than who asked Ling in an e-mail dated 3 June 2011 to forward him the details on the outstanding GE issue. [note: 41] On the same day, Ling clarified *via* e-mail [note: 42] that the 6 June meeting would have the following main points of discussion:

(a) The GE issue and billing of GE for outstanding payments;

(b) Clause 11.0 of the Agency Agreement referring to the termination of the agreement; and

(c) Outstanding AR/AP of LAP and ATSI.

47 It was clear from the foregoing that ATSI was concerned *not only* with the set-off and settlement of payments owing, but also with other issues without which the Agency Agreement and the business relationship could not be properly unravelled. Lemke's suggestion that a cheque be cut for the difference could not possibly have settled these further issues that concerned ATSI. ATSI's contemporaneous e-mail correspondence with LAP detailing these issues was also not consistent with the behaviour of a party with whom substantial agreement had been reached. There was no doubt that Lemke was concerned primarily with his company's receivables, and he had made clear in his 3June 2011 e-mail that he regarded his company, ATS, as separate from ATSI. Although he was

aware that there were outstanding issues between ATSI and LAP, he would not be privy to the details and said as much on cross-examination. [note: 43] As such, while he might have stated that LAP was to cut a cheque for the difference, he could not have agreed on behalf of ATSI that these were the only items for resolution or what items should be included to calculate what was owed to LAP Global by ATSI and thus the balance owing.

48 Lemke's and Goering's conversation about a set-off agreement could not have constituted an authorisation by ATSI that ATS could represent its interests and accept LAP's offer on their behalf. Goering testified that it was the opposite and that ATSI had agreed to help ATS with this issue, but only as an add-on to the existing outstanding issues which would first need to be resolved. When asked who had come up with the set-off proposal, Goering testified: [note: 44]

> I told him I would be glad to help within our termination agreement if that's what was holding up his accounts receivable. So it was just *one additional item* for me to con---to take in and I was very open and we remain [*sic*] open through the period to say that this should be a very simple matter to resolve with all the other outstanding items. So I did let him know that I would have Mr Ling Kwong continue on and ---and *include this into his discussions with Lap for the final settlement of all outstanding matters*.
>
> [emphasis added]

49 This was also clear from the caveat at the end of Lemke's e-mail, when he told Than that Ling "will discuss with you in the upcoming meeting" and that he would audit numbers "in the meantime". [note: 45] The plain and natural interpretation of this e-mail was that Lemke himself regarded any potential agreement for set-off as subject to ATSI's agreement and that pending this agreement, he would work out the details of a deal which could later be inked by all three parties. The giving of authorisation to ATS to accept on behalf of ATSI would not have been consistent with the e-mail correspondence between ATSI and LAP from 3 to 6 June 2011 and the 6th June 2011 meeting, which continued to ask for resolution on other issues at the end of the Agency Agreement and business relations. I did not believe Foo's testimony that there had been no discussion of the GE issue at the 6th June 2011 meeting. This was the main issue highlighted by Ling in his 3 June 2011 e-mail, and I found it implausible that he would not have brought this up in the 6th June 2011 meeting. I believed Ling's account that the Sany and GE issue had been raised and discussed at the 6th June 2011 meeting and that both parties understood that all three issues would have to be resolved before any agreement for set-off would be made (also see [54] below).

50 LAP alleged a tripartite agreement; even if Lemke's e-mail of 4 June 2011 constituted an acceptance of the telephone offer from Than, this acceptance would have been made on behalf of ATS and not ATSI. It was clear to me that ATSI had not accepted the offer but continued to regard the issue of set-off as one of a list of related issues arising from the *unresolved* unravelling of the business relationship arising from the Agency Agreement. I found that there was simply no acceptance on the part of ATSI.

51 I also found that it was clear from the e-mail of 4 June 2011 and the surrounding circumstances, including the e-mail correspondence between ATSI and LAP that both ATSI and ATS envisaged that there were outstanding matters which would be further discussed by the three parties. That being the case, what the parties had may be considered as merely an agreement to negotiate and not a binding agreement for a set-off arrangement. Leggatt J's comment in *Hofflinghouse & Co Ltd v C-Trade S.A. (the "Intra Transporter')* [1985] 2 QB (Com Ct) 158 on the

case of *Hussey v Horne-Payne* (1879) 4 App.Cas. 311 is relevant here (at 159):

> The essential point about *Hussey v Horne-Payne* was that what looked like a concluded agreement in the exchange of letters, was seen not to be so when it was recognised that there were other matters which had been discussed between the parties but which remained unresolved.

The 4th June 2011 e-mail from ATS

52 Lemke's email of 4 June 2011 to Than and Foo proposed to "cut a check [*sic*] for the difference between what LAP owes ATS and ATS owes LAP". The full text is found at [7] above. When asked why he had made such a statement, Lemke replied on cross-examination that he was "presenting an idea for a potential solution". [note: 46] LAP's case was that this e-mail was a clean offer which was accepted by conduct, as evidenced by the parties' efforts to implement the set-off. ATS disagreed. Even if this e-mail constituted an offer, it was contingent upon audit of figures and the outcome of ATSI's 6th June 2011 meeting with LAP.

53 I found that the 4th June 2011 e-mail could not be read as a clean offer. The meaning of the 4th June 2011 e-mail was self evident: that it was an expression of interest to work towards the objective of a set-off. The words "let's just keep this simple: LAP cuts a check" could not be be construed in isolation from the rest of the e-mail, which raised two further outstanding issues, *viz*, that Ling would discuss the issues in the 6th June 2011 meeting *and* that the numbers presented would be audited. The e-mail looked towards the 6th June 2011 meeting as the venue and time to discuss the contras.

54 It is significant that the 4th June e-mail was the first stage in the process, and it was not an offer that was capable of acceptance as the figures to enable the cheque to be cut have to be agreed. Again, as a matter of construction, in order to constitute a binding agreement to set-off, the 4th June e-mail had to be binding on ATSI as well, and it seems to me that Lemke was saying that the further discussions and unresolved audit and other matters was going to be necessary. Lemke plainly envisaged further discussions and that was entirely sensible given the need for ATSI's agreement. Lemke's version of events cohered with an objective reading of the e-mail. On cross-examination, he testified:

> Q: This---just looking at this e-mail alone.
>
> A: No, I think it---what I see is that it was the presentation of an offer to offset that was contingent upon proper closure. Again, I said "Ling would discuss with you in an upcoming meeting". That meeting was meant, among other things, to bring closure to our offer to offset.
>
> Q: What was Ling supposed to do to bring closure to that offer?
>
> A: Audit numbers, deal with the other issues that ATSI had pending with LAP. [note: 47]

55 Moreover, for the reasons given at [47]-[49] above, I found that ATS could not have made an offer on behalf of ATSI, as it did not have knowledge of the other issues that ATSI had pending with LAP Global, a matter that Lemke confirmed multiple times on the stand. [note: 48] Lemke's testimony

made sense as there was no reason for ATS to keep themselves apprised of ATSI's outstanding issues with LAP Global, as they had maintained consistently in their e-mails as well as during trial that ATS and ATSI were separate entities. Ling was representing primarily ATSI's interests but was specifically tasked to handle the question of figures on ATS's behalf. [note: 49]

56 For all these reasons, I concluded that the 4th June e-mail was not an offer. It represented an important start because it clarified that the numbers for the proposed set-off would be audited in answer to LAP's request to contra accounts.

57 Even if the 4th June 2011 e-mail was an offer, it was never accepted either expressly or by conduct. Ms Tan submitted that the proposal of a contra of accounts was accepted by Foo on 26 July 2011 by his reiteration of the contra principle. I found these submissions untenable for several reasons. It is clear that there was no express acceptance. ATSI's offer came much later in an e-mail sent by Meidl on 14 June 2011. [note: 50] This e-mail was instructive as it confirmed that the alleged clean offer given by Lemke on 4 June 2011 remained an offer which had not been accepted by LAP as at 14 June 2011. LAP's submission that the auditing of the figures between ATSI's Meidl and LAP's Karen Ong was acceptance by conduct was untenable. This e-mail was inconsistent with an agreement having already been made. Notably,

(a) The subject title reads "ATS/LAP – Account Overview & Offset *Proposal* 6/14/11" [emphasis added]. This was clear indication that the 14 June 2011 e-mail was intended to be an offer and was not written in contemplation of a concluded agreement;

(b) The opening sentence to this e-mail reads as follows:

> …I have been working with Karen Ong over the past two weeks to *come to an agreement* on the total amounts both payable to LAP and receivable to ATS International & ATS Specialized [*sic*].
>
> I believe at this point *it is in everyone's best interest* to proceed with an offset.
>
> [emphasis added]

(a) I found that the use of the words "come to an agreement" envisaged that a concluded agreement did not exist. This was not, as LAP claimed, simply building on an in principle agreement to offset. (Ms Tan called it an underlying agreement to contra rather than an in principle agreement to offset. Both expressions, however, mean the same thing.) If there were indeed an in principle agreement, this would make nonsense of Meidl's next sentence, which suggested that it would be a good idea to offset.

(c) After having provided a recap of all open items and credit notes, including those without documentation, Meidl clarified ATSI's position and stated:

> To reiterate we are *requesting* an offset in which the remaining balance then owed to us from LAP would be $179,078.96. We are holding firm that LAP *either provides us a written commitment* of the offset and remaining balance due via wire transfer by 6/17/11 *or confirms a face to face meeting* with Mr. Ling to resolve taking pla [*sic*] no later than 6/20/11.
>
> I will stand by for feedback and *ultimately your acceptance of offset* as described above *as*

well as confirmation of wire transfer for remaining balance due by 6/17/11.

[emphasis added]

(b) I found that this was clearly intended and structured to be a formal offer to set-off *based on* the figures proposed. If an earlier offer had already been accepted, it would not make sense for ATSI to offer or request an offset a second time. There was no separation of the question of quantum from the in principle decision to set off as LAP claimed. The acceptance requested of LAP was not only for confirmation of quantum, but *also* for the acceptance of the principle of set-off. Moreover, the e-mail made clear that an agreement could only take place *via* written commitment or a face to face meeting before the expiration of the offer on 20 June 2011.

58 Contrary to Ms Tan's submissions, I found that the 14 June 2011 e-mail was clearly an offer and not evidence of an acceptance by LAP of an earlier offer on 4 June 2011.

59 Moreover, LAP's conduct was also inconsistent with acceptance or with the alleged understanding that there was already an agreement. After receiving this offer, LAP did nothing to either accept the offer or clarify their position that there was already an in principle agreement for a set off. On 21 June 2011, Goering had to send a chaser e-mail to LAP in an attempt to have them settle these issues, writing that he hoped they would do the "right thing and cooperate with a sense of urgency to settle the below outstanding matter". [note: 51] LAP responded on the same day *via* e-mail with a non-committal response: [note: 52]

We understand the importances [*sic*] of resolving these outstanding [*sic*] between ATS/LAP, hence Joseph Foo, our Finance Director will be assisting us to clear the outstanding with Dick [Ling], unfortunately he is on urgent leave this week and will not return until next week due to his brother passed [*sic*] away.

This was clearly not an intimation of acceptance as Than was only informing Goering that Foo would clear what was outstanding with Ling. There was nothing in this e-mail to indicate that LAP believed there was already an in principle agreement to set off. An objective interpretation of the e-mail indicated that the issues under agreement were still being negotiated and needed to be resolved upon Foo's return.

60 At no point during the trial did LAP explain their failure to respond to ATSI's overtures by clarifying that there was an in principle set off. Their failure to respond could not have been due to the absence of Foo as it was also Than's position that the agreement had already been "set in place", and figures would not have been required for such clarification. [note: 53] I found it curious, to say the least, that LAP would not have responded to clarify their position if they indeed were of the opinion that there was a concluded agreement. I found that the chain of e-mails beginning to ATSI's renewed offer on 14 June 2011, as well as the LAP's conduct (or lack thereof) in relation to these e-mails were clear indications that there was no real meeting of the minds for a set-off agreement. Notably, just prior to the 26th July 2011 meeting, Foo had written: [note: 54]

Joe, we are *unable to even come to a consensus* on the items on our e-mail correspondences, how can we commit that [*sic*] to resolve all issues, in less than 2 hours on the meeting called by ATS?

[emphasis added]

In my view, it was clear that both parties knew that there was no consensus on essential outstanding items, much less a binding agreement between them.

61 Both Than and Foo were not very reliable witnesses, particularly in relation to their testimonies on whether they had accepted an offer from ATSI and begun to work on the basis of an in principle agreement. When cross-examined, Than was unable to give a straight answer when asked about what the in principle agreement to set-off was. [note: 55]

> Q: Because there is not set-off agreement?
>
> A: It is---is in---in the first place if on the 26th and they take legal proceeding on the 28th, and if they want to take legal proceeding against LAP Project, it should be on the contra amount – the final amount that we are yet to settle to final [*sic*] resolve---you cannot take back---bring back the whole figure and forget about the amount that we---that---that you owe us.
>
> Q: Therefore, Mr Than, I put it to you that there is in effect no set-off agreement because no figure has yet been finalised.
>
> A: It's only the final---fi---as I sto---as I told you earlier on, it's only the final agreement --- the final amount to be agreed upon.

62 Foo's performance on the stand was even more telling of the fact that there was no agreement. When asked why he had instructed Mr Sebastian Goh to demand full payment from ATS if there had indeed been an in principle set-off agreement, he rather disingenuously replied: [note: 56]

> Well, as I have been repeating all along is that there have been off-set agreements [*sic*] in principle between the parties and since, at that point of time, I was trying to pull them back that look, you sent a legal demand letter for the amount due from LAP Projects to ATS Wind Energy but *how about the amount that due from ATSI to LAP Project? It was not mentioned*.
>
> [emphasis added]

63 When it was pointed out that this contradicted his stated position that an in principle set-off agreement would already have dealt with this eventuality, Foo again rather disingenuously replied that it was the ATS Group who had refused to honour the set-off agreement. I found that Foo's testimony on this score simply did not make sense. ATSI had consistently attempted to settle a figure for set-off. They had sent a full list of items on 14 June 2011 through Meidl, and when a reply was not forthcoming, followed this up on 20 June 2011 with an e-mail going back over the accounts and proposing a different number of US$166,636.16 which was more favourable to LAP and which Meidl hoped would "inspire your cooperation". [note: 57] When this was again met with no response from Foo or Than, Goering e-mailed Than on 21 June 2011 asking if he could "count on your support as the owners to engage and assist in settling the below outstanding matter". After Than's reply to explain that Foo was not available to work on the accounts, Goering sent two further e-mails, on 22 June and 27 June 2011, asking for urgent settlement of accounts and other outstanding issues (including the Sany and GE issues). Than's eventual response of 27 June 2011 did not address the issue of figures for settlement at all, but was a short response to say that LAP was no longer issuing unauthorised house bills of lading. Goering then sent further e-mails itemising a list of issues for settlement on 29 June and 6 July 2011. The frustration of ATSI at having to chase LAP for follow-up action on the clearance of the outstanding issues (including the AR/AP) was clearly evident in the following portion of Goering's e-mail on 29 June 2011: [note: 58]

> You keep taking the time to respond to my e-mails, but with no content or action. If we do not have closure by our closing Thursday, I am left with only one remaining option which will not be pleasant for ATS or LAP. I have been avoiding the involvement of arbitration and legal [*sic*] feeling the cooperation over the years would bring reciprocal cooperation. ATS has bent over backwards with all happening to keep everything professional, and maintaining full and complete cooperation. LAP has gone silent, responding to action items with no result or content.

In light of what were clearly persistent efforts to come to an agreement on the figures for set-off, I could not believe Foo's testimony that ATSI or ATS had somehow rescinded their earlier agreement and forced LAP's hand, causing them to claim the full sum from ATSI. I found that LAP's conduct, particularly in claiming the full sum from ATSI on 19 September 2011, was inconsistent with acceptance of ATS's offer of a set-off.

64 By an e-mail sent on 15 July 2011, LAP was still speaking of an "intention to resolve the outstanding issues". [note: 59] There was no mention of a set- off agreement, and no response to the material issues raised in Goering's e-mails of 6 July and 15 July 2011. When asked to explain what was happening between the parties with this exchange of e-mails, Foo testified that he was "trying to get both parties to agree on the final numbers in order to close the case between the parties". [note: 60] I found it curious that Foo made no mention of an agreement for an in principle set off, which could have been used to force a conclusion on the final numbers; Foo was clearly aware that an agreement on quantum had to be made as part of an acceptance of ATS's offer.

Certainty

65 Even if I had found that there was an acceptance, I found that there was not enough certainty of terms to render any agreement enforceable. Generally, terms of a contract could be agreed later, if they were not vital matters material to both parties; *May & Butcher v R* [1934] 2 KB 17. As G H Treitel, *The Law of Contract* (Sweet & Maxwell, 2007, 12th edition) states (at 2-098):

> In these cases, the most natural inference to be drawn from the fact that the parties left such an important matter as the price to be settled by further agreement was that they did not intend to be bound until they had agreed on the price. Even where the points left outstanding are of relatively minor importance, there will be no contract if it appears from the words used or other circumstances that the parties did not intend to be bound until agreement on these points had been reached.

66 I found that the parties did not intend to be bound until quantum and other issues were decided. It was still necessary to complete this tripartite set- off agreement by offer and acceptance of a balance figure.

67 The debt owing from ATSI to LAP Global was not a straightforward one. Besides the GE issue, there was the matter of freight for the ongoing contracts of carriage to be taken into consideration. [note: 61] The GE issue was an important issue to ATSI. Ling explained this during examination-in-chief: [note: 62]

> Q: My question really is how does the issue on the unauthorised bills of lading affect the contra of the AR and AP?
>
> A: Well, it definitely affects is because at that point and up to now, we do not know the actual

number, the figures of those ATSI house bill of lading, the issuance of it. We do not know the contents. We got no idea what is it all about and what are the values that are involved and what are the complications and, at the same time, what are the compensation that we want to look at. This has not been resolved and this will definitely implicate into the AR and AP understanding.

Q: Do you know who issued those unauthorised house BL?

A: Well, in my best of my knowledge, it's been issued by LAP and LAP has two to three company which I believe that we are talking in terms of LAP Global. You can also be LAP Distribition which was earlier..the name of the company. It could be LAP Global. It could be Asia Wind. It could be LAP Projects Asia. We do not know it's because we do not receive the documents from LAP to date. So without these documents, I cannot confirm which company issued out this ATS house bill of lading.

Q: And that is why at this 26th of July meeting, you wanted to find out?

A: This is exactly what I want to find out and prior to it, I have requested for the documents to be furnished during this meeting.

68 An agreement for set-off which did not address these issues would necessarily be unable to address ATSI's concerns and would thus be incomplete. In addition, LAP's issue with overcharging (*ie* the Sany issue) was still being pursued by LAP. As stated, it was only on the first day of trial that LAP decided to abandon the Sany issue. It was demonstrably clear from the facts in evidence that quantum or the settlement of the Sany and GE issues were material to ATSI/ATS and LAP Global/LAP. These were material terms, and as ATSI and LAP had not had them resolved, there could be no tripartite agreement.

The Sany and GE issues

69 It was clear from the e-mail correspondence between the parties that the figures for set-off were not the only things that were important to ATSI. Ling's recap of the 6th June meeting in his e-mail of 4 July 2011 to Sebastian Goh, Foo and Than referred to the Sany and GE issues as an integral part of the 6th June 2011 meeting, the discussion of which was necessary for an agreement to be made: [note: 63]

The meeting held on 06 June 2011 at your office together wtih you and Mr Joseph Foo on the outstanding matters of the issuance of ATSi HBLs and the settlement of AR/AP. As promised by Mr Joseph Foo, he will check with the management and revert. To date, I have not heard nor received any further information from him.

70 This stance was repeated in e-mails sent by Goering to Foo on 29 June, 6 July and 18 July 2011. ATSI had maintained consistently that the three issues came as a package deal, and I found that a holistic review of the e-mail correspondence between the parties demonstrated that the Sany and GE issues were material to ATSI and that LAP knew this.

71 On Foo's part, he wanted to contra what ATSI owed to LAP Global with what LAP was required to pay ATS, and the Sany issue was an overbilling by ATS which LAP did not want to pay. As of 8 July 2011, Foo's stand was self-evident from his response in upper case to Goering's e-mail of 6 July 2011. [note: 64] Foo wrote on 8 July 2011: [note: 65]

Nothing more required from ATSI (see one email example attached "ATS/LAP Account Overview & Offset proposal [14/6/2011]

(LAP: I AM UNSURE ON THE SANY ISSUE, FROM A FINANCIAL STANDPOINT, WOULD PREFER ALL FINANCIAL NUMBERS ARE SET OFF AND THAT THERE IS NO MORE OUTSTANDING BEFORE LAP IS TO REMIT ANY FUND TO ATS OR VICE VERSA. MR LING OF ATS SINGAPORE CONCURRED THAT ATSI OWED LAP BEYOND THE AGREED TERM AND NOTHING WAS FORTHCOMING FROM ATS. THE OUTSTANDING SUM DUE TO ATS SPECIALISED IS MORE "CURRENT" THAN THE SUM OWED FROM ATS. GIVEN THE 'HOSTILE' SITUATION, LAP CAN ONLY ACCEPT FULL OFFSET SUM, AND NOT SANY DIFFEREN (sic) ISSUE AND ATS ANOTHER, ATSI ANOTHER.)

....

LAP seems to have some serious internal communication break down and why I must, for the last time, request final and complete closure of all matters outstanding, clearly communicated to CK by this Friday, July 8th [*sic*] 2011:

1. ...

2. Final settlement on AR/AP

([LAP:] TO INCLUDE SANY AND ALL EXISTING ONGOING HBL WHERE ATS/ATSI ARE STILL BENEFITTING FROM THE HBL)

72 On the Sany issue, Goering wrote on 18 July 2011: [note: 66]

Sany – You are proposing an off-set, we have communicated clearly that we do not accept this as it is two separate agreements. ATS International would not engage with LAP on this project, and LAP signed a separate agreement with ATS Wind Energy (contract signed attached). Sany is an agreement between ATS Wind Energy/ATS Specialised and LAP, ATS International played no role in this. As stated clearly in my last messages, ATS International has been proposing settling all AR and AP and we have simply been waiting for LAP to commit finally to sitting down and working through each statement. We have been very transparent and provided all statements of account to you for audit and comment which you continue to fail to do.

73 The first attempt to separate the issues into discrete components came after compensation for the GE issue was raised in Goering's letter of 12 July 2011 and Goering's e-mail of 18th July 2011. On 20 July 2011, Foo wrote: [note: 67]

We would like to bring to your attention on the point raised in your official signed letter, in which, ATSI alleged that ALP has been issuing your Bls without authorisation/unauthorised use of logos on websites and etc, with reference to agency agreement.

...

We are surprised by the allegation and ATS' request for compensation on BLs issued as stated in your letter. Your Singapore MD should be well aware that all businesses brought to ATSi by LAP was conducted and carried out in the best interest of ATSi. We hereby deny all the allegations categorically as I understand that even though there have not been any agreement [*sic*] in place between LAP and ATSi. Probably you are not well advised/aware, LAP has been acting in the best

interst of ATSi and, sincerely, we feel that it is a gross accusation by ATSi to LAP.

74 In response to Goering's views on the Sany issue, Foo maintained his position taken in his e-mail of 20 July 2011. [note: 68] Even though Ling proposed at the 26 July meeting to settle AR/AP leaving aside the Sany issue to a later date, Foo refused. Simply put, LAP had raised overbilling of US$56,738 which will affect the full offset sum as LAP was not going to pay ATS for it. He wrote on 26 July 2011: [note: 69]

> [A]s mentioned, LAP has the intention of resolving this matter amicably. As mentioned to you, I need time to figure out the main reason for the dispute and the amount is USD56,738 and I was made to understand that this issue was made known to ATS at the time it happened and surprisingly, you/ATSi claimed to have no information on this particular case. I need to put on record that it is our intention to resolve everything in one go. Again, I put it to you that no payment was forthcoming from ASTI to LAP when the payment was due and in this scenario of contra and set-off, in the interest of all, a clean clear cut will be the best solution for all parties.
>
> ...
>
> I would like to put on record again that LAP deny [*sic*] all this allegation of unauthorised issuance of HBL categorically and this is a serious allegation to LAP and LAP reserves all its rights for this allegation without basis.

75 In their submissions, LAP relied heavily on one portion of Ling's e-mail where figures were presented and there was a statement by Ling that "Total balance amount to settle actual AR for all owed to ATS companies is USD 92,437.62 and we asked you/Lap to make full payment for closure". I found that LAP's submission that this was clear evidence that a set-off was already in place with only quantum to be figured out was wholly implausible. A reading of the contents of the e-mail as a whole showed that there was no set-off agreement within the chronology of events both before and at the meeting. [note: 70] Ling had presented the figures and asked for payment of US$92,437.62 "for closure". On the stand, Ling testified that this was only one of the issues presented to LAP. [note: 71] The other issue was the GE issue. According to him, both issues had to be considered together. Given that the GE issue was raised at the 6 June 2011 meeting, I believed Ling's account that he had mentioned that both these issues would be considered together.

76 After explaining that ATSI had no right to interfere into LAP's and Sany's billings/invoices since they had no contractual obligations to Sany, there was a note by Ling that "we again proposed to have the main numbers (AR/AP) settled and to review the 'LAP-SANY" dispute separately and should there be any fault that lies on ATSI, assurance was given to you/ LAP to again settle the difference amicably. You/LAP rejected the proposal." As stated, Foo responded to Ling's e-mail saying that he wished to "put on record that it is our intention to *resolve everything in one go*" [note: 72] [emphasis added]. He stated again at the end of his response that "LAP's intention is to clear the issues *in one go* and amicably" [emphasis added]. It was clear to me that both parties had proceeded on the basis that the set-off, Sany and GE issues came together and it was only now, as a result of reaching an impasse in their negotiations, that it was suggested the issues be decoupled, and LAP rejected this suggestion. I agreed with Mr Chua that as of 26 July 2011, there was a challenge to the plaintiff's claim amount of US$325,781.40. In addition, there was a dispute on the GE issue which included billings to GE for its shipments. Since the issues were never resolved, there was no settlement in the form of a set-off agreement.

The account components for the final quantum

77 There were three different account receivables which required resolution for purposes of a set-off. These included:

(a) AR due to ATS from LAP for the Sany deals;

(b) AR due to ATSI from LAP Global, including the issue of unauthorised house bills of lading *after* the cessation of the Agency Agreement between ATSI and LAP Global; and

(c) AR due to LAP from ATSI.

78 I found that there was no agreement on which of these items should be added to the list for set-off. As of 20 July 2011, LAP had not agreed to add to the list for set-off the alleged unauthorised bills of lading (item 77(b)). [note: 73] Foo claimed on the witness stand that this was because there had been no discussion of item 77(b) during the 6th June meeting. [note: 74]

79 Ling confirmed on cross-examination that he, Foo and Sebastian Goh discussed the GE issue, *viz* the unapproved issuance of ATSI's house bills of lading to GE shipments after 31 May 2011, but this was denied by Foo in his Affidavit of Evidence-in-Chief, who claimed that this matter was not brought up until the 26th July meeting. However, under cross-examination, Foo said that he could not recall if the GE issue was discussed on 6 June meeting [note: 75] but he conceded that his e-mail of 16 July referred to the dispute which concerned an overbilling issue of US$ 56,730 in relation to ATS's March 2011 Contract ("the Sany issue") and the house bills of lading issue in relation to the GE shipments (*ie*, the GE issue). [note: 76] Foo also accepted that in order to finalise the numbers the Sany issue and freight in relation to the GE shipments had to be sorted out. [note: 77] In other words, both the Sany issue and the GE issue had to be sorted out.

80 As stated ATSI only raised the matter of compensation for the unauthorised issuance of house bills of lading in its letter dated 12 July 2011. [note: 78] On the witness stand, Foo appeared to have forgotten that he had in his e-mail of 20 July 2011 denied liability for the alleged unauthorised GE bills of lading; and that Foo at the time of the 18th July e-mail stated that there was still "some dispute over the revenue of that [ongoing] particular shipment [to GE] for Sany" (see [77(a)] above). [note: 79]

81 LAP's position was that there was an underlying agreement in principle for a set-off, with the exact numbers to be calculated later. It thus did not matter that there had been no agreement on items to be included (*ie*, [77 (a)] and [77(b)] above), or of the figures for all the ARs. I found this submission untenable. On cross-examination, Foo fell short of saying that there had been an agreement on what items would be included for the purposes of set-off. He instead papered over this question by continually referring to "an agreement to set off, pending finalisation of numbers". [note: 80] However, saying that figures were yet to be finalised is quite different from refuting ATS's claim that it was not even clear which items were to be included in the set-off agreement. The former is a matter of accounting, totalling up figures common to both parties. The latter logically precedes this process; there can be no calculation of figures unless it is first decided which receipts should be included as part of the set-off agreement. An agreement to set-off without specifying which items would be included under the set-off is analogous to an agreement to buy an unspecified item from a shop and is obviously void for uncertainty. If the objects of the agreement are not certain, this cannot be, as the plaintiff claims, an agreement with the proviso that price or figures would later be agreed upon. I found that without an agreement on the items for set-off, there was not sufficient

certainty for an agreement to be enforced.

The unresolved quantum

82 Even if it had been agreed which items would be included in the quantum, there would still not be an agreement as the exact figures had not been agreed upon. I found it contrary to commonsense that any business entity in the position of ATS or ATSI would have agreed to a set-off agreement without having first decided what their liabilities or rights under this agreement would be. This could only be resolved by reference to figures. The figures proposed in the e-mail correspondence covered a huge range. It began with an e-mail from Than to Lemke on 2 June 2011, offering a sum of US$56,714.35. Subsequent figures from Meidl on 14 and 20 June 2011 proposed sums of US$179,078.96 and US$166,636.16 respectively. By the 26th July 2011 meeting, the figure proposed for closure and suggested by Ling was the much reduced sum of US$92,437.62. LAP eventually tendered payment of US$95,348.44 (inclusive of interest) on 15 March 2012. LAP's primary case is that by 4 June 2011, there was already a concluded agreement. However, at that point of time, it was not clear what the disputed amounts were. Foo testified on the stand: [note: 81]

> At that point of time, I did not have an [*sic*] exact figures because I just took over the case as instructed by my MD and we did not agree on the numbers---the final number. It was just a rough mentioning of fifty over thousand differences.

I believed ATS's account that they would not have agreed to a set-off in such varied terms (a relatively significant difference of US$122,364.61) but that any agreement was contingent on how quantum would be calculated.

83 It was clear to me from the amount of time spent and calculations on the figures that the exact figures for set-off were material to both parties, and that the breakdown of agreement on figures was a breakdown of the entire arrangement to set off. Ling noted in the 26th July 2011 e-mail that "as such, you/Lap *do not agree and see no way to have contra [or set-off] work-on with this outstanding matter* by the end of this meeting" [note: 82] [emphasis added].

84 Foo's performance on the stand was, again, telling. When asked to consider what would have happened if the figures could not have been finalised, Foo hedged around before finally admitting that the parties have to agree on numbers and that the efforts to resolve the quantum under resolution was essentially part of resolving the *whole* dispute. I should include a portion of the transcript on Foo's cross-examination: [note: 83]

> Q: What if the figures can never ever be finalised?
>
> A: I do not how [*sic*] to answer your "what if" question, counsel.
>
> Q: Try. In that case, what happened?
>
> A: I think both parties have been putting a lot of effort to resolve the differences and that have [*sic*] been stated throughout my correspondence with ATS.
>
> Q: If the parties tried hard though they may be and they still cannot come to a finalisation of the figures, can there still be agreement to settle?
>
> A: Well, I reckon I cannot presume the "what if" scenarios. I need to get instructions.

Q: No, I am asking you now. I am asking you not---not predict that. If this scenario is present to you?

A: I---

Q: It's a straightforward question, Mr Foo.

A: I---*I believe the parties have to agree on the numbers* because it is rather straightforward, you see.

Q: But what---what if they can't?

A: What if?

Q: Yes.

A: How can you---I don't know how to answer your "what if". In fact, *we have been trying very hard to resolve the---the dispute*.

[emphasis added]

85 The nature of a set-off transaction requires the parties to agree to the components and items that were to be included in the set-off, otherwise the quantum cannot be determined. I found that the items for set-off, quantum, and the GE and Sany issues were all material terms. Without agreement from *all three parties* on these matters, any agreement would be void for uncertainty.

Consideration

86 Consideration was also a problem for the defendant. Ms Tan for the defendant argued that the consideration moving from LAP to ATSI was a forbearance to claim the full amount of receipts owing to LAP, [note: 84] while the consideration for ATSI's promise to pay ATS was that ATSI would not need to touch their cash flow. [note: 85] Ms Tan cited *Chwee Kin Keong & Ors v Digilandmall* [2004] 2 SLR 594 (at [139]) in support of her proposition that consideration need only be nominal. V K Rajah J had said *obiter* that:

> Indeed, the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial contracts. The marrow of contractual relationships should be the parties' intention to create a legal relationship

87 While it may be the case that the notion of consideration has its critics, *Chwee Kin Keong* did not abolish the notion of consideration but went on to find that there was ample consideration in the form of a promise to pay in exchange for the delivery of the requisite laser printers. The Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terrence Peter* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [64] acknowledged that the doctrine had weathered criticism and is still a standard requirement to formation of a contract.

88 The contention that ATSI would not need to touch their cash flow does not constitute legal consideration; in fact this agreement would have required ATSI and ATS to make adjustments to their books which were not in the ordinary course of business. Lemke clarified on the stand that the offset would have been a "whole accounting nightmare… which is difficult sometimes administratively to get done". [note: 86] The defendant had not developed the argument of a benefit from not needing to

touch their cash flow and this could not have been consideration coming from ATSI.

89 In a tripartite agreement, the following could arguably have been consideration:

(a) ATS undertook to vary LAP's contractual obligations to it by collecting from ATSI the sums ATSI owed to LAP Global and only collecting the balance in exchange for LAP's promise to pay it the balance;

(b) LAP Global undertook to forbear from collecting sums owed to LAP Global from ATSI in exchange for ATSI's promise to pay ATS; and

(c) ATSI undertook to pay ATS the sums it owed to LAP Global in exchange for LAP Global's forbearance to extract the full sums owed from ATSI to LAP Global.

90 I found, on the facts, that consideration was simply not proved on a balance of probabilities:

(a) I found that there was no indication that ATS had undertaken to vary LAP's contractual obligations to it by looking to set off the sums ATSI owed to LAP Global and only collecting the balance from LAP. It was clear that the sums owed by ATSI to LAP Global had become uncertain in light of ATSI's claim in relation to the unauthorised GE shipments, and it simply did not make sense that ATS had agreed to a mutual variation of contractual obligations.

(b) Equally, there was no indication that ATSI had given consideration in the form of an undertaking to pay ATS. On the stand, Lemke testified that what had been discussed between him and ATSI's Goering were the pros and cons of an offset and the use of an offset as a potential solution. [note: 87] I found that ATSI could not have agreed to pay ATS and on ATS's part to accept a mystery sum of money and there was accordingly no consideration moving from ATSI (as promisee) to ATS (as promisor).

91 Given the practical application of the traditional "benefit-detriment analysis" required to find that consideration exists (see *Gay Choon Ing* at [67]), the defendant had simply not made out its case. Parties would be well advised to opt for the route of assignment of debt, as this would reduce the amount of complications arising from lack of consideration or the need to show that consideration, however slight, existed.

Conclusion

92 For the reasons given in this grounds of decision, I found that there was no tripartite agreement to set-off and gave judgment for the plaintiff for the full sum of US$325,781.40, as the amount owing under the March 2011 Contract, with interest payable at the rate of 5.33% per annum from the date of the Writ of Summons to date of payment. The defendant was ordered to pay the plaintiff the costs of the action.

[note: 1] Transcript of Evidence dated 23 April 2012, p 60

[note: 2] Goering's AEIC, para 49

[note: 3] AB 19-20

[note: 4] AB 19

[note: 5] AB 19

[note: 6] AB 11-13

[note: 7] Defendant's Closing Submissions dated 23 April 2012, p 55

[note: 8] PBD 124

[note: 9] PBD 136

[note: 10] AB 29-30

[note: 11] AB 27-28

[note: 12] AB 26

[note: 13] AB 25

[note: 14] AB 32-37

[note: 15] PBD 177

[note: 16] PBD 177

[note: 17] PBD 176

[note: 18] PDB 176

[note: 19] AB 38-39

[note: 20] AB 62

[note: 21] AB 70-71

[note: 22] AB 100

[note: 23] Transcript of Evidence dated 23 April 2012, p 51

[note: 24] Transcript of Evidence dated 23 April 2012, p 44

[note: 25] AB 20

[note: 26] Transcript of Evidence dated 23 April 2012, p 66

[note: 27] AB 19

[note: 28] Transcript of Evidence dated 16 April 2012, p 59

[note: 29] Transcript of Evidence dated 16 April 2012, p 49

[note: 30] Transcript of Evidence dated 23 April 2012, p 67

[note: 31] Transcript of Evidence dated 23 April 2012, p 66

[note: 32] Transcript of Evidence dated 17 April 2012, p 20

[note: 33] Transcript of Evidence dated 16 April 2012, p 59

[note: 34] Transcript of Evidence dated 17 April 2012, p 21

[note: 35] Transcript of Evidence dated 17 April 2012, p 30

[note: 36]

[note: 37] Transcript of Evidence dated 23 April 2012, p 31

[note: 38] AB 15

[note: 39] Than's AEIC, para 16

[note: 40] AB 17

[note: 41] *Ibid*

[note: 42] AB 15

[note: 43] Transcript of Evidence dated 16 April 2012, p 46

[note: 44] Transcript of Evidence dated 17 April 2012, p 21

[note: 45] AB 19

[note: 46] Transcript of Evidence dated 16 April 2012, p 49

[note: 47] Transcript of Evidence 16 April 2012, pp 53-54

[note: 48] Transcript of Evidence dated 16 April 2012, pp 46, 50 and 54

[note: 49] Transcript of Evidence dated 16 April 2012, p 54

[note: 50] AB 29-30

[note: 51] AB 26

[note: 52] AB 25

[note: 53] Transcript of Evidence dated 23 April 2012, p 31

[note: 54] AB 62

[note: 55] *Ibid*

[note: 56] Transcript of Evidence dated 18 April 2012, pp 75-76

[note: 57] AB 28

[note: 58] PBD 172

[note: 59] AB 48

[note: 60] Transcript of Evidence dated 18 April 2012, p 51

[note: 61] Transcript of Evidence dated 18 April 2012, pp 62-63

[note: 62] Transcript of Evidence dated 18 April 2012, p 10

[note: 63] PDB 136

[note: 64] PBD 145

[note: 65] AB 87-88

[note: 66] AB 84

[note: 67] AB 84

[note: 68] AB 83-85

[note: 69] AB 80-81

[note: 70] AB 70-71

[note: 71] Transcript of Evidence dated 18 April 2012, p 16

[note: 72] AB 71

[note: 73] AB 48

[note: 74] Transcript of Evidence dated 18 April 2012, pp 58-59, 65

[note: 75] Transcript of Evidence dated 18 April 2012, pp 58-59; 65

[note: 76] Transcript of Evidence dated 18 April 2012, p 66

[note: 77] Transcript of Evidence dated 18 April 2012, p 73

[note: 78] AB 32

[note: 79] Transcript of Evidence dated 18 April 2012, p 53

[note: 80] Transcript of Evidence dated 18 April 2012, p 69

[note: 81] Transcript of Evidence dated 18 April 201, p 58

[note: 82] AB 80

[note: 83] Transcript of Evidence dated 18 April 2012, p 67

[note: 84] Transcript of Evidence dated 23 April 2012, p 90

[note: 85] Transcript of Evidence dated 23 April 2012, p 91

[note: 86] Transcript of Evidence dated 16 April 2012, p 60

[note: 87] Transcript of Evidence dated 16 April 2012, p 60

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