Rudhra Minerals Pte Ltd *v* MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)
[2013] SGHC 187

Case Number : Suit No 325 of 2012

Decision Date : 25 September 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Tan Poh Ling Wendy and Tony Tan Soon Yong(Stamford Law Corporation) for the plaintiff; Tan Chai Ming Mark and Melissa Marie Tan Shu Ling(Asia Practice LLP) for the defendant.

Parties : Rudhra Minerals Pte Ltd — MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)

Contract – Formation – Certainty of terms

Contract – Intention to create legal relations

Equity – Estoppel – Estoppel by convention/common assumption

Equity – Estoppel – Estoppel by representation

25 September 2013 Judgment reserved.

Andrew Ang J:

1 The question in this case is deceptively simple: was there a binding contract between the parties?

2 The Plaintiff is Rudhra Minerals Pte Ltd ("Rudhra Singapore"). The Defendant is MRI Trading Pte Ltd, formerly known as CWT Integrated Services Pte Ltd ("MRI"). Both parties are private limited companies incorporated in Singapore and in the business of trading coal and other commodities. In mid-2011, there were negotiations for the Plaintiff to purchase coal from the Defendant. However, the transaction never materialised and the Plaintiff sued the Defendant for damages, arguing that the Defendant was in repudiatory breach of an alleged agreement made between the parties.

The facts

3 The following paragraphs set out the main facts relevant to the present dispute. For ease of reference, a chronology of events has also been summarised in a table in the Annexure below.

The CoalTrans Meetings

4 The parties' relationship began in or about the end of May 2011 at the 17th Annual CoalTrans Conference in Bali, Indonesia, an annual conference organised for the coal industry ("the CoalTrans Conference"). The Plaintiff's representatives, namely, Ajaya Bhanja, Satish Sudarsan ("Satish") and Sim Ming Hui ("Jeffrey"), met with the Defendant's representatives, Benjamin David Harburg ("Ben") and Ng Wee Teck ("Wee Teck"), at the CoalTrans Conference. Satish was from the Marketing &

Operations Department of the Plaintiff's Indian associated company, whereas Jeffrey was a senior manager/trader of the Plaintiff's Indonesian associated company. Ben was the director for Mining Investments and Operations in the Defendant's parent company. [note: 1] Wee Teck was the procurement manager of Mining Investments and Operations of the Defendant.

5 There were two meetings between the parties' representatives at the CoalTrans Conference ("the CoalTrans Meetings"), the first meeting being more introductory in nature. [note: 2] During the CoalTrans Meetings, the parties discussed the possibility of the Defendant supplying to the Plaintiff BA-63 coal at US$96 per metric tonne ("MT") for a shipment between 21 and 30 July 2011 and US$97 per MT for a shipment in August 2011 (collectively referred to as the "Cargo"). The parties differ on whether a deal was actually concluded at the CoalTrans Meetings. However, it is common ground that during the CoalTrans Meetings, the Defendant informed the Plaintiff that the intended supplier of the Cargo would be PT Bukit Asam (Persero) Tbk ("PTBA"), a government-owned Indonesian coal company, whose choice of load port surveyor was PT Carsurin. The Plaintiff then requested that the Defendant check with PTBA as to whether PTBA would be agreeable to changing the load port surveyor to either PT Sucofindo or PT Geoservices and the Defendant agreed to do so.

6 Some explanation of the applicable technical terms may be useful here. BA-63 coal refers to a type of PTBA coal with a calorific value of 6,300 kilocalories. [note: 3] A load port surveyor in the present context is a professional surveyor, chosen by parties to a transaction, who is responsible for taking a sample of the coal and analysing that sample according to international standards to determine its chemical composition and properties. [note: 4] The results of the load port surveyor's analysis will indicate whether the goods conform to the contractual specifications. If the goods fail to meet the contractual specifications and the contract provides for rejection levels, the buyer may be contractually entitled to reject the goods. Rejection levels (or rejection limits) are certain "tolerance" parameters for variance from the contractual specifications; if the goods fall outside these parameters, the buyer has the contractual right to reject the goods. [note: 5]

Subsequent correspondence

7 Following the CoalTrans Meetings, there was a flurry of correspondence between the Plaintiff's Satish and Jeffrey and the Defendant's Ben and Wee Teck.

8 Satish and Jeffrey each sent an e-mail to the Defendant's representatives on 1 June 2011. Satish sent an e-mail on 1 June 2011 at 11.50am to Ben and Wee Teck, thanking them for their hospitality at the CoalTrans Conference and stating that the Plaintiff "would be extremely keen to continue buying BA-63 coal from [the Defendant] on a regular basis". [note: 6] Jeffrey's e-mail on 1 June 2011 at 12.43pm to Wee Teck requested for the "coal offer that we had concluded at CoalTrans Bali 2011". [note: 7] On 1 June 2011 at 1.05pm, Wee Teck sent a reply e-mail to Jeffrey, copied to, *inter alia*, Satish and Ben, attaching a Full Corporate Offer ("FCO") which stated: [note: 8]

> REF: Full Corporate Offer Indonesian Thermal Coal PTBA BA63
>
> Dear Jeffrey,
>
> We, with full legal and corporate responsibilities, confirm that we are ready, willing and able to offer for sale STEAM COAL in accordance with the terms and conditions set out as follows:

PARAMETER	BASIS	GUARANTEE
Gross Calorific Value	(ADB)	6,300 kcal/kg
Total Moisture	(ARB)	22%
Inherent Moisture	(ADB)	10.5%
Ash Content	(ADB)	7%
...	...	...

Port of loading: Tarahan, Sumatra

Loading Rate: 16,000mt PWWD SHINC

Payment: 100% Confirmed, Irrevocable, and Non-Transferable LC [Letter of Credit] at Sight from Prime Bank. LC to be issued within 3 calendar days upon signing of contract

Surveyor: *To be mutually decided*

Laycan Date: 21–30 July and August 2011

Quantity: 1 x 60,000 MT +/- 10% per month

Price FOB MV: US$96/mt July 2011, US$97/mt August

Offer Validity: COB [close of business] 3rd June 2011

The above is subject to further terms and conditions to be mutually agreed.

...

[emphasis added]

9 The Plaintiff's Jeffrey then sent a response e-mail dated 1 June 2011 at 5.01pm (the "Plaintiff's 1 June 2011 Response E-mail"), stating: [note: 9]

Dear Wee Teck,

Thank you very much for the FCO which we received.

We confirm purchase of 2 shipments of BA-63 loading 20–30 July 2011 & Aug 2011 at USD 96 & USD 97 respectively.

...

We now request you to send us the contract for both shipments asap.

...

10 On 2 June 2011, Wee Teck sent an e-mail to Jeffrey at 5.22pm (the "Defendant's 2June 2011 E-mail"), thanking him for the confirmation and stating that the Defendant "will send [the Plaintiff] the contracts once [the Defendant's] legal has reverted with the draft". [note: 10]

11 The Plaintiff alleges that there were various telephone conversations between the parties' representatives around this period of time, although this is disputed by the Defendant. The Plaintiff alleges that there was a telephone conversation on 1 June 2011 between Jeffrey and Wee Teck during which Jeffrey confirmed the purchase of the Cargo before following up with the Plaintiff's 1 June 2011 Response E-mail. [note: 11] Further, the Plaintiff claims that there was a telephone conversation on 6 June 2011 between Ben and Satish, wherein Satish informed Ben that the Plaintiff had begun taking active steps to sub-sell the Cargo and asked to "close" the formalities for the deal. [note: 12]

12 On 7 June 2011, the Defendant's Ben sent the Plaintiff via e-mail a draft contract for the two shipments, asking the Plaintiff to "sign and revert". [note: 13] Jeffrey replied on 7 June 2011, noting that "the surveyor stated is PT Carsurin but we have agreed should either be PT Sucofindo or PT Geoservices" and asking Ben to confirm this. [note: 14] Satish also replied on 7 June 2011 to Ben's e-mail, similarly noting that the draft contract still mentioned PT Carsurin even though the Plaintiff had "requested for change in loadport Inspection agency from PT Carsurin to PT Sucofindo". Additionally, Satish's e-mail of 7 June 2011 requested for rejection limits for the Cargo. [note: 15]

13 On 15 June 2011, the Plaintiff's Jeffrey sent an e-mail to the Defendant's Ben and Wee Teck attaching the draft contract with comments and asking the Defendant to review the draft contract. [note: 16] It appears that there was no further e-mail correspondence between the parties until 30 June 2011, when the Plaintiff's Satish sent a chaser e-mail to Ben and Wee Teck urgently requesting the Defendant to send the signed contract to the Plaintiff. [note: 17] On 1 July 2011 at 11.10am, Satish sent a second chaser e-mail to Ben and Wee Teck, again asking for the signed contract. [note: 18] Ben replied to Satish on 1 July 2011 at 11.55am stating, *inter alia*, that: [note: 19]

> Based on our phone conversations with yourself and Jeffrey beginning 14 June, we have notified all parties that we are possibly facing quality issues on past PTBA shipment. We are currently investigating those issues. Until settled, we are barred from making further shipments with this producer. You have been fully aware of this situation and outcome for the past 3 weeks.

The "phone conversations" referred to in Ben's e-mail of 1 July 2011 are another source of contention between the parties. As seen from the excerpt above, the Defendant's position is that on or about 14 June 2011, it had contacted the Plaintiff by telephone to inform them about potential quality issues with PTBA coal and that the Defendant could not place further orders until these issues were resolved. [note: 20] The Defendant further alleges that sometime in the second half of June 2011, Ben contacted Satish by telephone to inform him that the negotiations could not continue as the parties could not agree on the load port surveyor and the rejection levels. [note: 21] The Plaintiff denies that the Defendant informed them as such and asserts that the Plaintiff was only informed about the alleged quality issues on or about 29 June 2011. [note: 22]

14 On 5 July 2011, the Plaintiffs sent an e-mail to the Defendant requesting the Defendant to perform its obligation "as per the agreed terms of the contract". [note: 23] The Defendant replied on 13 July 2011 denying the existence of a binding legal contract between the parties and stating that

the negotiations between the parties had broken down as they were unable to agree on certain terms. [note: 24] Subsequently, the Plaintiff sent various "without prejudice" reminders to the Defendant from July to August 2011. [note: 25] A letter of demand dated 1 February 2012 was then sent by the Plaintiff's solicitors to the Defendant, under which the Plaintiff purported to accept the Defendant's repudiatory breach of the alleged contract as bringing it to an end.

Defendant's application for leave to admit Wee Teck's evidence

15 There were three witnesses in total: Jeffrey and Satish for the Plaintiff; and Ben for the Defendant.

16 Wee Teck did not attend the trial in April 2013 to give evidence for the Defendant, even though he had already filed an affidavit of evidence-in-chief ("AEIC"). On 10 April 2013, the Defendant applied in Summons No 1927 of 2013 ("SUM 1927") for leave to admit Wee Teck's AEIC without his attendance at the trial for cross-examination. Wee Teck had apparently informed counsel for the Defendant that he would not be able to attend the trial as he was starting up his own mining business in Indonesia and could not leave the job site there due to his work schedule. [note: 26] I heard SUM 1927 on 12 April 2013 and dismissed the application with costs reserved.

17 Subsequently in May 2013, before Closing Submissions were filed, there was an unsuccessful attempt to fix a further hearing date for cross-examination of Wee Teck. On 20 May 2013, the Defendant applied for leave to call Wee Teck to testify; I allowed this application with costs of the application to the Plaintiff. A further one-day hearing was subsequently fixed for 17 July 2013. However, this hearing date was vacated after the Defendant informed the court that Wee Teck would not be available to attend the further hearing after all. Accordingly, I disregarded Wee Teck's evidence contained in his AEIC, given his failure to attend the trial for cross-examination. I drew no adverse inference against the Defendant for Wee Teck's failure to attend the trial as the Plaintiff did not raise this argument in its submissions.

Issues and pleadings

18 By consent of the parties, the present trial was confined to issues of liability, with issues of damages to be determined at a later date. [note: 27] The main issues to be resolved are:

(a) Whether there was a binding and enforceable contract between the parties for the sale and purchase of the Cargo, in particular:

(i) whether parties intended to enter into legal relations;

(ii) whether the contract was certain and complete; and

(b) Alternatively, whether the Defendant is estopped from denying the existence of such a contract.

19 The Plaintiff's primary argument is that a binding agreement between the parties was formed at the CoalTrans Meetings or, alternatively, by the acceptance of the FCO as acknowledged by the Defendant. [note: 28] As such, the written contract that Jeffrey had requested for in the Plaintiff's 1 June 2011 Response E-mail was merely a formality intended to record or embody a binding agreement that had already been reached. [note: 29] The Defendant takes the contrary position that a binding agreement would only come into existence upon the execution of a formal written contract. Moreover,

the Defendant says that the parties viewed the identity of the load port surveyor and rejection levels as essential terms that had to be agreed upon before any binding agreement was reached, and that failure to reach agreement on the load port surveyor issue (at least) would render the contract as a whole unworkable for uncertainty. [note: 30] The Plaintiff disagrees that these were essential terms but submits that in any event the parties had in fact agreed on these two terms. [note: 31]

20 The Plaintiff's alternative argument is that the Defendant is estopped from denying the existence of a binding agreement. In particular, the Plaintiff relies on the doctrines of estoppel by convention/common assumption and estoppel by representation.

Whether parties entered into a binding and enforceable agreement

21 Having considered the evidence and arguments before me, I find that the parties intended to enter into a binding contract on 1 June 2011 when the Plaintiff accepted the FCO, even though the choice of load port surveyor was to be agreed upon at a later date. However, as there was no evidence that the parties reached agreement on the surveyor issue, the contract is unworkable and void for uncertainty.

Parties intended to be bound

22 The issue here is whether parties intended to enter into a binding agreement at the CoalTrans Meetings or, alternatively, by the acceptance of the FCO as acknowledged by the Defendant. The test for ascertaining the parties' intentions is an objective one and thus the language used by one party, whatever his real intention may be, has to be construed in the sense in which it would reasonably be understood by the other: *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40].

23 I should first state that while much oral evidence was given as to the witnesses' subjective state of mind at the CoalTrans Meetings and during subsequent discussions, I have placed more reliance on the relevant documentary and circumstantial evidence instead. The reason for this is that I found the subjective statements of the witnesses often unhelpful in terms of objectivity and recollection. As Andrew Phang JA observed in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 ("*OCBC Capital*") at [41]:

> ... It bears mention that the first port of call for any court in determining the existence of an alleged contract and/or its terms would be the relevant *documentary* evidence. Where (as in the present case) the issue is whether or not a binding contract *exists* between the parties, a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired. Such evidence may be coloured by the onset of subsequent events and the very factual dispute between the parties. In this regard, *subjective* statements of witnesses *alone* are, in the nature of things, often unhelpful. Further, where the witnesses themselves are not legally trained, counsel ought not … to forensically parse the words they use as if they were words in a statute. This is not to state that oral testimony should, *ipso facto*, be discounted. On the contrary, *credible* oral testimony can be helpful to the court, especially where … such testimony is given for the purpose of *clarifying the existing documentary evidence*. … [emphasis in original in italics; emphasis added underlined]

24 There are a number of indications that the parties did intend to enter into a binding contract on 1 June 2011 through the Plaintiff's acceptance of the FCO. The parties had already met twice at the CoalTrans Conference, where the Defendant's representatives had represented to the Plaintiff that

the Defendant was able and interested to supply the Plaintiff with PTBA coal. [note: 32] During the CoalTrans Meetings, the parties reached agreement on most of the major terms of the transaction, including the specifications of the product to be sold, the price, the quantity, and the shipment period. [note: 33] Shortly thereafter, Satish and Jeffrey followed up on the parties' discussions by sending e-mails to the Defendant's representatives on 1 June 2011. Satish's e-mail to Ben and Wee Teck on 1 June 2011 at 11.50am stated that the parties had "conclude[d] 2 shipments of BA-63 coal" and that the Plaintiff "would be extremely keen to continue buying BA-63 coal from [the Defendant] on a regular basis". [note: 34] Jeffrey's e-mail on 1 June 2011 at 12.43pm requested Wee Teck for the "coal offer that we had concluded at CoalTrans Bali 2011". [note: 35] Wee Teck did not challenge Jeffrey's use of the word "concluded" but sent the FCO to the Plaintiff less than an hour later at 1.05pm. The FCO stated that:

> [The Defendant], with full legal and corporate responsibilities, confirm that we are ready, willing and able to offer for sale STEAM COAL in accordance with the terms and conditions set out as follows …

It also clearly stated that the "Offer Validity" was until 3 June 2011 (see [8] above). The FCO was thus the formal offer letter sent to the Plaintiff recording whatever was discussed and agreed upon at the CoalTrans Meetings. [note: 36] This offer was accepted at 5.01pm on the same day through the Plaintiff's 1 June 2011 Response E-mail, the purpose of which was to "confirm purchase of 2 shipments of BA-63 loading 20–30 July & Aug 2011 at USD 96 & USD 97 respectively" (see [9] above). The next day, the Plaintiff's confirmation of the purchase was acknowledged by Wee Teck in the Defendant's 2 June 2011 E-mail. The language used by the parties in their e-mails and in the FCO was evidently the language of offer and acceptance. Moreover, the Defendant only issued an FCO to the Plaintiff and not to other potential buyers who were interested in purchasing the Cargo around the same time at a similar price. [note: 37]

25 It is argued on behalf of the Defendant that the FCO was nevertheless "subject to contract" such that parties are only bound when a formal written contract is executed. [note: 38] To this end, the Defendant asserts that the phrase "subject to further terms and conditions to be mutually agreed" located at the end of the FCO has the same meaning as the stock phrase "subject to contract", which is that parties do not intend to be contractually bound until a contract is signed: see *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another appeal* [2011] 4 SLR 617 ("*Norwest Holdings*") at [23]. However, I am minded to agree with the Plaintiff that a more objective interpretation of this phrase is: "[t]here may be further terms, in addition to what is stated in the FCO, that parties may decide to agree to in relation to the sale and purchase of the [C]argo". [note: 39] Ultimately, whether or not certain stock phrases are used in a contract, the question whether there is a binding contract between the parties is determined by considering all the circumstances of the case: *Norwest Holdings* at [24]. In the present context, the phrase "subject to further terms and conditions to be mutually agreed" clearly referenced the fact that there was already existing agreement on the terms and conditions stated in the FCO, to which *further* terms and conditions could be added by mutual agreement. The present situation thus belongs to the fourth class of cases identified in the Australian courts (additional to the three stated in *Masters and another v Cameron* [1954] 91 CLR 353) as:

> … one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms …

Sinclair, Scott & Co Ltd v Naughton (1929) 43 CLR 310 at 317; *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd* (1986) 40 NSWLR 622.

26 Perhaps the strongest argument made on behalf of the Defendant was that parties had not reached a binding agreement because they had not agreed on all essential terms to the transaction. The Defendant argues that the parties viewed the choice of the load port surveyor and the inclusion of rejection levels as two essential terms that had to be agreed upon before any binding agreement was reached. In particular, the choice of load port surveyor was stated in the FCO "[t]o be mutually decided". In ascertaining the meaning and import of this phrase, I had regard to two Singapore cases dealing with the phrase "to be agreed". In *Jewellery Industries (S) Pte Ltd v Sintat Rent-a-Car Pte Ltd* [1993] 1 SLR(R) 744 ("*Jewellery Industries*"), Judith Prakash JC held that an option for renewal of a lease which provided that the renewed tenancy was to be "on such terms and conditions as may be agreed to between the parties" was void for uncertainty. In that case, it was also stated (at [20]) that the phrase "to be agreed" is the classic phrase typically employed when parties do not want to be contractually bound. Subsequently in the case of *Climax Manufacturing Co Ltd v Colles Paragon Converters (S) Pte Ltd* [1998] 3 SLR(R) 540 ("*Climax Manufacturing*"), Prakash JC clarified (at [26]) that her statement in *Jewellery Industries* was a general observation and not an unbending rule; the words "to be agreed" have to be construed in their context and their mere presence in the agreement does not mean that *ipso facto* no concluded contract is formed. I wholly agree with this proposition. The use of a stock phrase in a document is not conclusive of the parties' intention to be bound; in every case, all the circumstances must be considered.

27 At this juncture, I would also emphasise that parties may conclude a binding contract even though there are some terms yet to be agreed between them; the important question is whether the parties, by their words and conduct objectively ascertained, have demonstrated that they intend to be bound despite the unsettled terms: see *OCBC Capital* ([23] *supra*) at [39], citing *The "Rainbow Spring"* [2003] 3 SLR(R) 362 at [20]. The following principles laid down by Lloyd LJ in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 ("*Pagnan*") at 619 are apposite:

> As to the law, the principles to be derived from the authorities … can be summarized as follows:
>
> …
>
> (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.
>
> (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; …
>
> (4) ***Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled*** (see *Love and Stewart v. Instone* per Lord Loreburn at p. 476).
>
> (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
>
> (6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot

be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by "essential" one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. ***It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant.*** It is the parties who are, in the memorable phrase coined by the Judge, "the masters of their contractual fate". Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called "heads of agreement". …

…

[emphasis added in bold italics]

The passage above makes it clear that whether or not a term is objectively important is a different question from whether the parties intended to be bound. It is not for the court to decide which terms are important such that parties must agree on those terms before any binding contract can be concluded. Rather, it is for the parties to decide whether and when they wish to be bound and, if so, by what terms. I therefore do not accept the Plaintiff's submission that whether or not a term is essential is to be determined by the court and that a party's subjective intention or understanding in that regard is irrelevant. [note: 40]

28 In my opinion, the fact that the load port surveyor was "[t]o be mutually decided" as stated in the FCO does not detract from the parties' intention to be bound at that time. I accept that the choice of load port surveyor was of economic significance to both parties and would usually be agreed before any binding contract was entered into. Jeffrey was saying as much when he agreed in cross-examination that the choice of the load port surveyor was "essential in order to have a contract". [note: 41] However, I do not accept that either party intended agreement on this issue to be a precondition to being bound. The FCO was drafted shortly after the CoalTrans Meetings where parties had discussed the choice of load port surveyor and agreed that the Defendant would request PTBA to change the load port surveyor to either PT Sucofindo or PT Geoservices from PT Carsurin (see [5] above). Parties had narrowed down the identity of the load port surveyor to a few names and there was a broad understanding as to how the parties were to reach agreement on this issue shortly thereafter. I do not think that either party as at 1 June 2011 imagined that there would subsequently be a dispute as to the identity of the load port surveyor. From the evidence I also do not think that either party considered the consequences of failing to agree on this issue. In this context, the inclusion of the phrase "[t]o be mutually decided" in the FCO does not, to my mind, indicate that the parties intended to be bound only when they had actually agreed upon a particular load port surveyor.

29 As for rejection levels, the Plaintiff did regard this term as important. Having received the draft contract from Ben on 7 June 2011, Jeffrey and Satish both sent a number of reply e-mails to Ben highlighting the importance of having rejection levels in the contract. For instance, Jeffrey's e-mail on 8 June 2011 at 9.36am stated that the Plaintiff "need[ed] rejection levels". [note: 42] Similarly, Satish sent an e-mail to Ben on 8 June 2011 at 4.05pm stating that "[s]ince we have rejection levels with our client, it is imperative to have cut off values for CV(adb) & TM(arb) even if we have no rejection levels for ash & sulphur". [note: 43] While Jeffrey testified at the trial that the inclusion of rejection levels was *not* an essential term of the contract and the Plaintiff might still have taken the coal

without rejection levels because PTBA was a reputable miner and the product was a "branded coal" [note: 44], I was not persuaded that the inclusion of rejection levels was wholly unimportant to the Plaintiff.

30 However, the issue of rejection levels only surfaced after the Defendant sent the draft contract to the Plaintiff; it was neither discussed at the CoalTrans Meetings nor mentioned in the FCO. [note: 45] Therefore it cannot be said that the parties intended to defer legal relations until the issue of rejection levels had been agreed upon because this issue was a new point that was only brought up *after* 1 June 2011 when the Plaintiff accepted the FCO. That there were subsequent discussions between the parties on the inclusion of rejection levels is of little relevance once we accept that the parties were capable of arriving at a binding agreement on 1 June 2011. As Lord Cozens-Hardy MR said in *Perry v Suffields, Limited* [1916] 2 Ch 187 ("*Perry*") at 191–192, approving the headnote in *Bellamy v Debenham* (1890) 45 Ch D 481 ("*Bellamy*"):

> … "Though, when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made, and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed on between the parties,"—that means, of course, agreed on at the date of the offer and acceptance—"the complete contract thus arrived at cannot be affected by subsequent negotiation. When once it is shewn 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." …

Of course, this does not mean that regard should never be had to subsequent negotiations; the court should look at the parties' correspondence holistically. *Hussey v Horne-Payne* (1879) 4 App Cas 311 ("*Hussey*") was a case where subsequent negotiations showed that the terms of the intended agreement, which were of great practical importance to the parties, then remained unsettled and were still the subject of further negotiation. But *Hussey* was distinguished by *Perry* on the ground that in the former case there were, prior to the date of the two letters relied upon as establishing a contract, certain terms which had been discussed and had not been settled between the parties (*Perry* at 190). Lord Cozens-Hardy MR in *Perry* then cited with approval the following statement by North J in *Bellamy* (*Perry* at 192):

> … In my opinion, subsequent negotiations, first commenced on *new points* after a complete contract in itself has been signed, cannot be regarded as constituting part of the negotiations going on at the time when it was signed. … [emphasis added]

In a similar vein, Lloyd LJ in *Pagnan* also stated (at 620):

> … Indeed the only indication the other way is that the parties continued with their negotiations after the confirmatory telex of Feb. 1. But that is not really an indication at all. Once one accepts that the parties are in law capable of making what I will call an interim agreement, it was only to be expected that they would continue negotiating the terms that remained without delay. This is what they did. In my view the Judge drew the right inference as to the parties' intentions.

I agree with the above statements made in *Perry* and *Pagnan*. If anything, rejection levels would be part of the "further terms and conditions to be mutually agreed" (see [25] above).

31 It was further argued on behalf of the Defendant that the fact that the Plaintiff made substantial amendments to the draft contract and kept chasing for the signed contract showed that

a binding agreement had not yet been entered into. [note: 46] It is evident that the Plaintiff did propose numerous amendments to the draft contract, including amendments relating to the *force majeure* clause, limitation of liability provisions, choice of load port surveyor and the inclusion of rejection levels. [note: 47] I also agree that the Plaintiff displayed some urgency in its requests to conclude the draft contract, especially as the days drew closer to the proposed delivery date under the FCO. For example, the Plaintiff's 1 June 2011 Response E-mail requested for "the contract for both shipments asap". [note: 48] On 6 June 2011, Satish asked the Defendant to "forward [the Plaintiff] the contract asap since we need to close this". [note: 49] Satish's first chaser e-mail to the Defendant on 30 June 2011 also requested for the signed contract in the following manner: [note: 50]

> We are still awaiting the signed contract from your end for which we have been continuously chasing and for which we have not received any response yet. ...
>
> As discussed with Ben Harburg a while ago, we have already sold the first cargo (21–30 July 2011) to one of our clients and since the laycan is fast approaching, it is imperative that [MRI] send us the signed contract asap.
>
> The matter is most urgent and solicits your immediate response.

The fact that there were substantial amendments to the draft contract as well as the fact that the draft contract incorporated numerous new terms not found in the FCO diminishes the Plaintiff's submission that the written contract was merely a formality meant to embody what was already agreed in the FCO: see *Cendekia Candranegara Tjiang v Yin Kum Choy* [2002] 2 SLR(R) 283 at [25], [33]). However, as I have stated above, parties may conclude a binding contract even though there are some terms yet to be agreed between them. As for the urgency for the written contract on the part of the Plaintiff's representatives, I do not think that this can be interpreted to mean only that the Plaintiff knew that they did not yet have a binding agreement with the Defendant. It is equally likely that the Plaintiff, knowing that there were further terms and conditions as well as the choice of the load port surveyor to be mutually agreed upon after the date of acceptance of the FCO, simply wanted the signed contract to ensure that all these details were finalised before the first shipment date on 21 July 2011.

Contract void for uncertainty

32 That the parties intended to be bound on 1 June 2011 by the Plaintiff's acceptance of the FCO despite there being further terms still to be agreed is not conclusive of the matter. The question now is whether parties have indeed reached agreement on these further terms. If they have not, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty: *Pagnan* at 619 (see [27] above). For a contract to be valid and enforceable, its terms must be certain and the contract must be complete. A term that is "uncertain" exists but is otherwise incomprehensible; an agreement that is "incomplete" has certain terms that do not (but should) exist and the non-existence of these terms make the agreement incomprehensible: *The Law of Contract in Singapore* (Andrew Phang Boon Leong ed) (Academy Publishing, 2012) at para 03.145. A term is also uncertain and a contract incomplete where there is no objective or reasonable method of ascertaining how the term or agreement is to be carried out, thus rendering the agreement unworkable. As Maugham LJ stated in the classic case of *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at 13:

> … unless all the material terms of the contract are agreed there is no binding agreement. An agreement to agree in future is not a contract; nor is there a contract if a material term is

neither settled nor implied by law and the document contains no machinery for ascertaining it.

I also bear in mind the countervailing policy of endeavouring to uphold contracts where possible rather than striking them down: see *Climax Manufacturing* ([26] supra) at [22] and [26]; *Gardner Smith (SE Asia) Pte Ltd v Jee Woo Trading Pte Ltd* [1998] 1 SLR(R) 950 at [10]–[11]; *Hillas & Co Limited v Arcos Limited* (1932) LT 503 at 514.

33 In my view, the key issue here revolves around the choice of the load port surveyor rather than rejection levels. While it was unclear from the parties' subsequent correspondence whether or not parties eventually agreed on rejection levels, the FCO which the Plaintiff had accepted did not provide for rejection levels and unless there was a subsequent agreement stipulating otherwise, the transaction could very well have proceeded on the basis of no rejection levels. [note: 51] As mentioned above at [29], Jeffrey testified that the Plaintiff might have taken the Cargo even without rejection levels.

34 The role of the load port surveyor in a transaction such as the present would be to analyse samples of the Cargo using international standards for the purposes of ascertaining whether or not the Cargo conforms to the contractual specifications (see [6] above). It should first be noted that both parties implicitly accepted that a load port surveyor was necessary for the transaction; the only disagreement was on whether the *identity* of the load port surveyor was important. The Plaintiff's argument was that the choice of load port surveyor was not an essential term of the contract, such that lack of an agreement on this issue could *not* have the effect of rendering the contract unworkable. These were essentially the Plaintiff's reasons:

(a) Since load port surveyors in the coal industry employ an international standard, the results of analysis of the same product taken by any professional, independent and established surveyor employing the same method of sampling and testing are expected to be largely similar. [note: 52]

(b) In the absence of agreement on the identity of the load port surveyor, it would still be possible to perform the contract and the Defendant would still be able to prove that it has complied with its contractual obligations by producing the results of any professional, independent and established load port surveyor showing that the goods conform to the contractual specifications. [note: 53]

35 I do not accept the Plaintiff's contention that the choice of load port surveyor was not an essential term of the contract (*ie*, a term without which the contract cannot be enforced). The Plaintiff's argument that the results of analysis of the same product by any professional, independent and established surveyor would be largely similar is a mere "logical" inference unsupported by any evidence and contradicted by Ben's testimony that "the load port results from different surveyors regardless of whether they're following the same international standards are quite different". [note: 54] This argument is also inconsistent with Satish's testimony that he had bad experiences with PT Carsurin in the past. As Satish stated in cross-examination: [note: 55]

Q Did you---did---did you know of or have any personal bad experience with Carsurin?

A Not in this company. But in my previous companies, yes.

Q With Carsurin?

A Yes.

Q You had issues with?

A Yes.

Q What---what---what sort of issues did you have?

A Well, they have been the ba---the report that they, er, er, get at the load port sometimes one or two shipments we faced the problem at the discharge port, er, *it has been inconsistent*. It had been at that time. That is the reason we've requested Ben if you could---

Q *When you say it's inconsistent, you mean their load port survey was not---not quite accurate? Not good enough?* What---what---what do you mean?

A *In a general way, that's exactly what I'm trying to tell you, yes*.

[emphasis added]

Satish's testimony clearly shows that there may be divergence in the results of different surveyors analysing the same coal. If the Plaintiff's position then is that PT Carsurin produces inconsistent results because it is not a professional, independent and established surveyor, the Plaintiff is still conceding that the identity of the load port surveyor is important because it must comply with the criteria of being "professional, independent and established". The Plaintiff's suggestion that it would still be possible to perform the contract by the Defendant producing the results of any "professional, independent and established" load port surveyor is thus not workable not only because there is no evidence that the results of any "professional, independent and established" surveyor would be equally satisfactory but also because there appears to be no objective way of ascertaining whether or not a particular load port surveyor is "professional, independent and established".

36 The question is then whether or not the parties had reached agreement on the load port surveyor. The Plaintiff contends that the parties agreed that the choice of the load port surveyor would, by default, be PT Carsurin if the Plaintiff's preference for PT Geoservices or PT Sucofindo was not acceptable to PTBA. [note: 56] This arrangement was allegedly discussed and agreed upon at the CoalTrans Meetings. The Plaintiff did not insist on the appointment of their preferred surveyor. [note: 57] The Defendant, however, maintains that the parties never agreed on a default load port surveyor. [note: 58] According to Ben, Satish had informed him at the CoalTrans Meetings that PT Carsurin was not acceptable to the Plaintiff as a surveyor and that the Plaintiff would not agree to a deal if PT Carsurin was appointed as the load port surveyor. [note: 59]

37 Looking at the evidence in totality, it is unlikely that the parties agreed at the CoalTrans Meetings or at any point thereafter that the default load port surveyor would be PT Carsurin if the Plaintiff's request to change the load port surveyor could not be accommodated. Nowhere in the documentary evidence was a default arrangement to use PT Carsurin mentioned. The FCO sent to the Plaintiff on 1 June 2011 only provided that this issue was "[t]o be mutually decided". [note: 60] In fact, Satish's and Jeffrey's e-mails dated 7 June 2011 which acknowledged receipt of the draft contract both seemed to push for the load port surveyor to be changed without more (see [12] above). An e-mail from Satish to Ben dated 8 June 2011 at 10.24am stated: "we appreciate your constant follow up with PTBA and trust that you will continue to endeavor to get either PT Geoservices or PT Sucofindo accepted by PTBA and send us your kind confirmation subsequently". [note: 61] All references to "PT

Carsurin" in the draft contract were amended to "PT Sucofindo / PT Geoservices" by the Plaintiff when it sent back the amended draft contract to the Defendant on 15 June 2011. [note: 62] Moreover, a "without prejudice" e-mail sent by the Plaintiff to the Defendant dated 19 July 2011 asking the Defendant to perform its legal obligations noted that "the surveyor according to the FCO itself was to be mutually decided between the Parties". [note: 63]

38 The Plaintiff's explanation as to why Satish and Jeffrey had not mentioned this default arrangement in their e-mail correspondence was as follows: [note: 64]

> [The Plaintiff] did express a preference for its own choice and naturally, [the Plaintiff] would wish that its choice could prevail. In these circumstances, it is perfectly understandable that Satish and/or Jeffrey, as commercial men, would not have highlighted in their email correspondences [*sic*] explicitly that the default surveyor would be PT Carsurin since they would like [the Defendant] to try and get PTBA to agree to [the Plaintiff's] preferred load port surveyor.

I fail to see how the above explanation proves that there was indeed such a default arrangement between the parties. On the contrary, if Satish and Jeffrey, as commercial men, wanted their choice of load port surveyor to prevail, they would not have told the Defendant at all that they were willing to accept PT Carsurin by default. Had they done so, this would have impaired their chances of getting PTBA to agree to change the load port surveyor. Moreover, if the Plaintiff was indeed prepared to accept PT Carsurin, it was odd that they did not capitulate sooner on this issue, given Satish's and Jeffrey's own understanding that PTBA was likely to adopt a "take it or leave it" attitude regarding the choice of load port surveyor. [note: 65] I also find it telling that there was no allusion whatsoever to any default arrangement regarding the surveyor issue in the parties' correspondence starting from early July 2011, which was the period of time when it was becoming increasingly clear that the Defendant had no intention of performing the shipments and the parties were exchanging many "without prejudice" letters. In fact, counsel for the Defendant highlighted that the Plaintiff had amended its Reply only in late February 2013, eight months after the original Reply was filed, to include the point that there was an agreement that PT Carsurin would be the default surveyor. [note: 66]

39 I also do not accept the Plaintiff's argument that because the Defendant never stated that the Plaintiff's alleged insistence on the load port surveyor was a deal-breaker and never called off the deal to approach other interested buyers, the omission of any such response indicated that there was in fact an agreement between parties that the default surveyor would remain as PT Carsurin. [note: 67] I cannot infer solely from the Defendant's silence the existence of an agreement to use PT Carsurin as the default load port surveyor; the burden of proving this falls on the Plaintiff.

40 Thus, as the term relating to the choice of load port surveyor was essential to the contract but not agreed, the contract is void for uncertainty or, to be more precise, for being incomplete. Even though parties had narrowed down the choice of load port surveyor to PT Casurin, PT Susofindo or PT Geoservices, there was no way to objectively ascertain who the load port surveyor should be as there was no evidence of either an established course of dealing between the parties or trade practice in relation to a choice of a default load port surveyor.

Whether the Defendant is estopped from denying the existence of a contract

Estoppel argument does not overcome problem of uncertainty

41 Having concluded that any agreement formed between the parties for the sale and purchase of the Cargo would be void for lack of an essential term, I find that this also disposes of the Plaintiff's alternative argument based on estoppel by convention and estoppel by representation. Let me explain why.

42 The Plaintiff's argument based on estoppel by convention is as follows. Both parties mistakenly assumed, and acted on the common assumption, that there was a binding agreement between them and that the formal contract was only intended to embody the already concluded agreement. Alternatively, this assumption was made by the Plaintiff and acquiesced to by the Defendant. As a result of such an assumption, the Plaintiff sourced for sub-buyers for the Cargo and it would therefore be unjust to allow the Defendant to aver otherwise. [note: 68]

43 Further, or in the alternative, the Plaintiff argues that there was estoppel by representation as the Defendant's representations had induced the Plaintiff to believe that there was a binding agreement between the parties and the Plaintiff had relied on those representations by sourcing for sub-buyers for the Cargo. [note: 69] The Plaintiff also says that the Defendant is estopped from asserting that it had not agreed to the inclusion of rejection levels. These alleged representations made by the Defendant were express representations or representations in the form of silence when there was an obligation on the Defendant to refute the Plaintiff's assertions, such as Ben's e-mail of 1 July 2011 (see [13] above) wherein the Defendant did not dispute the existence of a binding contract or assert that the issues relating to the load port surveyor and rejection levels were outstanding. [note: 70]

44 One immediate problem with the Plaintiff's arguments as they are formulated is that it is unclear whether they purport to establish conclusions of law or conclusions of fact. In other words, it is unclear whether these arguments purport to establish a binding agreement or merely the *fact* that the Defendant had intended to enter into a binding agreement. The Plaintiff pleaded an estoppel by representation of fact, the effect of which, at the risk of stating the obvious, is to estop a party from denying the relevant fact. Estoppel by convention, on the other hand, is not a discrete category of estoppel of the same order as proprietary estoppel, promissory estoppel and estoppel by representation of fact but is distinguished by the *means* by which responsibility is assumed for the proposition on which the estoppel is founded: Piers Feltham, Daniel Hochberg and Tom Leech, *The Law Relating to Estoppel by Representation: The Original Text By George Spencer Bower* (LexisNexis UK, 4th Ed, 2004) at p 8, para I.2.9. In each case an estoppel by convention will thus be an instance of:

(a) proprietary estoppel (where it concerns rights in or over property);

(b) promissory estoppel (where it concerns a promise); or

(c) estoppel by representation of fact (where it concerns a fact): *ibid*.

In this case it is not clear which of these three categories the alleged estoppel by convention falls into. But it seems to me that the Plaintiff should have pleaded promissory estoppel rather than estoppel by representation of fact, because the Plaintiff was really seeking to prevent the Defendant from going back on an alleged promise or assurance as to its future conduct. A statement as to intention that purports to bind the representor as to the future is in nature a promise and will not, therefore, found an estoppel by representation of fact: *The Law Relating to Estoppel by Representation* at p 31, para II.5.1.

45 However, even if the Plaintiff had pleaded a promissory estoppel, this argument would have failed for want of certainty. The requirement of certainty applies to the doctrine of promissory estoppel as much as it does in contract law. In *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2002] 1 All ER (Comm) 737 ("*Baird*"), one of the claims was that the defendant was estopped from denying that there was an implied contract between the parties. Sir Andrew Morritt V-C rejected this argument, stating at [38]:

> In my view English law, as presently understood, does not enable the creation or recognition by estoppel of an enforceable right of the type and in the circumstances relied on in this case. First it would be necessary for such an obligation to be ***sufficiently certain*** to enable the court to give effect to it. That ***such certainty is required in the field of estoppels*** such as is claimed in this case as well as in contract was indicated by the House of Lords in *Woodhouse AC Israel Cocoa Ltd SA v Nigeria Produce Marketing Co Ltd* [1972] 2 All ER 271, [1972] AC 741 and by Ralph Gibson LJ in *Troop v Gibson* [1986] 1 EGLR 1 at 6. … [emphasis added in bold italics]

Woodhouse AC Israel Cocoa Ltd SA and another v Nigerian Produce Marketing Co Ltd [1972] AC 741 ("*Woodhouse*") was an appeal concerning the alleged variation of existing contractual terms through the parties' correspondence and, alternatively, by virtue of a promissory estoppel. The House of Lords dismissed the appeal and held that if the correspondence was ambiguous or imprecise, the alternative claim based on promissory estoppel would fail. Lord Pearson stated (at 762):

> … In a case of this kind the alleged "representation" or promise or assurance ought to be reasonably clear and definite both as to the terms of the contract which is being waived and as to the duration of the waiver. It may be that the "representation" or promise or assurance has to have at least as much precision as would be needed for a variation of the contract.

Lord Hailsham of St Marylebone LC in *Woodhouse* also doubted whether an ambiguous statement could found an estoppel to vary the contract (at 757):

> … I share the feeling of incredulity expressed by Lord Denning M.R. in the course of his judgment in the instant case when he said [1971] 2 Q.B. 23, 59–60:
>
> > "If the judge be right, it leads to this extraordinary consequence: A letter which is not sufficient to *vary* a contract is, nevertheless, sufficient to work an *estoppel*—which will have the same effect as a *variation*."
>
> [emphasis in original]

46 Thus, my earlier finding that any purported contract for the sale and purchase of the Cargo would be void for uncertainty or for being incomplete as the identity of the load port surveyor was not agreed on between the parties is also fatal to the Plaintiff's alternative arguments based on estoppel.

Estoppel as a shield, not as a sword

47 After the close of the trial and exchange of closing submissions, I was also troubled by the lack of argument on what seemed like an obvious point of controversy, namely, whether the Plaintiff is relying on estoppel as a cause of action in this case and, if so, whether this is permissible under Singapore law. I thus directed parties on 15 August 2013 to file brief further submissions on this point. Having done so, I think it important to make some observations on this issue although this was not strictly necessary, given my conclusion above that the Plaintiff's estoppel argument fails *in limine* for

want of certainty.

48 The Plaintiff in its further submissions argued that the doctrines of estoppel by representation and estoppel by convention can be used to found its cause of action (*ie*, as a "sword"). The alternative argument was that estoppel could be used to preclude the Defendant from denying the existence of the contract or setting up a defence that the FCO was "subject to contract" or that the parties had not agreed on essential terms. [note: 71] The Plaintiff highlighted that an estoppel may be pleaded as a cause of action in Australia and New Zealand, relying in particular on the Australian High Court case of *Waltons Stores (Interstate) Limited v Maher and another* (1988) 164 CLR 387 ("*Waltons Stores*"). To that end, the Plaintiff also relied on the Hong Kong case of *Siegfried Adalbert Unruh v Hans-Joerg Seeberger and another* [2007] HKCFA 10 ("*Siegfried*") where it was stated at [152] that "[t]he doctrine [of estoppel by convention] therefore does not play a wholly defensive role in litigation". However, that this reliance was misplaced becomes evident when one considers the whole paragraph of *Siegfried* from which this sentence was lifted:

> 152. It is clear that, unlike equitable estoppels which create enforceable equitable rights, *an estoppel by convention is not a source of legal obligation*. However, such an estoppel may, in the circumstances of the particular case, *result in an otherwise ineffective or incomplete cause of action being made viable*. The doctrine therefore does not play a wholly defensive role in litigation. [emphasis added]

The above passage merely shows that an estoppel may be used to establish a proposition necessary to complete or make effective a cause of action, which is a less controversial proposition than that an estoppel can be used as a cause of action in itself. For the same reason, the Plaintiff's reliance on the observations of Brandon LJ in *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 131-132 that "while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed" is also misplaced.

49 The Defendant asserted that the Plaintiff was in essence relying on estoppel as a cause of action because the facts giving rise to the cause of action did not exist independently of the estoppel. [note: 72] This was not permissible under Singapore law as well as English law, following *Baird* ([45] *supra*) and *Haden Young Limited v Laing O'Rourke Midlands Limited* [2008] EWHC 1016 (TCC).

50 Singapore courts have not yet accepted the view that an estoppel can be utilised as a cause of action. The Court of Appeal in *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250 stated at [23] that "[i]t is trite law that promissory estoppel can only be used as a shield and not as a sword to enforce any rights". In the case of *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 201 ("*OMG Holdings*"), I also found that the plaintiff in that case could not establish goodwill by virtue of the doctrine of estoppel by convention, as "[e]stoppel cannot be used as a free-standing element to create a cause of action" (at [72]). Counsel for the Plaintiff highlighted that in *OMG Holdings*, authorities such as *Waltons Stores* had not been brought to my attention and thus urged me to reconsider my position in *OMG Holdings*.

5 1 *Waltons Stores* was considered by Steven Chong J in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 2 SLR 311, who distinguished the case on the facts and thus found it unnecessary to decide whether estoppel by convention could be used as a "sword". On appeal, the Court of Appeal, having disposed of the case on contractual grounds, similarly declined to decide on the parties' arguments in relation to the doctrine of promissory estoppel, stating (*OCBC Capital* ([23] *supra*) at [65]):

> … a number of potentially thorny legal issues were raised in relation to the operation of this doctrine [of promissory estoppel] in the Singapore context – all of which will need to be addressed by this court when they arise directly for decision in a future case. …

This echoes the observations by the Court of Appeal in *Tee Soon Kay v Attorney-General* [2007] 3 SLR(R) 133 that whether the doctrine of promissory estoppel could be used as a cause of action in itself was "an issue that is still shrouded in some controversy" (at [114]) and in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 that "the doctrine of promissory estoppel still contains pockets of controversy" such as "whether it can be used as a 'sword'" (at [115]).

52 It is clear from these authorities that whether the Australian position in *Waltons Stores* should be followed in Singapore is still very much an unresolved issue. I am thus reluctant to express a final view on the parties' arguments on this issue, especially those of the Plaintiff. I will, however, state that I found the concern raised by the Defendant to be a very real one, *viz*, that if the Plaintiff were allowed to succeed on its alternative argument based on estoppel, this would lead to a nonsensical result whereby the same facts that were insufficient to give rise to a binding contract could be used to found an estoppel giving rise to a binding contract. [note: 73] The concern raised by this case is thus that if the doctrine of estoppel is extended to confer new rights in the absence of a pre-existing legal relationship, this might become a way for parties to subvert the established rules of contract formation.

Conclusion

53 For the reasons above, I find that there is no binding contract between the parties for the sale and purchase of BA-63 coal. Accordingly, the plaintiff's claim is dismissed. I will hear the parties on costs, including the costs reserved in SUM 1927.

ANNEXURE: CHRONOLOGY OF EVENTS

S/No	Date	Event
1	End May 2011	CoalTrans Meetings in Bali, Indonesia.
2	1 June 2011, 1.05pm	FCO sent by the Defendant to the Plaintiff.
3	1 June 2011	Alleged telephone conversation between Jeffrey and Wee Teck confirming purchase of the Cargo.
4	1 June 2011, 5.01pm	Plaintiff's 1 June 2011 Response E-mail.
5	2 June 2011	Defendant's 2 June 2011 E-mail thanking the Plaintiff for the confirmation.
6	6 June 2011	Alleged telephone conversation between Satish and Ben about the Plaintiff taking steps to sub-sell the Cargo.
7	7 June 2011, 2.38pm	Draft contract sent by the Defendant to the Plaintiff.
8	7 June 2011. 3.17pm and 4.29pm	Reply e-mails from Satish and Jeffrey requesting for rejection levels and a change in load port surveyor.

9	14 June 2011	Alleged telephone conversations between the parties' representatives regarding quality issues.
10	15 June 2011	Draft contract with the Plaintiff's comments sent to Defendant.
11	Second half of June 2011	Alleged telephone conversation between Ben and Satish ending negotiations.
12	30 June 2011	Plaintiff's chaser e-mail to the Defendant requesting for the signed contract.
13	1 July 2011; 11.10am	Plaintiff's second chaser e-mail.
14	1 July 2011; 11.55am	Defendant's reply e-mail regarding possible quality issues.
15	5 July 2011	Plaintiff's e-mail asking the Defendant to perform its contractual obligations.
16	13 July 2011	Defendant's reply e-mail denying the existence of a binding legal contract.
17	1 February 2012	Letter of Demand.

[note: 1] Ben's AEIC dated 18 Mar 2013 at [1]; Transcript dated 12 Apr 2013 at p 7.

[note: 2] Transcript dated 12 Apr 2013 at p 21.

[note: 3] Transcript dated 11 Apr 2013 at p 63; Transcript dated 12 Apr 2013 at p 22.

[note: 4] Transcript dated 11 Apr 2013 at p 69; Transcript dated 12 Apr 2013 at pp 68-69; Plaintiff's Closing Submissions at [136].

[note: 5] Plaintiff's Closing Submissions at [148]; Transcript dated 12 Apr 2013 at p 67.

[note: 6] AB 34-35.

[note: 7] AB 1-2.

[note: 8] AB 3, 60.

[note: 9] AB 60.

[note: 10] AB 59.

[note: 11] Jeffrey's AEIC dated 15 Mar 2013 at [31]-[32]; BP 77-78 (Statement of Claim (Amendment No 1) at [7]).

[note: 12] Satish's AEIC dated 18 Mar 2013 at [32]; BP 78 (Statement of Claim (Amendment No 1)

at [8]).

[note: 13] AB 5, 32, 86.

[note: 14] AB 85.

[note: 15] AB 4-5.

[note: 16] AB 31.

[note: 17] AB 64.

[note: 18] AB 63-64.

[note: 19] AB 63.

[note: 20] Defendant's Opening Statement dated 2 Apr 2013 at [19]; Ben's AEIC dated 18 Mar 2013 at [39].

[note: 21] BP 94 Defence at [12(n)]; Ben's AEIC dated 18 Mar 2013 at [44].

[note: 22] Satish's AEIC dated 18 Mar 2013 at [44]-[45]; Transcript dated 11 Apr 2013 at pp 91-92.

[note: 23] AB 68.

[note: 24] AB 69.

[note: 25] AB 70-72.

[note: 26] Affidavit of Melissa Marie Tan Shu Ling dated 10 Apr 2013 at [4]-[5].

[note: 27] BP 106.

[note: 28] Plaintiff's Closing Submissions at [46].

[note: 29] Plaintiff's Closing Submissions at [55], [127].

[note: 30] Defendant's Closing Submissions at [110], [178].

[note: 31] Plaintiff's Closing Submissions at [129], [135].

[note: 32] Transcript dated 12 Apr 2013 at p 21 line 17, p 22 line 5.

[note: 33] Transcript dated 12 Apr 2013 at p 25 line 16.

[note: 34] AB 35.

[note: 35] AB 2.

[note: 36] Transcript dated 12 Apr 2013 at p 24 line 25, p 27 line 16, p 28 line 7.

[note: 37] See Transcript dated 12 Apr 2013 at p 50; Plaintiff's Closing Submissions at [97], [99], [122].

[note: 38] Defendant's Closing Submissions at [23], [32].

[note: 39] Plaintiff's Closing Submissions at [91].

[note: 40] Plaintiff's Submissions at [134].

[note: 41] Transcript dated 11 Apr 2013 at p 67; Transcript dated 11 Apr 2013 at p 24.

[note: 42] AB 85.

[note: 43] AB 29.

[note: 44] Transcript dated 11 Apr 2013 at pp 62-63.

[note: 45] Transcript dated 11 Apr 2013 at p 107; Transcript dated 12 Apr 2013 at p 40.

[note: 46] Defendant's Closing Submissions at [94]-[104].

[note: 47] See Transcript dated 11 Apr 2013 at p 38.

[note: 48] AB 60.

[note: 49] AB 7, 34.

[note: 50] AB 64.

[note: 51] Transcript dated 12 Apr 2013 at p 70 line 10.

[note: 52] Plaintiff's Closing Submissions at [137].

[note: 53] Plaintiff's Closing Submissions at [138].

[note: 54] Transcript dated 12 Apr 2013 at p 79 line 22-25.

[note: 55] Transcript dated 11 Apr 2013 at pp 97-98.

[note: 56] Plaintiff's Closing Submissions at [14], [135], [139].

[note: 57] Plaintiff's Closing Submissions at [135].

[note: 58] Defendant's Closing Submissions at [132].

[note: 59] Ben's AEIC dated 18 Mar 2013 at [12]; Transcript dated 12 Apr 2013 at pp 80, 83.

[note: 60] AB 3.

[note: 61] AB 28.

[note: 62] AB 40-41.

[note: 63] AB 71.

[note: 64] Plaintiff's Closing Submissions at [140].

[note: 65] Satish's AEIC dated 18 Mar 2013 at [20]; Transcript dated 11 Apr 2013 at p 61.

[note: 66] Transcript dated 11 Apr 2013 at p 102–106; BP 60 (Reply (Amendment No 1) at [6]).

[note: 67] Plaintiff's Closing Submissions at [141].

[note: 68] Plaintiff's Closing Submissions at [160].

[note: 69] Plaintiff's Closing Submissions at [161], [164].

[note: 70] Plaintiff's Closing Submissions at [162].

[note: 71] Plaintiff's Further Submissions dated 22 Aug 2012 at [15].

[note: 72] Defendant's Further Submissions dated 22 Aug 2012 at [14].

[note: 73] Defendant's Further Submissions dated 22 Aug 2013 at [18].

Copyright © Government of Singapore.