IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA(I) 3

Civil Appeal No 46 of 2021

Between

CSDS Aircraft Sales & Leasing Inc

… *Appellant*

And

Singapore Airlines Limited

… *Respondent*

In the matter of SIC/Suit No 4 of 2019

Between

Singapore Airlines Limited

… *Plaintiff*

And

CSDS Aircraft Sales & Leasing Inc

… *Defendant*

JUDGMENT

[Contract — Remedies — Specific performance]
[Contract — Breach]
[Contract — Termination]

Version No 1: 02 Mar 2022 (15:58 hrs)

TABLE OF CONTENTS

INTRODUCTION AND OVERVIEW OF DECISION 1

FACTS 3

THE PARTIES 3

BACKGROUND TO THE DISPUTE 3

THE PARTIES' CASES 6

DECISION BELOW 7

APPLICATION TO AMEND DEFENCE AND COUNTERCLAIM 8

PARTIES' CASES ON APPEAL 9

ISSUES TO BE DETERMINED 10

ISSUE 1: CONSTRUING THE FIRST SET OF PLEADINGS 10

ISSUE 2: EFFECT OF A PLEA FOR SPECIFIC PERFORMANCE ONLY 15

MISCELLANEOUS POINTS 24

CONCLUSION 26

Version No 1: 02 Mar 2022 (15:58 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

CSDS Aircraft Sales & Leasing Inc
v
Singapore Airlines Ltd

[2022] SGCA(I) 3

Court of Appeal — Civil Appeal No 46 of 2021
Andrew Phang Boon Leong JCA, Steven Chong JCA and Beverley Marian McLachlin IJ
18 January 2022

2 March 2022 Judgment reserved.

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

Introduction and overview of decision

1 It is often said that pleadings form the foundation upon which the evidence and arguments in a civil dispute are built. This court has emphasised – time and time again ― the essential function of pleadings. In this appeal, however, a quite different question with regard to pleadings is thrown into sharp focus. Where a plaintiff pleads *solely* for specific performance of a contract in its first set of pleadings, is the plaintiff thereby taken to have affirmed the contract such that the defendant's *prior* repudiatory breaches are waived? In what circumstances can such a plaintiff nevertheless claim thereafter for damages for breach of contract, if at all?

2 To state our conclusion right at the outset, we affirm the Judge's decision below in *Singapore Airlines Ltd v CSDS Aircraft Sales & Leasing Inc* [2021]

5 SLR 26 ("the Judgment") that the respondent, Singapore Airlines Limited ("SIA"), pleaded for specific performance *and*, in the *alternative*, damages for breach of contract in its first set of pleadings. In such circumstances, there was no clear and unequivocal affirmation of the contract. Indeed, this is (perhaps somewhat ironically) precisely what (amongst other things) was also held in the very case which the appellant, CSDS Aircraft Sales & Leasing Inc ("CSDS"), relied upon as a foundational precedent in the present appeal, *viz*, the English Court of Appeal decision of *The Public Trustee v Pearlberg* [1940] 2 KB 1 ("*Pearlberg*") – a point to which we will return (see [27]–[29] below). In the present case, therefore, SIA could and did accept the defendant's repudiatory breaches and validly terminated the contract.

3 Given the position we take with regard to SIA's first set of pleadings, we do not think that it is necessary for us to express a definitive view on the questions at [1] above. That being said, we express our preliminary view that even if a plaintiff pleads *solely* for specific performance of a contract in its first set of pleadings, it is *unlikely* that this circumstance in itself is sufficient to constitute an affirmation of the contract such that the defendant's *prior* repudiatory breaches are waived – not, at least, in any permanent way. Put simply, an election (if any) would be merely procedural and, at best, temporary in nature, and the plaintiff would be free to resile from it at any time. As a result, the plaintiff may still terminate the contract by accepting the defendant's *prior* repudiatory breaches, although in so doing, the plaintiff necessarily abandons his claim for specific performance. Again, we will elaborate upon the reasons for this provisional view below. Let us turn now to the facts and background of the present appeal.

Version No 1: 02 Mar 2022 (15:58 hrs)

Facts

The parties

4 The appellant, CSDS, is a company incorporated in the US and based in California. CSDS carries on the business of, *inter alia*, aircraft sales and leasing.

5 The respondent, SIA, is a company incorporated in Singapore and carries on the business of, *inter alia*, international carriage by air.

Background to the dispute

6 On 19 September 2018, SIA and CSDS entered into an Aircraft Purchase Agreement ("the Agreement") for the sale of one Boeing B777-212 aircraft bearing Manufacturer's Serial Number 30875 ("the Aircraft"). By cl 11 of the Agreement, the governing law was that of England. The purchase price of the Aircraft was US$6.5m. CSDS had paid a deposit of US$250,000 and a sum of US$6.25m remained outstanding ("the Outstanding Sum"). As the delivery date of 15 September 2018 had passed by the time the Agreement was entered into, it is not disputed by the parties that delivery was to take place on a mutually agreed date.

7 CSDS does not now dispute that, following the conclusion of the Agreement, there was a series of dates on which CSDS agreed to make payment of the Outstanding Sum. CSDS also does not challenge the Judge's finding that on at least six of those agreed dates, CSDS did not make payment of the Outstanding Sum. Thereafter, on 23 October 2018, SIA sent a Letter of Demand ("SIA's 23/10/2018 LOD") requiring CSDS to make payment of the Outstanding Sum by 5.00pm on 26 October 2018. In an e-mail by SIA on 26 October 2018 ("SIA's 26/10/2018 E-mail"), SIA recorded an agreement

Version No 1: 02 Mar 2022 (15:58 hrs)

between the parties in which SIA would send out the Bill of Sale ("the BOS") to the escrow agent that day, and CSDS would transfer the funds that night, at the opening of the US day, with confirmation of such payment by close of business on 26 October 2018 (California time). However, CSDS did not make payment of the Outstanding Sum by close of business on 26 October 2018 (California time).

8 On 31 October 2018, SIA instituted proceedings in the High Court. The Writ was endorsed with a Statement of Claim ("the First SOC"). As the exact terms of the First SOC assumed a central role in the arguments of the parties below and on appeal, we set out the relevant paragraphs of the First SOC in full as follows:

> 10. [CSDS] has, to date, failed and/or refused to (i) make payment of the Outstanding Sum or any part thereof to [SIA], and/or (ii) provide evidence that [CSDS] has appointed a process agent in England and that such process agent has agreed to act as agent.
>
> 11. On the other hand, [SIA] is and has at all material times been ready, willing and able to fulfil all its obligations under the Agreement.
>
> 12. By reason of the aforesaid, [SIA] is entitled to specific performance of the Agreement, and payment of the Outstanding Sum from [CSDS].
>
> 13. In the alternative, by reason of [CSDS's] aforesaid breaches of the Agreement, [SIA] has suffered loss and damage.
>
> …
>
> And [SIA] claims:
>
> (i) an order for specific performance by [CSDS] of the Agreement;
>
> (ii) the Outstanding Sum of US$6,250,000;
>
> (iii) in the alternative, damages to be assessed;
>
> …

Version No 1: 02 Mar 2022 (15:58 hrs)

9 On 1 November 2018, 8.25pm (Singapore time), SIA sent a letter to CSDS ("SIA's 1/11/2018 Letter") stating that it was prepared to consider an extension of time for CSDS to complete the purchase of the Aircraft, on the condition that CSDS agree to a number of terms, including payment of the Outstanding Sum by 2 November 2018, 12.00pm (Singapore time). It is not disputed that CSDS did not accept SIA's offer of an extension of time or make payment of the Outstanding Sum by the deadline given.

10 The first set of pleadings (including the First SOC) was served on CSDS on 2 November 2018 (California time). On the same day (California time), CSDS responded to say that "CSDS will perform as per the court filing".

11 On 4 November 2018, SIA's solicitors wrote to CSDS ("DN's 4/11/2018 Letter") stating that as CSDS continued to be in default on its obligation to pay the Outstanding Sum, SIA accepted CSDS's repudiation of the Agreement and terminated the Agreement with immediate effect.

12 On 5 November 2018, SIA amended the Writ and Statement of Claim ("the Second SOC"). In the Second SOC, SIA made amendments to remove its claim for specific performance and added further particulars, *viz*:

(a) On or around 23 October 2018, SIA notified CSDS of its failure to pay the Outstanding Sum.

(b) CSDS's continued failure and/or refusal to make payment of the Outstanding Sum constituted an event of default under cl 16.1(a) of the Agreement and/or a repudiatory breach of the Agreement.

Version No 1: 02 Mar 2022 (15:58 hrs)

(c) On or around 4 November 2018, SIA accepted CSDS's repudiation of the Agreement and, by notice to CSDS, terminated the Agreement with immediate effect.

This second set of pleadings (including the Second SOC) was served on CSDS on 5 November 2018 (California time).

The parties' cases

13 On 13 August 2019, the proceedings were transferred to the Singapore International Commercial Court. Claims and counterclaims arose in relation to the way in which the Agreement came to an end, it being the case of each party that the other was in repudiatory breach, which breach had been accepted.

14 Before the Judge, the central argument advanced by CSDS was that no date for payment and delivery was ever agreed. In the alternative, CSDS relied on *Pearlberg* to argue that service of the first set of pleadings (including the First SOC) by SIA constituted an affirmation of the Agreement with the effect that all *prior* repudiatory breaches by CSDS (if any) were waived. If SIA wanted thereafter to terminate the Agreement for CSDS's non-payment of the Outstanding Sum, it would have had to reimpose a new time limit for CSDS to make payment. SIA did not do so. In the circumstances, CSDS pleaded instead that by DN's 4/11/2018 Letter, SIA was itself in repudiatory breach, which breach CSDS had accepted.

15 On the other hand, SIA disputed CSDS's contention that there were no agreed dates for payment and delivery. SIA argued that CSDS was in repudiatory breach when it failed to make payment of the Outstanding Sum, which repudiatory breach SIA had accepted by way of DN's 4/11/2018 Letter. In so far as CSDS's alternative argument was concerned, SIA argued that as the

Version No 1: 02 Mar 2022 (15:58 hrs)

First SOC had pleaded for specific performance *and*, in the alternative, damages for breach of contract, it was entitled to elect between the alternative remedies at any stage, which it did by way of DN's 4/11/2018 Letter.

Decision below

16 The Judge rejected CSDS's argument that there were no agreed dates for payment and delivery, finding that CSDS did, in fact, agree to a series of dates for payment or release of funds and confirmation with SIA. Despite assurances given by CSDS of payment on the dates in question, no funds were transferred.

17 The Judge was of the view that SIA's 26/10/2018 E-mail provided a final deadline for CSDS to make payment. Consequently, CSDS was in repudiatory breach of the Agreement as at the close of business on 26 October 2018 (California time) which gave rise, at common law, to the right of SIA to accept that repudiation as bringing the contract to an end, regardless of the contractual provisions of cl 16 of the Agreement. Nonetheless, when the period of five business days expired, *ie*, as at the close of business on 2 November 2018 (California time), the Judge was of the view that the non-payment would constitute an "Event of Default". At this point, SIA would have been entitled under cl 16.2, as a matter of contract, whilst the Event of Default was still continuing, to accept the non-payment as a repudiation and give a notice of termination with immediate effect.

18 The Judge found that SIA was not electing to affirm the Agreement when it served the first set of pleadings on 2 November 2018 (California time). Although the primary remedy being sought was specific performance, there was an alternative claim for damages for breach of contract. The Judge found that

Version No 1: 02 Mar 2022 (15:58 hrs)

CSDS's continuing failure to pay when the claim for specific performance was being pursued and before its abandonment was cumulative in its effect as repudiatory conduct which would make DN's 4/11/2018 Letter good as a letter of termination. In any event, subsequent conduct by CSDS after the second set of pleadings was served made it plain that CSDS would not make payment and this also constituted repudiatory conduct, which SIA accepted thereafter.

Application to amend defence and counterclaim

19 Before the hearing of the present appeal, CSDS filed an application for leave to amend its defence and counterclaim. In its application, CSDS sought to amend its defence and counterclaim to include the following:

(a) There was an implied term in the Agreement that SIA had to deliver the BOS to the escrow agent first before CSDS made payment of the Outstanding Sum.

(b) In the alternative, SIA had waived any obligation of CSDS to make payment or provide evidence that funds in the amount of the Outstanding Sum had been released, before the BOS was delivered to the escrow agent.

(c) By seeking specific performance in the First SOC, SIA had elected to affirm the Agreement and waived its right to terminate the Agreement on the basis of any *prior* repudiatory breaches committed by CSDS.

(d) In the alternative, SIA was estopped from denying that it had affirmed the Agreement and waived its right to terminate the Agreement on the basis of any *prior* repudiatory breaches committed by CSDS.

Version No 1: 02 Mar 2022 (15:58 hrs)

20 On 3 December 2021, we dismissed CSDS's application. We found that the proposed amendments at [19(a)], [19(b)] and [19(d)] above were new defences. If allowed, they would constitute a second bite of the cherry and would cause prejudice to SIA which could not be compensated for in costs. In so far as the proposed amendment at [19(c)] above was concerned, it was already before the court and could be canvassed on appeal without the need for any amendment of the pleadings. Given our findings, and as we pointed out to the parties at the commencement of the oral hearing of the appeal, certain arguments (such as that on estoppel) would no longer stand.

Parties' cases on appeal

21 On appeal, CSDS avers that the Judge erred in finding that SIA's first set of pleadings contained an alternative claim for damages for breach of contract, as the phrase "damages to be assessed" in the First SOC referred merely to damages ancillary to the claim for specific performance. Consequently, CSDS submits that the effect of service of the first set of pleadings on CSDS is that SIA elected to affirm the Agreement and waived *prior* repudiatory breaches by CSDS. Absent evidence of a fresh repudiatory breach by CSDS or evidence that CSDS would not perform the contract, which CSDS contends did not exist, SIA would not be able to terminate the Agreement and seek damages on the basis of CSDS's repudiatory breach (as there was simply no such repudiatory breach to begin with).

22 SIA, on the other hand, submits that this court should affirm the Judge's decision. Not only did the first set of pleadings contain on its face an alternative claim for damages for breach of contract, SIA makes the further point that when construed in its proper context – and, in particular, the repeated delays and default by CSDS to transfer or tender the Outstanding Sum – it was clear that

Version No 1: 02 Mar 2022 (15:58 hrs)

the first set of pleadings contained such an alternative claim. This brings the present case outside the scope of *Pearlberg* and this is, SIA submits, sufficient to dispose of the appeal.

Issues to be determined

23 Based on the parties' arguments, there are two key issues before this court:

(a) First, did the Judge err in finding that SIA's first set of pleadings contained an alternative claim for damages for breach of contract and consequently that there was no affirmation of the Agreement?

(b) Second, if the Judge erred, is the effect of a plea for *specific performance only* that SIA is taken to have affirmed the Agreement such that CSDS's *prior* repudiatory breaches are waived?

Issue 1: Construing the first set of pleadings

24 As the Judge noted, the relevant principles of election and affirmation are not in dispute as between the parties (see the Judgment at [80]). In the House of Lords decision of *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391 ("*The Kanchenjunga*"), Lord Goff of Chieveley helpfully clarified the various senses of "waiver". In particular, he observed (at 397–398) that:

> It is a commonplace that the expression "waiver" is one which may, in law, bear different meanings. In particular, it may refer to a forbearance from exercising a right ***or*** to an *abandonment* of a right. Here we are concerned with waiver in the sense of abandonment of a right which arises by virtue of a party making an election. Election itself is a concept which may be relevant in more tha[n] one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in

Version No 1: 02 Mar 2022 (15:58 hrs)

> which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. Characteristically, this state of affairs arises where the other party has repudiated the contract or has otherwise committed a breach of the contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform to the terms of the contract. … In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it. … In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him – for example, to determine a contract or alternatively to affirm it – he is held to have made his election accordingly … But of course an election need not be made in this way. It can be communicated to the other party by words or conduct; though, perhaps *because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms* … Once an election is made, however, it is final and binding … Moreover, it does not require consideration to support it … [emphasis added in italics and bold italics]

25 In the present case, we are concerned with waiver in the sense of *abandonment* of a right which arises by virtue of a party making an election. CSDS's case is that SIA, by serving the first set of pleadings, must be taken in law to have elected *not* to terminate the Agreement on the basis of CSDS's *prior* repudiatory breaches (choosing, instead, to affirm it), thereby waiving or *abandoning* its right to do so. As Lord Goff took pains to emphasise (at 398), "because a party who elects not to exercise a right which has become available to him is *abandoning* that right, he will *only* be held to have done so if he has so communicated his election to the other party in *clear and unequivocal terms*" [emphasis added]. The key question therefore is whether there had been the necessary unequivocal representation by SIA in *abandoning* its right to elect to

Version No 1: 02 Mar 2022 (15:58 hrs)

terminate the Agreement on the basis of CSDS's *prior* repudiatory breaches (thereby *choosing* to *affirm* the Agreement), when it served the first set of pleadings.

26 The Judge held that SIA was *not* electing to affirm the Agreement when it served the first set of pleadings, but was leaving its options open to terminate the Agreement and claim damages for breach of contract (see the Judgment at [92]). We are of the view that the Judge was right in arriving at this conclusion.

27 Looking at paras 10–13 of the First SOC (see [8] above), it is clear to us that there was *an* ***alternative claim*** *for damages for breach of contract*. At para 13 of the First SOC, the claim for loss and damage was said to be for "[CSDS's] aforesaid breaches of the Agreement", which must refer to the breaches of the Agreement by CSDS as set out at para 10 of the First SOC. In addition, the structure in which the prayer for relief was pleaded puts it beyond doubt that the damages claimed was "in the *alternative*" to an order for specific performance and, for that matter, a claim for the Outstanding Sum. In the circumstances, we agree with the Judge that the present case is unlike *Pearlberg*. Here, the alternative damages claim was *not* tied completely to the claim for specific performance. It is apposite, at this particular juncture, to note that, in addition to the main issue that was before the court in *Pearlberg* (as to which, see [36]–[40] below), there are also relevant observations by all the judges in that case which in fact *support* the ***legal*** *proposition* that where there is a claim for specific performance *as well as an* ***alternative claim*** *for damages for breach of contract*, ***no*** *election* of the type argued for by CSDS in the present case would be found. Slesser LJ, for example, observed as follows (at 11):

> If the writ is equivocal in nature, whereby a statement of claim claiming rescission could be made on a writ for specific performance, I think there would be force in the argument that

Version No 1: 02 Mar 2022 (15:58 hrs)

> such a writ did not necessarily involve action on the contract, and an assumption of its existence …

Indeed, during oral submissions, Slesser LJ posed the following question (at 4) to counsel for the successful appellant in that case, who comprised A T Denning KC (later Lord Denning) (with D Weitzman assisting): "If a writ claimed specific performance ***or alternatively*** *rescission*, could the vendor be said to have *affirmed* the contract?" [emphasis added in italics and bold italics] – to which counsel responded with an unequivocal "No".

28 Luxmoore LJ observed thus (at 19):

> I agree that *if the writ is equivocal and there is a claim for specific performance with* ***an alternative claim*** *for rescission, the vendor has* ***not*** *in fact made a definite choice in favour of the enforcement of the contract.* [emphasis added in italics and bold italics]

29 Finally, Goddard LJ (as he then was) stated as follows (at 24):

> *No one doubts* that a plaintiff in an action for specific performance ***can*** *claim* ***the alternative remedy*** *of rescission: but that is no more than saying that if the Court, for any reason, thinks that though the defendant is in default, specific performance cannot be granted, then the plaintiff asks that it may be declared that he can rescind the contract and exercise his rights of forfeiture.* ***No inconsistent position*** *arises because, if the judgment is for rescission, it follows* ex hypothesi *that the claim for specific performance is thereby ended.* [emphasis added in italics and bold italics]

30 Counsel for CSDS pointed us to the Supreme Court of Canada decision of *Dobson v Winton and Robins Ltd* [1959] SCR 775, which states that a plaintiff suing in the alternative for specific performance or damages must make sure that his claim for damages is identifiable as one at common law for breach of contract, lest his claim for damages be treated as if it were made in substitution for or as an appendage to the equitable remedy of specific performance. However, we do not, with respect, think that this takes CSDS very

Version No 1: 02 Mar 2022 (15:58 hrs)

far. As we have found above, the First SOC was clear in identifying SIA's claim for damages as one at common law for breach of contract. There is no indication on its face that the claim for damages was merely ancillary to the claim for specific performance. We emphasise – once again – that there was clearly an *alternative* claim for damages for breach of contract and that, consequently, there could have been no clear and unequivocal election by SIA to affirm the Agreement.

31 CSDS also submits that the amendments made in the second set of pleadings (see [12] above) show that the first set of pleadings was indeed an unequivocal election by SIA to affirm the Agreement. CSDS highlights the fact that, unlike in the Second SOC, there was no reference in the First SOC to a "repudiatory" breach or acceptance of that repudiatory breach. However, we note that it is for CSDS to prove that SIA had communicated its election to affirm the Agreement in clear and unequivocal terms. Even if we were to accept that SIA could have been clearer in stating that the breach was of a repudiatory nature and providing further particulars of the breach in the Second SOC, this does not detract from our finding that the *substance* of the first set of pleadings contained a plea for damages for breach of contract in the alternative and it cannot be said that there was at any point a clear and unequivocal election by SIA to affirm the Agreement.

32 CSDS also highlights that there was no acceptance by SIA of any repudiatory breach by CSDS as at the time of service of the first set of pleadings. On SIA's case, this only came later by way of DN's 4/11/2018 Letter. We do not think that this brings CSDS very far. Even if the plea for damages for breach of contract in the alternative was deficient in some way, *eg*, because SIA had not accepted CSDS's repudiatory breach at the time, it does not follow that the

Version No 1: 02 Mar 2022 (15:58 hrs)

representation by SIA was thereby unequivocal in making a plea for *specific performance only*. On the contrary, we are of the view that SIA's not having accepted CSDS's repudiatory breach at the time of service of the first set of pleadings supports the Judge's finding that SIA was leaving its options open (see [26] above). Indeed, if SIA had accepted CSDS's repudiatory breach by that time, it would not have been open to SIA to seek specific performance.

33 For all the above reasons, we do not see any reason to interfere with the Judge's finding that the first set of pleadings contained an *alternative* claim for damages for breach of contract and, consequently, that there was *no* affirmation of the Agreement. At its highest, the amendments made in the second set of pleadings show that there was some ambiguity as at the time of the first set of pleadings as to whether SIA was electing for damages for breach of contract. Yet, this is not inconsistent with the Judge's finding that SIA was leaving its options open by pleading for specific performance and damages for breach of contract in the alternative. Put another way, SIA had *not* elected or chosen between the two alternative and inconsistent courses of action open to it – to determine the Agreement or, alternatively, to affirm it at the time of service of the first set of pleadings. SIA only made such an election or choice when it wrote to CSDS by DN's 4/11/2018 Letter.

Issue 2: Effect of a plea for specific performance only

34 Notwithstanding our findings above that the first set of pleadings contained a plea for specific performance *and* damages for breach of contract in the *alternative*, we proceed to discuss the following proposition ("the Proposition"): CSDS's argument that, assuming SIA's first set of pleadings contained a plea for *specific performance only* (which, we should emphasise, we have already found *not* to be the case on the facts and circumstances), based

Version No 1: 02 Mar 2022 (15:58 hrs)

on the authorities, SIA would be taken in law to have affirmed the Agreement with the effect that all *prior* repudiatory breaches by CSDS would be waived.

35 We express our ***preliminary*** *view (only)* that it is not at all clear that the authorities as they stand take this position, and in so far as they do, we are ***not*** persuaded that it ought to be the case that, as a matter of course, instituting a suit for *specific performance only* would *necessarily* constitute an affirmation of the contract without more. Consistent with our earlier analysis, we are of the view that the key question remains as follows: whether, on the first set of pleadings, there had been an unequivocal representation by SIA to affirm (hence, waiving the *prior* breaches by CSDS). Let us elaborate. However, before proceeding to do so, it is important to reiterate that we are using the concept of "waiver" in the second sense as explained by Lord Goff in *The Kanchenjunga* (see [24] above), *viz*, as evincing the *total* ***abandonment*** of the right concerned (here, the right to terminate the contract for *prior* breaches committed by the other party).

36 The starting point in the analysis of the authorities is *Pearlberg*, which CSDS relies on for the Proposition. A brief summary of the facts in *Pearlberg* is apposite. The contract in that case was for the sale and purchase of a freehold cotton-mill. When the date for completion had passed (with the purchaser not having made payment), the executor of the vendor (as the vendor had passed away by this time) issued a writ on 9 November 1932, for specific performance of the agreement and, in addition or in substitution, damages. The writ was served on 4 July 1933, and appearance was entered on 12 July 1933. No proceedings on the writ were ever taken, but it was never taken off the file and remained operative, though dormant at all material times. On 13 October 1933, the executor gave notice to the purchaser that unless payment was made within

Version No 1: 02 Mar 2022 (15:58 hrs)

14 days, the contract would be terminated and the deposit forfeited. On 28 October 1933, the executor gave notice purporting to terminate the contract and forfeit the deposit.

37 Each of the members of the Court of Appeal delivered a separate judgment. That being said, all three members of the court decided the case on the basis that the notices in October 1933 were bad or ineffectual as there was an action for specific performance still pending. This was sufficient to decide the case.

38 What is more interesting is what each of the three learned Lords Justices commented, by way of *obiter dicta*, with regard to the effect of bringing an action for *specific performance only, without more*. Luxmoore LJ took the view that bringing such an action implies an affirmation of the contract (see *Pearlberg* at 18). While Slesser LJ did not put it in such terms, he took the view that bringing such an action is an assertion by the plaintiff as to the existence of the contract and that the defendant is still not out of time to complete it (see *Pearlberg* at 11–12). Goddard LJ appeared to express a similar view: where an action for specific performance is an assertion by the vendor that he or she regards the contract as subsisting, he or she cannot terminate the contract *unless* he or she resiles from this position by discontinuing the action (see *Pearlberg* at 22–23). As such, a reading of the observations of all three Lords Justices appears to provide some support for the Proposition. This is grounded on their views as to the nature of a plea for *specific performance only* as being an assertion by the vendor as to the continuation of the contract, at a time when the vendor could have terminated it for breach by the purchaser.

39 At this juncture, we highlight once again that these observations by the three Lords Justices were purely *obiter dicta*, and were thus not essential to the

Version No 1: 02 Mar 2022 (15:58 hrs)

decision in *Pearlberg*. We say this because the decision turned on the validity of the notices in October 1933 while there was still a pending action for specific performance. There was, strictly speaking, no need to consider the effect of an action for *specific performance only* on the right of the vendor to terminate. Even so, we note that the court in *Pearlberg* did not exclude such a possibility, *ie*, of the vendor terminating, though some of the members of the court did suggest that termination had to be done on the basis of a *further*, *fresh* or *continuing* breach. For instance, Luxmoore LJ (*Pearlberg* at 19) suggested that the vendor needed to fix a new time for completion, while Goddard LJ (*Pearlberg* at 23) stated that the vendor needed to show that the purchaser was still at fault. We emphasise that only Luxmoore LJ linked the bringing of an action in *specific performance only* to an affirmation of the contract. Even then, Luxmoore LJ did not go further to link it to a waiver of *prior* breaches by the purchaser. None of the three Lords Justices also made express the distinction between *past* and *further*, *fresh* or *continuing* breaches, and none made clear that only the latter could give rise to a right to terminate on the part of the vendor after the institution of an action for *specific performance only*.

40 In light of the above, we do not think that the Proposition is at all settled. The *ratio decidendi* of *Pearlberg* is that a notice to terminate while there is still in existence a plea for specific performance is bad or ineffectual. The decision in *Pearlberg* did not turn on the legal effect of a plea for *specific performance only*, *ie*, whether it will *always* constitute an affirmation of the contract and a waiver of *prior* breaches committed by the other party, with the effect that a termination of the contract thereafter requires *further*, *fresh* or *continuing* breaches.

Version No 1: 02 Mar 2022 (15:58 hrs)

41 The next authority we consider is the House of Lords decision of *Johnson and another v Agnew* [1980] AC 367 ("*Johnson v Agnew*"). *Johnson v Agnew* involved a contract for the sale of land. When the purchaser failed to complete, the vendors issued a writ claiming specific performance and damages in lieu of or in addition thereto and, alternatively, a declaration that the vendors were no longer bound to perform the contract and for further relief. Summary judgment for specific performance was entered in favour of the vendors. The issue that arose was whether, after an order for specific performance had been made, the vendors could proceed to ask the court to permit them to accept the purchaser's repudiation, declare the contract to be terminated and recover damages for breach of contract. The House of Lords answered the question in the affirmative.

42 Notably, Lord Wilberforce, with whom the other Law Lords agreed, drew a distinction between two courses of action which a vendor can take if a purchaser fails to complete. In the first course of action, *viz*, when the vendor chooses to put an end to the contract by accepting the purchaser's repudiation, he or she cannot afterwards seek specific performance. In the second course of action, however, when the vendor seeks from the court an order for specific performance, Lord Wilberforce stated that a vendor may quite well thereafter, if specific performance fails to be realised, say, "Very well, then, the contract should be regarded as terminated". On the facts of *Johnson v Agnew*, when specific performance failed to be realised even after summary judgment, action was taken by the vendors' mortgagees to sell the properties. The House of Lords found that the vendors were entitled thereafter to seek a declaration that the contract was terminated and an inquiry as to damages. Lord Wilberforce explained that "[a] vendor who seeks (and gets) specific performance is merely electing for a course which may or may not lead to implementation of the

Version No 1: 02 Mar 2022 (15:58 hrs)

contract – what he elects for is not eternal and unconditional affirmation, but a continuance of the contract under control of the court which control involves the power, in certain events, to terminate it" (*Johnson v Agnew* at 398).

43 We are of the view that Lord Wilberforce's characterisation of a plea for specific performance in *Johnson v Agnew* is, with respect, slightly more nuanced than that of the three Lords Justices in *Pearlberg* (see [38] above). By adopting the view that a plea for specific performance was a decision *provisionally* to keep the contract alive, Lord Wilberforce (*Johnson v Agnew* at 398–399) stated that there was no election of an eternal and unconditional affirmation of the contract. A vendor could still seek to terminate the contract and claim damages for breach, even after an order for specific performance had been granted. That being said, we acknowledge that Lord Wilberforce did not directly address the question of whether a plea for *specific performance only* constitutes an affirmation of the contract in the more limited sense, *viz*, to waive *prior* repudiatory breaches of the defaulting party.

44 Given our view that the cases cited by CSDS do not directly address the Proposition and, in so far as they do, are purely *obiter dicta*, we proceed to express our preliminary views as to the Proposition.

45 The starting point of the inquiry should remain the principles of election and affirmation of a contract. As Lord Wilberforce stated in *Johnson v Agnew* at 398, "[e]lection, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity". To resolve the Proposition, therefore, one has to ask the question: where a party pleads for *specific performance only*, has there been such an unequivocal representation to affirm the contract and waive *prior* breaches committed by the other party?

Version No 1: 02 Mar 2022 (15:58 hrs)

46 We are of the view that, in order for the court to determine whether there has indeed been an affirmation of the contract (and, hence, a waiver of the *prior* breaches committed by the other party), much would depend on the facts and circumstances of each case. We do not preclude the possibility that there may well be an election where the factual background coupled with the institution of an action for *specific performance only* creates a situation from which affirmation of the contract in the sense of waiver of *prior* breaches must follow in such a manner that such an election is irrevocable. Equally, even if the institution of an action for *specific performance only* does not *initially* constitute an affirmation of the contract, subsequent communication to the other party by words or conduct may, depending on the precise facts and circumstances, create a situation from which the party instituting the action would be taken in law to have affirmed and to have waived *prior* repudiatory breaches by the other party.

47 In the present case, however, we do not think that there was such an affirmation of the Agreement, even if we were to assume that SIA's first set of pleadings contained a plea for *specific performance only*. A relevant and substantial argument, repeated before this court during oral arguments, is that the non-completion of the Agreement was due to the default of CSDS. Prior to the institution of the action for specific performance, there were at least six agreed dates on which CSDS failed to tender payment (see [7] above). As the Judge pointed out (see the Judgment at [45]) and as SIA emphasised on appeal (see [22] above), there was a history of delay, prevarication and procrastination on the part of CSDS. In so far as there was any ambiguity occasioned by the First SOC, it is not disputed that SIA was entitled to leave its options open and plead its remedies in the alternative. In any event, SIA elected between the options shortly thereafter when it accepted CSDS's repudiatory breach and terminated the Agreement via DN's 4/11/2018 Letter. This is not a situation

Version No 1: 02 Mar 2022 (15:58 hrs)

where any inequity can be said to arise from SIA's actions and we had also rejected CSDS's belated argument of estoppel (see [20] above). What is also clear is that at no point in time did CSDS tender payment of the Outstanding Sum, nor is there even evidence that CSDS was in a position to do so. On its own case, CSDS could only obtain finance if SIA first delivered the BOS to the escrow agent, but this was not a term which the Agreement provided for. As such, none of the surrounding circumstances can support CSDS's case that SIA had affirmed the Agreement and had waived CSDS's *prior* repudiatory breaches at the time of service of the first set of pleadings.

48 What remains to support CSDS's case of affirmation is SIA's first set of pleadings. Even if we were to accept that it contained a plea for *specific performance only*, we agree with Lord Wilberforce's characterisation that it is at its highest a decision *provisionally* to keep the contract alive (see [43] above). It is certainly not disputed that a vendor may proceed by action for the remedies of specific performance and damages in the *alternative* (see *Johnson v Agnew* at 392). It is also uncontroversial that a party may well put in a plea for specific performance first, and then amend and add or substitute a plea for damages (*per* Lord Atkin in the House of Lords decision of *United Australia Limited v Barclays Bank Limited* [1941] AC 1 at 29). In light of the above, we express the ***preliminary*** view that it is *unlikely* that the mere institution of an action for *specific performance only* is sufficient, *in and of itself*, to constitute an affirmation of the contract such that the defendant's *prior* repudiatory breaches are waived. Certainly, it should not be the case that the mere institution of an action for *specific performance only* constitutes an affirmation of the contract in the sense of waiving the defendant's *prior* repudiatory breaches ***in all situations***. Applied to the present case and assuming that SIA's first set of pleadings contained a plea for *specific performance only* (which, once again,

Version No 1: 02 Mar 2022 (15:58 hrs)

was *not* the situation on the facts before us), we are of the view that there was no such affirmation of the Agreement by SIA. Something more would be required to make it unjust to CSDS, in the circumstances then existing, before we would be prepared to find that SIA had elected to affirm.

49 In summary, even if we were to agree with CSDS that SIA's first set of pleadings contained a plea for *specific performance only* (which, it bears repeating, we found was *not*, in fact, the case here), we would *not* have found in favour of CSDS that SIA had affirmed the Agreement with the effect that all *prior* repudiatory breaches by CSDS had been waived. We thereby affirm the Judge's decision that CSDS was in repudiatory breach of the Agreement as at close of business on 26 October 2018 (California time), which repudiatory breach was accepted by DN's 4/11/2018 Letter (see [17]–[18] above).

50 At this juncture, we deal with a further issue which arises in the event that we agree with CSDS that SIA affirmed the Agreement and waived *prior* repudiatory breaches by CSDS when it served the first set of pleadings (which, for the avoidance of doubt, we do *not*). The issue relates to the circumstances that would justify SIA terminating the Agreement. CSDS submits that it is necessary for SIA to reimpose a new time limit for CSDS to make payment. In so far as CSDS is saying that this is the *only* way in which a right to terminate on the part of SIA could arise, we are unable to agree with the breadth of this proposition. This is just *one* of the actions which might give rise to a right to terminate. This finds support in the High Court of Australia decision of *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 460–462, which stands for the proposition that where a purchaser (here, CSDS) commits a further breach of contract or evinces an intention never to complete, the vendor (here,

Version No 1: 02 Mar 2022 (15:58 hrs)

SIA) may terminate the contract, notwithstanding the earlier institution of an action for specific performance by the vendor.

51 In the present case, we agree with the Judge that after service of the second set of pleadings, CSDS's conduct in making it plain that it would only make payment if SIA first delivered the BOS to the escrow agent, was an insistence on a non-contractual requirement which evinced a clear intention not to perform the Agreement based on its contractual terms (see the Judgment at [98]). In the circumstances and given that we had also rejected CSDS's belated arguments of implied term and waiver (see [19(a)]–[19(b)] and [20] above), this amounted to repudiatory conduct on the part of CSDS, which entitled SIA to terminate the Agreement. We see no reason to interfere with the Judge's decision in this regard that there were, in fact, fresh breaches committed by CSDS after the service of the second set of pleadings, entitling SIA to terminate.

Miscellaneous points

52 We mention briefly several other points canvassed by parties in the proceedings below and on appeal. In so far as CSDS maintains that there were no clear agreed dates for payment and delivery, we affirm the Judge's decision that there were such agreed dates for payment and delivery and, in particular, that SIA's 26/10/2018 E-mail provided a final deadline for payment. We also find CSDS's further contention that the deadlines given for payment were unreasonable to be without merit, particularly when these deadlines (for example, the deadline in SIA's 26/10/2018 E-mail) were provided by or agreed to by CSDS. Consequently, we affirm the Judge's decision that as at close of business on 26 October 2018 (California time), CSDS was in repudiatory breach of the Agreement which gave rise, *at common law*, to the right of SIA to accept that repudiation as bringing the contract to an end. As mentioned earlier, SIA

Version No 1: 02 Mar 2022 (15:58 hrs)

accepted that repudiation and terminated the Agreement by DN's 4/11/2018 Letter.

53 We also affirm the Judge's finding that SIA's 23/10/2018 LOD complied with the notice requirement in cl 16.1 of the Agreement in complaining that payment had not been made (see the Judgment at [46]) and that this would have entitled SIA, *as a matter of contract*, to accept CSDS's non-payment as a repudiation and give a notice of termination after close of business on 2 November 2018 (California time). We do not accept CSDS's contention that SIA's 26/10/2018 E-mail, or for that matter, SIA's 1/11/2018 Letter, nullified the notice of non-payment, *viz*, SIA's 23/10/2018 LOD. We are also unable to accept CSDS's contention that SIA failed to follow up with a notice of termination as required in cl 16.2 of the Agreement. We affirm the Judge's finding that DN's 4/11/2018 Letter was good as a letter of termination (see the Judgment at [97]), whether at common law or as a matter of contract.

54 For completeness, we affirm the Judge's finding that CSDS was in any event in repudiatory breach of the Agreement after the second set of pleadings was served, which SIA had accepted thereafter. In the circumstances, we also agree with the Judge that CSDS's counterclaim must fail. On the question of the return of the deposit, we see no reason to disturb the Judge's decision on this issue, *ie*, that it will have to await another day (see the Judgment at [105]).

Version No 1: 02 Mar 2022 (15:58 hrs)

Conclusion

55 For the foregoing reasons, we dismiss the appeal. We order CSDS to pay the sum of $70,000 (all-in) to SIA as the costs of the appeal. The usual consequential orders will apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Beverley Marian McLachlin
International Judge

Shobna Chandran, Yong Manling Jasmine, Muhammad Taufiq bin Suraidi and Thaddaeus Aaron Tan Yong Zhong (Tan Rajah & Cheah) for the appellant;
Stephen Houseman QC (instructed), Tan Teck San Kelvin, Choy Wai Kit Victor and Yip Ting Yuan Darren (Drew & Napier LLC) for the respondent.

Version No 1: 02 Mar 2022 (15:58 hrs)