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

[2024] SGHC 285

Originating Claim No 82 of 2022

Between

ISU Specialty Chemical Co Ltd

… *Claimant*

And

C&D (Singapore) Business Pte Ltd

… *Defendant*

JUDGMENT

[Contract — Formation — Offer]

ISU Specialty Chemical Co Ltd
v
C&D (Singapore) Business Pte Ltd

[2024] SGHC 285

General Division of the High Court — Originating Claim No 82 of 2022
Choo Han Teck J
6, 7, 16, 20 August, 24 September 2024

6 November 2024 Judgment reserved

Choo Han Teck J:

1 ISU Exachem Co Ltd ("ISU") and the claimant are South Korean companies in the wholesale business of trading in liquid fuel and related products. On 25 January 2024, ISU and the claimant entered into a spin-off merger agreement, which was carried out on 2 April 2024. Pursuant to that agreement, all of ISU's rights and obligations were effectively transferred to and assumed by the claimant, including ISU's entitlement to pursue the present claim. The defendant is a Singaporean company in the business of the wholesale trade of a variety of goods without a dominant product.

2 Between July 2020 to January 2021, the defendant had purchased Light Cycle Oil ("LCO") from ISU on six occasions ("the six previous transactions"). On each of these six occasions, a contract for the sale of 300,000 barrels of LCO was negotiated and concluded between Oh Jung Hak ("John Wu"), an agent acting on behalf of ISU, and Ke Rulai ("Jason Ke"), the defendant's

representative. The first five transactions were done by way of tender — Jason Ke would tell John Wu the defendant's bid price, and ISU would then tender a bid to Hyundai Oil Singapore Pte Ltd ("Hyundai Singapore") for the barrels of LCO. The final transaction, concerning barrels of LCO to be delivered in February 2021 ("the February cargo"), was carried out through private negotiations, the details of which I shall address later.

3 Between January and February 2021, ISU and the defendant discussed the sale of 300,000 barrels of LCO from the former to the latter, to be delivered in March 2021 ("the March cargo"). Jason Ke had initiated the discussion to take part in the tender for the March cargo. He subsequently told John Wu to hold off offering a bid price, but eventually caused the defendant to offer ISU an FOB price of US$7.70/BBL for the March cargo on 27 January 2021. On the same day, ISU submitted a bid to Hyundai Singapore for the March cargo at an FOB price of US$6.20/BBL. This was the defendant's offer of US$7.70/BBL, which included a profit of US$1.50 (which ISU would take). ISU's bid failed. However, John Wu remained keen to continue private negotiations with Hyundai Oilbank Co Ltd ("Hyundai Korea") for the March cargo. Hyundai Korea is the parent company of Hyundai Singapore, and the manufacturer of the LCO sold by Hyundai Singapore. On 28 January 2021, John Wu (on ISU's behalf) began encouraging Jason Ke to buy the March cargo, and the parties started discussing over WeChat and voice calls. The key dispute is whether these discussions resulted in the formation of a contract of sale between ISU and the defendant.

4 The claimant's case is that discussions between John Wu and Jason Ke culminated in an oral contract for the purchase of the March cargo. Specifically, over two phone calls with John Wu at 3:48pm and 3:54pm on 2 February 2021,

Jason Ke offered to purchase the March cargo at a cost, insurance and freight ("CIF") price of US$8.50/BBL above Mean of Platts Singapore ("MOPS") for March. MOPS is the price based on the average price of Singapore-based oil product prices of the entire month, usually published in the following month by Platts. Hence the MOPS price for March would be published in April. Jason Ke offered to purchase the March cargo, knowing that ISU would subsequently make a back-to-back offer to Hyundai Korea. ISU proceeded to do so, and consequently, on 3 February 2021, this offer was accepted by Hyundai Korea for the sum of US$20,846,796.83. According to the claimant, that constituted automatic acceptance of the defendant's back-to-back offer, and thus, a contract. The claimant further alleges that on 11 March 2021, the defendant repudiated the contract by denying that the contract existed. The claimant now seeks damages amounting to US$1,667,507.91, having taken steps to mitigate its losses by selling the March cargo to Wisope Energy International Pte Ltd ("Wisope") instead.

5 The defendant denies that Jason Ke had made any such offer to John Wu, and therefore, there was no contract between it and the claimant. It claims that John Wu, driven by personal interest, sought to represent to both parties that a contract for the March cargo had been concluded. The defendant also makes a counterclaim for US$33,947.61, for legal costs incurred pursuant to abortive arbitration proceedings which it says ISU wrongfully commenced.

6 It is clear that the parties discussed the March cargo on 2 February 2021 over the phone. This much was admitted by both John Wu and Jason Ke. What is disputed is the contents of the call(s) regarding the March cargo. The claimant alleges that Jason Ke had made an offer to purchase the March cargo at a CIF price of US$8.50 above MOPS. In reply, the defendant claims that on

2 February 2021, Jason Ke told John Wu that the defendant could not discuss the purchase of the March cargo at that point, but could do so after the Spring Festival. The defendant would also have to consider tender results from another Korean refinery, GS Caltex Corporation ("GS") which would be released on 4 February 2021. However, Jason Ke did indicate that the defendant was open to a March shipment with shipment dates between 26–30 March 2021. They did not discuss price or any other terms in the call. The issue before me is which version is more probable.

ISU's sales of LCO are done on a back-to-back basis

7 I start by determining the nature of the sales of LCO concluded between ISU and the defendant. The claimant says that ISU's business model for LCO sales was to engage in back-to-back trades as a middleman between a refinery and a buyer (a "refinery middleman"). This means that once ISU received an offer or acceptance from a buyer (in this case, the defendant), ISU would make an offer to the refinery (in this case, either Hyundai Singapore or Hyundai Korea). Conversely, if ISU did not receive any offer or acceptance from a buyer, ISU would not make an offer to the refinery. And if the refinery did not accept ISU's offer, no contract would be formed between ISU and the buyer. This arrangement, says the claimant, is market practice in the LCO industry and was also how ISU and the defendant did business in the six previous transactions. The defendant disagrees, saying that the discussions for the March cargo took place in the context of a private negotiation and not by tender. The defendant says that market practice applies only to a contract by tender, and does not apply to the March cargo. Therefore, there could be no presumption of any back-to-back deal or automatic acceptance of the defendant's alleged offer (or acceptance) upon ISU entering into a deal with Hyundai Korea. In any event,

before the defendant had entered into its first transaction for an LCO cargo with ISU around July 2020, Jason Ke called Son Jungkyu, ISU's representative, to explain that all transactions had to be confirmed by email, *ie*, any deal recap sent by ISU to the defendant would have to be confirmed by the defendant for there to be a contract. Hence, ISU knew from the beginning that unless the defendant provided an email confirmation, there would be no agreement to purchase any LCO cargo. ISU and the defendant thus could not have concluded deals on a back-to-back basis.

8 I find that ISU and the defendant understood that they would contract on a back-to-back basis. In other words, the contract between ISU and the defendant for barrels of LCO is subject to a concluded contract between ISU and the refinery for those barrels of LCO.

9 It is important to recognise that in the LCO industry, the refineries accept bids or offers very quickly. Both parties' experts agree on this point. The claimant's expert, Choe Won Chun, says that bids are accepted very quickly by refineries, because (among other reasons) the refineries have "almost all the bargaining power" and "the market is very competitive". The defendant's expert, John Driscoll, says that "tradeable bids do not remain valid and available for acceptance indefinitely". Traders would not agree to extending open-ended bids without time limits as "that would expose a trader to an unacceptable degree of risk, given the persistent volatility and uncertainty in gasoil and LCO markets, sudden shifts in supply/demand balances and the threat of increased government oversight and intervention". The corollary of John Driscoll's evidence is that in the LCO industry, a firm bid is accepted very quickly. In my view, once ISU submits a bid to Hyundai Singapore or Hyundai Korea, ISU has

to conclude a deal quickly. ISU does not have the luxury of keeping the refineries waiting for an end-buyer's (*eg*, the defendant's) approval.

10 In this context, I find that it is market practice for a refinery middleman to carry out back-to-back trades, and this practice applies to deals negotiated under a private negotiation, not just pursuant to an open tender. Choe Won Chun opines that it is "clearly understood" in the industry that the refinery middleman's offer to the buyer is subject to the refinery's acceptance of the refinery middleman's back-to-back offer. This is because the "only profit that [the refinery middleman] makes is the difference in price between the purchase price with the refinery and the sale price between [the refinery middleman] and [the buyer]". In line with this, counsel for the claimant submits that ISU's profit margin per sale hovered around 0.4% to 0.5%, and that it was not commercially sensible for ISU to assume market risk for such a low profit margin. ISU's risk must have been limited to counterparty risk, *ie*, the risk that the buyer or the refinery would not perform the contract. I agree with counsel and Choe Won Chun.

11 The core of the defendant's rebuttal is that discussions regarding the March cargo took place in the context of private negotiations instead of an open tender. John Driscoll opined in writing that the practice of the middleman offering back-to-back transactions only applies to open tender situations. For private negotiations, the buyer and refinery middleman "start from scratch" and "negotiate whether the bid is indicative or firm and tradeable, how long the bid is in effect, and other relevant commercial terms". Private negotiations are "less transparent and more vulnerable to potential misunderstanding than public tenders" and will thus "require more clarity, definition and confirmation". Therefore, he claims that when ISU was engaging in private negotiations with

the defendant for a cargo that would be obtained from Hyundai Korea, the deal did not have to be done on a back-to-back basis, nor did ISU have to secure a firm bid from the defendant or submit a firm, tradeable bid to Hyundai Korea. But on the stand, John Driscoll invalidated his written evidence. When he was asked, under cross-examination, about ISU's potential profit from the March cargo and whether that profit was a lot of money, he answered that, "as a trader this is a back-to-back deal intended to be riskless", *ie*, riskless for ISU. When he was responding to a question, in his re-examination, as to why he placed greater emphasis on the Platts index in his report, he again stated that "this is a back-to-back deal". These responses, as counsel for the claimant points out, were unprompted – they were not given in response to questions on whether the March cargo was to be sold on a back-to-back basis. His responses revealed that as a trader, he too considered it commercially unworkable for ISU to bear market risk as a refinery middleman in relation to the sale of the March cargo. This fortifies the claimant's point that traders in the industry, including the defendant, would have known that ISU was selling the LCO cargo, including the March cargo, on a back-to-back basis.

12 Counsel for the defendant nonetheless submits that in the circumstances of the March cargo, the market practice could not apply. First, both the claimant's and defendant's experts agree that discussions in a private negotiation start with parties exchanging indicative prices (instead of firm bids or offers). It was thus possible that Jason Ke did not give any firm offers during the discussions and in the phone call on 2 February 2021. Second, the private negotiations in relation to the March cargo "was probably the closest that ISU could come to a *risk-free discussion* for the purchase and onwards sale of the March cargo" [emphasis in original]. ISU was not obliged to put forward a firm bid to Hyundai Korea by a fixed time. ISU could thus have managed both ends

of the transaction and ensure that its agreements with Hyundai Korea and the defendant respectively be concluded only upon ISU's acceptance. In other words, ISU could have put the terms of the potential deal with the defendant in writing and seek their confirmation of the deal subject to ISU's final confirmation. ISU could then try to purchase from Hyundai Singapore. If Hyundai Singapore refused to deal, then ISU could simply not give final confirmation to the defendant and all parties would walk away from the deal. The market understanding of back-to-back deals thus did not apply.

13 Counsel's arguments fall short. On counsel's first point, although discussions in a private negotiation start off with indicative prices, it could very well lead to a party making a firm offer. Counsel's second point puts the cart before the horse — ISU would not have seen the need to do as counsel suggests, because the market's understanding is that the middleman between a refinery and a buyer would sell LCO cargo on a back-to-back basis. All parties, including John Wu, ISU and the defendant, would be expected to and would likely know this. ISU therefore should not be faulted for not structuring its contracts in the manner suggested by the defendant's counsel.

14 As for the assertion that there can be no contract between ISU and the defendant without his email confirmation to ISU's deal recap (see [7] above), this is a bare assertion, supported only by the words of Jason Ke and his colleague, Wen Jing. If this assertion were true, ISU would have willingly exposed itself to market risk in the six previous transactions and for the March cargo. This exposure would stem from the defendant's right to not buy the LCO cargo even after ISU had bought the LCO cargo from Hyundai Singapore or Hyundai Korea. As just explained, such a situation goes against commercial sense. Moreover, in the past, the defendant had taken up to seven days to issue

its email confirmation. ISU would not have left an offer dangling for that long, for the commercial concerns raised by John Driscoll at [9] above. Both experts also agreed that the six previous transactions were contracted on a back-to-back basis, and eventually agreed that the March cargo was to be sold on the same basis. The experts' opinions contradict Jason Ke's and Wen Jing's story utterly. I thus disbelieve Jason Ke's and Wen Jing's evidence.

15 Counsel for the defendant's points out that in the six previous transactions and the current situation concerning the March cargo, ISU had always sent multiple reminders, sometimes with great urgency as seen from multiple reminders sent on the same day. This, counsel says, proves that Jason Ke's email confirmation was required for ISU and the defendant to form a contract. I do not accept that. According to Choe Won Chun, a recap is sent for formality and book-keeping purposes, to record in writing a deal which was conducted by way of instant text messaging or voice calls. Traders ask for confirmation of the deal recap to ensure that there have been no errors in the understanding between the parties. In this context, Son Jungkyu and John Wu's reminders to Jason Ke served two purposes: one, to check for discrepancies; and the other, to serve as a reminder to the defendant of its obligations under the concluded contract. The reminders do not require further email confirmation to conclude the contract.

16 Counsel for the defendant then points to Jason Ke's position as an employee in a Chinese state-owned company. He had to comply with company requirements to seek internal approval and to accept an offer from ISU in writing and over email. If he failed to comply with company requirements, he would suffer personal consequences. Hence, "logic dictates" that Jason Ke could not have reached a deal through phone call "while taking the risk that the

transaction would not be approved" by the defendant. I do not doubt that Jason Ke would have to seek internal approval. However, apart from Jason Ke's and Wen Jing's words, there is no evidence of any company requirement that Jason Ke had to accept ISU's offers, or offers in general, only by email confirmation.

17 From the above, I find that it is common knowledge in the industry that ISU, as a middleman, would sell LCO cargo on a back-to-back basis. The defendant knew this. It has not proven that contracts would only be concluded upon the defendant's email confirmation. I thus hold that ISU and the defendant knew that the March cargo, if sold, would be sold on a back-to-back basis.

The evidence points towards a concluded contract for the March cargo

18 Accordingly, the WeChat messages on 2 February 2021 are inconsistent with Jason Ke's allegations that he would not proceed with the negotiation until after the Spring Festival. Those messages show the parties discussing the date of the laycan for the March cargo. Son Jungkyu had asked John Wu to confirm the laycan period with the defendant, and had said "the later the better" regarding the laycan period. Pursuant to this, John Wu and Jason Ke had the following conversation:

> John: (16:01) As late as possible
> John: (16:01) Request by ISU
> Jason (16:01) When will that be?
> Jason (16:01) Still 20/25?
> John (16:01) 26-30
> Jason (16:01) OK
> John (16:02) ["ok" emoji]
> John (16:02) Let me try
> John (16:02) Chi

John (16:02) Cheers

Jason (16:03) Hahaha

19 John Wu's message stating "Let me try" obviously implied that John Wu was trying to check with Hyundai Korea on whether the latter would be agreeable to this laycan period. This could not have eluded Jason Ke's notice. Yet, Jason Ke gave an affirmative response. Jason Ke knew that ISU would sell the March cargo on a back-to-back basis. If Jason Ke had really told John Wu that the defendant could not discuss the purchase of the March cargo at that point, it would have been premature for John Wu to check with Hyundai Korea regarding the laycan for the March cargo, and for Jason Ke to give an affirmative response to "Let me try". These facts indicate that Jason Ke had already, on the defendant's behalf, concluded a deal with ISU.

20 Next, Jason Ke's failure to respond to or protest the deal recap sent by ISU served as evidence which pointed to a contract between ISU and the defendant. On 3 February 2021, Son sent a deal recap to Jason Ke. He subsequently sent reminder emails with the recap on 8, 24 and 25 February 2021. Jason Ke did not respond to any of those recaps. He nonetheless continued messaging John Wu on 4, 8 and 18–19 February 2021. From 24 February onwards, his replies on WeChat became less frequent, purportedly because he was on a business trip. Jason Ke finally told John Wu on 10 March 2021 that "I haven't confirmed this deal with ISU all the while", and told Son Jungkyu on 11 March 2021 that "I have no idea [that] you have confirmed deal with Hyundai at this price" and that "I have clearly instruct[ed] John [Wu] to end this price negotiation for this cargo before your deal recap email on 3rd Feb".

21 The claimant contends that a deal recap is usually issued once a deal has been formed. If there is an error in the deal recap, or if no deal was actually

made, the defendant's receipt of the deal recap from ISU would have been an unexpected and disconcerting development which would have prompted an immediate response. Choe Won Chun opines that a deal recap essentially says "this is what you agreed to buy". If the trader did not agree to buy the cargo, he would normally be very surprised and concerned to receive a deal recap, and would be expected to immediately contact his counterparty and clarify. He further says that unless the trader immediately contacts the seller to disagree with the deal recap, "it would generally be understood in the market that the deal has been agreed and the trader is obligated to purchase the cargo". John Driscoll essentially agrees by saying that if a trader receives a deal recap for a cargo they did not wish to purchase, "a trader may be expected to respond promptly to deny the existence of any agreement to purchase the said cargo", but caveats that "the trader is not obligated to do so". He further opines that a trader's reluctance or delay in denying the deal recap should not be construed as acceptance or grounds for validating the deal recap. John Driscoll's caveats, however, do not detract from Choe Won Chun's evidence. The claimant also relies on *Apex Energy International Pte Ltd v Wanxiang Resources (Singapore Pte Ltd)* [2020] SGHC 138 ("*Apex Energy*"), which held at [45] that in that case, the defendant's refusal to respond to or protest a deal recap was "persuasive evidence in favour of the existence of such a deal".

22 Counsel for the defendant argues that since there was no prior agreement between ISU and the defendant, the sending of a deal recap could not evince an agreement, and could not by itself bring an agreement into existence. This is a circular point. The question is whether Jason Ke's failure to respond to or protest the deal recap evinces a prior agreement. By saying that there was no prior agreement, counsel makes the assumption of the very conclusion that must be shown.

23 Counsel attempts to distinguish this case from *Apex Energy* by saying that the latter case involved an open tender and that the discussions and prior deal between the parties were recorded in writing. But in my view, nothing about the nature of private negotiations (as opposed to the nature of an open tender) would have any bearing on the market practice of issuing a deal recap after the deal is made. It is also of little relevance that in *Apex Energy*, the court found that there was a prior deal and that the deal was recorded in writing. In that case, the court held that a deal recap is evidence (albeit not necessarily conclusive) that a deal had been concluded (at [41]), and that if the defendant does not protest the deal recap, that is evidence in favour of the existence of the deal (at [45]). These holdings are not dependent on there being a prior deal between the parties, or the deal being recorded in writing.

24 Hence, I agree that when a trader receives a deal recap setting out a deal into which the trader had in fact not entered, the trader would be expected to reject the claim. This stems from the market's understanding that a deal recap is usually sent after a deal is concluded. Such an understanding is supported by Choe Won Chun and John Driscoll. John Driscoll attempts to come up with "exceptions" to the market's understanding by saying that a deal recap is valid only if parties have reached an agreement on the price and general terms and conditions and there is evidence of that. However, these are not strictly exceptions; they merely reflect the commonsensical position that one may send a deal recap wrongly or prematurely. The industry's understanding remains that a deal recap is taken to be a record of a deal. It follows that if the deal recap is inaccurate or asserts a deal when there is none, the recipient of the deal recap would object quickly. If the recipient fails to object to a document purporting to record a concluded deal, that is a factor pointing towards a concluded deal.

25 In this case, Jason Ke received ISU's deal recap (sent by Son Jungkyu) on 3, 8, 24 and 25 February 2021. He did not respond to any of the emails although he kept in contact with John Wu in the meantime. He claimed that he did not respond because he missed Son Jungkyu's emails as it was close to the Chinese Spring Festival. With respect, I do not believe Jason Ke's story. First, it is highly unlikely that he would miss four emails referring to the deal recap. Second, his story is refuted by his own colleague Wen Jing, who testified that she received Son Jungkyu's email on 3 February 2021, and discussed it with Jason on the same day or the next day. Jason Ke's inconsistent evidence suggests that he believed, just like John Wu and Son Jungkyu, that the defendant had entered into a contract with ISU. His failure to clarify that there was no deal, or that he did not wish to negotiate for the time being, points towards him believing that there was a deal, putting him (and the defendant) *ad idem* with ISU and John Wu.

26 This raises the question of why Jason Ke would deny the contract. The answer to me is straightforward. On 4 February 2021, Jason Ke realised that the tender results held by GS for LCO showed that the FOB price was US$6/BBL, lower than the US$7/BBL which ISU paid Hyundai Korea and much lower than the US$8.50/BBL which the defendant would have to pay ISU. The defendant would likely have to sell the barrels of LCO for a cheaper price than the price which it bought them. In other words, if the defendant admits that it had bought the March cargo under a concluded contract, it would have to suffer a loss.

27 The defendant tries to portray John Wu as an agent driven by personal gain to the point of falsely telling ISU that the defendant had entered into an agreement with ISU. First, the defendant says that John Wu would enjoy a commission of US$30,000 if he sold the March cargo. Relatedly, it contends

that John Wu wished to build his relationship with Hyundai Korea and ISU, to secure continued profit for himself. Second, in the case where John Wu had made a mistake or misrepresented the actual position to ISU on whether he had reached an agreement with the defendant, he had every incentive to encourage ISU to believe that a deal was concluded, and to convince the defendant or Wisope to buy the cargo, so that the true situation would not come to light. One example of this was how John Wu did not tell ISU about his discussions with Jason Ke regarding Wisope, which was allegedly to be the defendant's end buyer. Third, John Wu told Jason Ke that if the defendant did not take the March cargo, John Wu would "be finished" and that he "would be in trouble as ISU will sue me". This, says the defendant, showed that John Wu knew that the defendant never agreed to buy the March cargo and would not be the party held responsible.

28 The defendant's arguments do not stand up to scrutiny. First, John Wu has too much to lose from intentionally misrepresenting to ISU that the defendant had entered into a deal. That would spell the end of the relationship between him and Hyundai Korea and Hyundai Singapore. A commission of US$30,000 is simply too small for John Wu to take the risk of conjuring up a transaction where none exists, given the dire sanctions that Hyundai Singapore and Hyundai Korea would mete out. The same goes for ISU's and John Wu's desire to build a relationship with Hyundai Korea. The highest that the defendant can go is to say that John Wu had genuinely misunderstood the discussions, which I find unlikely in the face of the rest of the evidence.

29 Second, John Wu and Jason Ke's discussion regarding Wisope buying the March cargo did not point away from a concluded deal. During cross-examination, counsel for the defendant insinuated that John Wu was trying to

sell the March cargo to Wisope in February 2021. Counsel told him that if ISU had sold the March cargo to the defendant, then John Wu could not be selling it to Wisope. John Wu replied that Jason Ke had asked him to speak to Wisope about buying the March cargo off the defendant's hands. Counsel put to John Wu that this was nowhere in his pleadings. Nonetheless, I find it obvious that John Wu was not trying to sell the March cargo to Wisope directly. If he wanted to do so, he would have no reason to talk to Jason Ke about it, or ask Jason Ke to talk to Wisope. After all, the WeChat messages on 3 March 2021 reveal that John Wu could talk to Wisope's contact, Lyu Hongjie, without needing Jason Ke to connect them. Instead, John Wu was trying to help the defendant by arranging an end-buyer (Wisope) for the defendant regarding the March cargo. This is supported by the WeChat messages on 10 March 2021, in which John Wu told Son Jungkyu that he was talking to the defendant's buyer continuously, while telling Jason Ke that he was talking to Lyu Hongjie. John Wu may have arranged for Wisope to be the defendant's end buyer because Jason Ke indeed asked him to. Or he could have been anxious to get the March cargo moving because, as of 18 February 2021, Jason Ke had not replied to the deal recap or showed any sign of performing his end of the deal. As counsel for the claimant puts it, "Jason needed Mr Lyu to buy the March cargo from him, and John needed Mr Lyu to buy the March cargo from Jason so that [the defendant] would perform" the contract for the March cargo. The point is that the discussion regarding Wisope buying the March cargo is more consistent with the claimant's case than the defendant's. In this light, just because John Wu did not tell Son Jungkyu about these discussions does not indicate that John Wu was dishonest or lacked candour. Instead, it suggests that the defendant had in fact bought the March cargo.

30 Third, John Wu's declarations that he would be finished, and sued by ISU, must be viewed in context. John Wu was still trying to persuade Jason Ke to accept the cargo, and so had to use a roundabout way to insinuate the consequences which all the parties would face if the deal did not go through. In John Wu's words during cross-examination, he had to "tone down" his language. Also, John Wu faced the risk of being finished as an LCO trader or agent, because Hyundai Korea and Hyundai Singapore could blacklist him for the failed March cargo deal. Similarly, if the defendant did not buy the March cargo, ISU might think that John Wu was at fault (even if he were not) and thus sue him.

31 Granted, it is possible that John Wu may have misunderstood what Jason Ke was saying over the voice call on 2 February 2021. However, this is unlikely to be the case when viewed with the rest of the evidence suggesting that ISU and the defendant had contracted for the March cargo.

32 The defendant also argues that on 2 February 2021, the defendant's interest clearly pointed away from agreeing to purchase the March cargo. To make its point, the defendant points to the poor market conditions for LCO in China and falling prices of LCO from 27 January 2021 onwards, the approaching holidays and pending information on prices put forward by other buyers in the market. The defendant would have to be incredibly naïve to purchase the March cargo. The falling market prices and poor market conditions may be seen from the Wind Financial Terminal data and from John Driscoll's expert report. I acknowledge the poor market conditions for LCO from 27 January 2021 onwards. I also acknowledge that on that same day, on which Hyundai Singapore held the tender for the March cargo, Jason Ke had told John Wu to hold off from offering a price for the tender first, because "the domestic

market is actually really bad at the moment" and "we need to see what other people's price will be". Crucially, however, Jason Ke eventually put in a bid of US$7.70/BBL (price as according to Son Jungkyu and unchallenged by the defendant) for the tender on 27 January 2021, which failed. This was despite Jason Ke knowing that the domestic market was "really bad". It would thus be consistent for Jason Ke to agree to a lower price of US$7/BBL on 2 February 2021. Hence, I place limited weight on the claims made by the defendant above.

33 The evidence shows that it is more likely that Jason Ke and John Wu entered into a contract for the March cargo on behalf of the defendant and ISU respectively. The terms of the contract are as written on the recap sent by Son Jungkyu to the defendant. Although Jason Ke and John Wu only discussed the price and laycan of the March cargo, the rest of the details would be understood as being the same as those stated in the tender documents for the March cargo.

34 For completeness, I deal with two of the claimant's less-convincing arguments. First, the claimant alleges that Jason Ke discussed with John Wu about averaging down the price of the March cargo by buying an additional shipment of LCO. However, as the defendant pointed out, the claimant could not show that Jason Ke wanted to average down the March cargo instead of the February cargo. Jason Ke had talked about averaging down the cargo as early as 27 January 2021. The parties had not yet begun private negotiations for the March cargo then. The evidence does not persuade me on the balance of probabilities that Jason Ke was trying to average down the March cargo.

35 Second, the claimant contends that on 2 February 2021, John Wu had told Jason Ke that Hyundai Korea would sell the March cargo to ISU at a minimum price of US$7/BBL (which ISU would sell to the defendant at

US$8.50/BBL) if the defendant was willing to bring forward the laycan for the February cargo from 20–26 February 2021 to 19–21 February 2021. Since the messages dated 2 February 2021 show that the Jason Ke was willing to bring forward the laycan for the February cargo to 19–21 February 2021, this shows, therefore, that the defendant had contracted for the March cargo. However, there is simply no objective evidence of such a deal by Hyundai Korea or evidence that John Wu told Jason Ke about the deal. Also, the difference between a laycan of 20–26 February and 19–21 February 2021 is not very big, with the latter period intersecting with the former period. This change in laycan period also did not affect the opening date for the defendant's letter of credit. Hence, Jason Ke may well have agreed to the change in laycan for the February cargo independently of any deal for the March cargo. The claimant argues that Jason Ke had been unwilling to bring forward the laycan for the February cargo until after the call on 2 February 2021, which shows that it was Hyundai's offer that changed Jason Ke's mind. But Hyundai Korea had previously requested to change the laycan to 16–18 or 19 February 2021 latest. This laycan period did not intersect with the original period of 20–26 February 2021, and might have interfered with the defendant's opening date for the letter of credit. Hence, there is insufficient evidence to show that Hyundai Korea would sell the March cargo at US$7/BBL if the defendant agreed to bring forward the laycan for the February cargo.

36 Notwithstanding the above, the evidence shows that on a balance of probabilities, the defendant had contracted for the March cargo with ISU. Hence, when Jason Ke denied that the contract existed, he put the defendant in repudiatory breach of contract.

Damages

37 Since the defendant has breached the contract for the March cargo, it must compensate the claimant for ISU's losses to put ISU in a position as if the contract had been performed. The following are calculations from the claimant regarding ISU's losses. Just from buying the cargo from Hyundai Korea and selling it to Wisope, ISU had lost US$1,179,632.91. The profit that ISU would have made from selling the March cargo to the defendant would have been US$450,000. Additionally, ISU had incurred an additional port charges of US$29,625 from selling the cargo to Wisope as compared to the defendant. ISU further suffered a loss of US$8,250 arising from a difference in the laytime of 12 hours. These sums add up to US$1,667,507.91. I order that the defendant pay this sum to the claimant forthwith.

38 The defendant suggested in its opening statement that ISU had not properly mitigated its losses. However, the defendant did not include this issue in its pleadings. According to *Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2012] 1 SLR 131 at [23]–[24], mitigation of damages as a defence must be properly pleaded and proved. If that is not done, the court will not entertain submissions on the other party's failure to mitigate its losses. The defendant had not pleaded that ISU or the claimant had failed to reasonably mitigate its losses and is thus precluded from so arguing now.

The defendant's counterclaim is dismissed

39 The defendant claims for US$33,947.61 in legal costs for arbitration proceedings which it says ISU wrongfully commenced under the Singapore International Arbitration Centre ("SIAC") on 16 August 2021. On 15 November 2021, SIAC terminated the arbitration reference as against the defendant

pursuant to r 28.1 of the SIAC Rules 2016 (which was in force at the material time). Rule 28.1 of the SIAC Rules 2016 reads as follows:

> If any party objects to the existence or validity of the arbitration agreement or to the competence of SIAC to administer an arbitration, before the Tribunal is constituted, the Registrar shall determine if such objection shall be referred to the Court. If the Registrar so determines, the Court shall decide if it is *prima facie* satisfied that the arbitration shall proceed. The arbitration shall be terminated if the Court is not so satisfied. Any decision by the Registrar or the Court that the arbitration shall proceed is without prejudice to the power of the Tribunal to rule on its own jurisdiction.

40 Counsel for the defendant argues that since SIAC terminated ISU's arbitration reference pursuant to the above rule, this shows either that the arbitration reference did not exist or was invalid, or that SIAC had no competence to administer the arbitration, or both. In any of these cases, it is clear that the claimant had wrongfully commenced arbitration.

41 Counsel for the claimant first notes that the defendant has not specified the legal action that it is relying on to found its counterclaim. Second, the Registrar of the SIAC Court had already determined the costs payable by ISU to the defendant to be S$5,792.71, pursuant to r 34.7 of the SIAC Rules 2016:

> 34.7 In all cases, the costs of the arbitration shall be finally determined by the Registrar at the conclusion of the proceedings…

Counsel thus submits that the SIAC's determination of costs for the abortive arbitration proceedings was final. Also, the parties did not object to the amount of costs determined by the SIAC or at any time thereafter.

42 Third, counsel argues that this court has no jurisdiction to disturb the final costs determination made by the SIAC courts, as O 21 r 2(1) of the Rules

of Court 2021 only grants the court power to determine costs of or incidental to all proceedings in the Supreme Court or the State Courts at any stage of the proceedings or after the conclusion of the proceedings. The abortive arbitration reference was separate from this case and thus did not constitute proceedings in or incidental to the Supreme Court or the State Courts. Finally, the defendant has not adduced any evidence whatsoever in support of its counterclaim.

43 I dismiss this counterclaim for a simple and basic reason: the defendant has not adduced evidence to support its claim of US$33,947.61. The defendant also gave me no evidence or factual basis for me to disturb the Registrar's assessment of costs for the abortive arbitration at S$5,792.91. I thus dismiss the counterclaim.

44 I will hear the parties on costs.

- Sgd -
Choo Han Teck
Judge of the High Court

Sarbjit Singh Chopra, Luis Inaki Duhart Gonzalez and Chow Ee Ning (Selvam LLC) for the claimant;
Nicholas Lum Kin Leong, Leong Lu Yuan and Joshua Ho Jun Yang (CLASIS LLC) for the defendant.