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

[2025] SGHC 168

Suit No 49 of 2022

Between

Smart Glove International Pte Ltd

… *Plaintiff*

And

Full Support Healthcare Ltd

… *Defendant*

Counterclaim of Defendant

Between

Full Support Healthcare Ltd

… *Plaintiff in Counterclaim*

And

Smart Glove International Pte Ltd

… *Defendant in Counterclaim*

JUDGMENT

[Contract — Breach]
[Contract — Discharge — Repudiatory breach]
[Contract — Waiver]
[Damages — Assessment]
[Contract — Remedies — Deposits]

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Smart Glove International Pte Ltd
v
Full Support Healthcare Ltd

[2025] SGHC 168

General Division of the High Court — Suit No 49 of 2022
Hoo Sheau Peng J
25–28 June, 1–5, 9–11 July, 7 October 2024, 28 February 2025

22 August 2025 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 At the height of the Covid-19 pandemic, the defendant engaged the plaintiff to produce and deliver nitrile powder-free gloves under a supply agreement and three purchase orders. There were delays in the deliveries.

2 The defendant argues, as part of both its defence and its counterclaim, that these delays, among other events, constituted repudiatory breaches by the plaintiff, which it accepted through an email sent on 20 April 2021. It seeks reliefs, including damages and the refund of certain monies paid to the plaintiff (which it argues are refundable advance payments).

3 On the other hand, the plaintiff argues, in its claim and its defence to the defendant's counterclaim, that it was the defendant who was in breach of its obligations by refusing to continue performing its obligations after the email

was sent. It asks for reliefs, including damages and specific performance. Additionally, the plaintiff also seeks to retain all monies received from the defendant (arguing that they are forfeitable deposits).

4 Having heard the parties and considered the evidence, I find that both parties were in breach of the contracts. Further, I find that the monies paid in advance by the defendant to the plaintiff are refundable advance payments. These are my reasons.

Facts

The parties

5 The plaintiff, Smart Glove International Pte Ltd ("SGI"), is a Singapore-incorporated company in the business of selling and distributing medical equipment, including gloves. SGI is wholly owned by Smart Glove Holdings Sdn Bhd ("SGH"), a company incorporated in Malaysia.[1] SGH is also the ultimate holding company of a group of companies, including Smart Glove Corporation Sdn Bhd ("SGC"), GX Corporation Sdn Bhd ("GX"), Platinum Glove Industries Sdn Bhd ("PGI"), and Sigma Glove Industries Sdn Bhd ("Sigma").[2] In this judgment, I will refer to SGH and its subsidiary companies collectively as the "Smart Glove Group" or "SGG".

6 Within the Smart Glove Group, SGI is the sales and distribution arm. SGC, GX, PGI and Sigma (collectively, the "SGG Manufacturers") are the companies which operate factories and/or plants manufacturing, *inter alia*,

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1 Plaintiff's Closing Submissions ("PCS") at para 8.

2 PCS at para 9.

nitrile gloves. All gloves produced under the disputed agreements in this case were produced by the SGG Manufacturers.[3]

7 SGI called three factual witnesses to prove its case. These were Mr Long Say Sing ("Mr Long"), the General Manager of SGI,[4] Mr Hew Yew Fook ("Mr Hew"), the Chief Operating Officer of SGH,[5] and Mr Ahmad Faizi Mohd Kamil ("Mr Faizi"), the Chief Corporate Officer of SGH.[6] SGI also called Mr Dawin Tang Keng Wai ("Mr Tang"), a director at PKF Covenant Equity Consulting Sdn Bhd and a Chartered Accountant, as its expert witness to quantify the parties' claims and counterclaims.[7]

8 The defendant, Full Support Healthcare Ltd ("FSH"), is a United Kingdom-incorporated company. Its business includes buying and selling personal protective equipment.[8]

9 FSH called five factual witnesses to prove its case. They were Ms Sarah Jane Stoute ("Ms Stoute"), the Chief Executive Officer of FSH,[9] Ms Zheng Bikun ("Ms Zheng"), FSH's Head of Finance,[10] Ms Sarah Jane White ("Ms

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3 Affidavit of Evidence-in-Chief of Mr Ahmad Faizi Mohd Kamil ("Faizi's AEIC") at para 7.

4 Affidavit of Evidence-in-Chief of Mr Long Say Sing ("Long's AEIC") at para 1.

5 Affidavit of Evidence-in-Chief of Mr Hew Yew Fook ("Hew's AEIC") at para 1.

6 Faizi's AEIC at para 1.

7 Affidavit of Evidence-in-Chief of Mr Dawin Tang Keng Wai ("Tang's AEIC") at para 1.

8 Defendant's Closing Submissions ("DCS") at para 7.

9 Affidavit of Evidence-in-Chief of Ms Sarah Jane Stoute ("Stoute's AEIC") at para 1.

10 Affidavit of Evidence-in-Chief of Zheng Bikun ("Zheng's AEIC") at para 1.

White"), FSH's Commercial Director,[11] Mr Sarbjit Singh Mahli ("Mr Mahli"), FSH's Insight Inventory Controller,[12] and Ms Ruth Elizabeth Roper ("Ms Roper"), FSH's Quality and Improvement Director.[13] FSH also called Mr Oliver Alexander Richard Watts ("Mr Watts"), a Partner at Osborne Partners, who is also a Chartered Financial Analyst and a Chartered Accountant.[14]

Background to the dispute

10 As alluded to at [1] above, the dispute centres on a supply agreement and three sets of purchase orders entered into between FSH and SGI, which I will now detail.

The Supply Agreement

11 In May 2020, FSH enquired with SGI on the supply of powder free nitrile gloves.[15] On 11 June 2020, following some discussions, SGI and FSH entered into a Memorandum of Agreement for the Supply of Medical Examination Gloves (the "Supply Agreement").[16] While the agreement was

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11 Affidavit of Evidence-in-Chief of Sarah Jane White ("White's AEIC") at para 1.

12 Plays mAffidavit of Evidence-in-Chief of Mr Sarbjit Singh Mahli ("Mahli's AEIC") at para 1.

13 Affidavit of Evidence-in-Chief of Ms Ruth Elizabeth Roper ("Roper's AEIC") at para 1.

14 Affidavit of Evidence-in-Chief of Mr Oliver Alexander Richard Watts ("Watts' AEIC") at para 1.

15 Statement of Claim (Amendment No. 1) ("SOC-A1") at para 3; Defence and Counterclaim (Amendment No. 3) ("D&C-A3") at para 4.

16 PCS at para 12; DCS at para 9.

expressed to be between SGI and "Full Support Group", the parties have always understood the agreement to be between SGI and FSH.[17]

12 The parties differ on the interpretation of various aspects of the Supply Agreement. However, the agreement effectively provides for the tentative sale and purchase of 1,300,000,000 Gen-X 3mil nitrile powder-free blue gloves ("3mil gloves") as follows:[18]

> **1. SUPPLY OF PRODUCTS**
>
> 1.1 Purchaser intends to purchase **one billion three hundred million** (1,300,000,000) pieces of gloves, over a period of 7 months, from June 2020 to December 2020. The quantities and/or the period of deliveries may be increased and/or extended as may be agreed between the parties.
>
> 1.2 The Supplier undertakes to use all reasonable endeavours to meet all orders for the Product required by the Purchaser in accordance with the agreed terms of delivery. The tentative schedule of deliveries, subject to receipt of advanced payment by Supplier as per clause 2.2, are as follows:-
>
> (a) Approximately 100 million pieces (i.e. +/- 10%) in the month of June 2020,
>
> (b) Approximately 200 million pieces each month (i.e. +/- 10%) for the months of July 2020 to December 2020.
>
> The actual quantity to be delivered for each month will be dependent of the quantity that can be fitted into the shipping container, the vessel sailing dates or other similar factors.
>
> 1.3 The Product that Purchaser intends to purchase is **240mm 3mil Nitrile Powder-free Blue gloves** (weight M: 3.50g +/- 0.2g), in the Supplier's brand "**Gen-X**".
>
> 1.4 The Purchaser shall issue a Purchase Order ("PO") for the order to be placed for the supply of gloves detailing all the

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17 SOC-A1 at para 6; D&C-A3 at para 7.

18 Agreed Bundle of Documents (Volume 1 of 52) ("1AB") 7–11.

> requirements of the order including the Product specifications, quantity, quality, pricing, and time of delivery.
>
> 1.5 Upon acceptance of the order(s), the Supplier shall issue a Proforma Invoice (PI) confirming the details of the order including the specifications, quantity, quality, pricing, and the estimated time of delivery(ies). Where required, separate PIs may be issued for each month of delivery.
>
> …
>
> 1.7 The Supplier shall ship the Product to the Purchaser's designated location(s) in accordance with the following:
>
> > …
> >
> > (b) The Purchaser shall enter into and bear all costs relating to the contract of carriage and contract of insurance.
>
> …
>
> [emphasis in original]

13 As regards the prices and payment, the Supply Agreement provides for a default price of US$82.50 per 1,000 pieces of gloves, for a total contract sum of US$107,250,000:

> **2. <u>PRICES AND PAYMENT</u>**
>
> 2.1 For the quantity of 1.3 billion pieces under this MOA, Parties have agreed that the price shall be **US Dollars Eighty-Two and Fifty Cents (US$82.50)** per 1000 pieces of gloves, for a total contract sum of **US Dollars One Hundred Seven Million, Two Hundred and Fifty Thousand only (US$107,250,000).** The price shall be fixed for the full quantity

unless there are extenuating circumstances beyond Supplier's control that both parties agree warrants a change.

2.2 The payment term shall be as follows:-

Payment Date	Payment Amount	Purpose of Payment
Upon issuance of PO	$33,000,000	80% Deposit for first 3 months shipments
30"' June 2020	$1,650,000	20% Balance of June Shipments
1st July 2020	$13,200,000	80% Deposit for September shipments
31st July 2020	$3,300,000	20% Balance for July Shipments
3rd August 2020	$13,200,000	80% Deposit for October shipments
31" August 2020	$3,300,000	20% Balance for August Shipments
1" September 2020	$13,200,000	80% Deposit for November shipments
30"' September 2020	$3,300,000	20% Balance for September Shipments
1st October 2020	$13,200,000	80% Deposit for December shipments
31" October 2020	$3,300,000	20% Balance for October Shipments
30"' November 2020	$3,300,000	20% Balance for November Shipments
31" December 2020	$3,300,000	20% Balance for December Shipments
Total Payment	**$107,250,000**	

For avoidance of doubt, the above delivery quantities and corresponding payments are subject to variation depending on factors mentioned in clause 1.2.

2.3 The time for payment shall be of the essence and no payment shall be deemed to have been made until the Supplier has received payment in full in its bank account. The details of the bank account shall be notified in the PI.

2.4 If Purchaser fails to make payment in accordance with the above schedule, Supplier reserves the right to withhold shipment or set-off any of the advance payment against any outstanding invoices.

[emphasis in original]

14 The Supply Agreement also contains certain warranties made by SGI regarding the quality of the gloves supplied:

> **3. SUPPLIER'S WARRANTY**
>
> 3.1 Supplier hereby warrants that all gloves are manufactured by SGH's wholly owned subsidiaries in accordance with the prevailing quality standards as specified for each of the type of gloves. All gloves supplied by Supplier shall undergo quality inspection to conform to the quality standards for the gloves including any applicable standards as required by Purchaser.
>
> 3.2 Supplier verifies that its affiliates practices Good Manufacturing Practices (GMP) and is certified to ISO 9001 and ISO 13485 and ensures that it is a well-managed manufacturing operation. Upon request by Purchaser, Supplier shall provide copies of its affiliated factories' ISO certification, EN455 certification, EN374 PPE certification and MDR Certificate of Conformity.

15 Finally, the Supply Agreement contains clauses pertaining to force majeure, variation of terms and waiver:

> 4.4 Force Majeure. Either Party shall be excused from any delay or failure in performance required hereunder if caused by reason of any occurrence or contingency beyond its reasonable control, including, but not limited to, acts of God, acts of war, fire, insurrection, strikes, lock-outs or other serious labour disputes, riots, earthquakes, floods, explosions or other acts of nature…
>
> 4.5 Variation. This MOA may only be varied or amended upon mutual MOA of both Parties in writing.
>
> 4.6 Waiver. No failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy

The first purchase order

16 After the Supply Agreement was concluded, FSH issued a purchase order to SGI dated 12 June 2020 for a total of 1,302,000,000 pieces of 3mil

gloves ("PO1"), comprising 372 orders, as well as a summary page headed "Summary of Orders for Blue Nitrile PF Disposable Gloves".[19] This summary page contains tables reflecting a "Monthly Summary" and "Weekly Schedule" respectively.[20]

17 On 16 June 2020, FSH issued a revised purchase order increasing the number of 3mil gloves to 1,306,500,000 pieces at US$82.50 per 1,000 gloves, for a total sum of US$107,786,250 ("PO1.2"), comprising 390 orders. FSH also issued a signed summary page headed "Summary of Orders for Blue Nitrile PF Disposable Gloves" ("PO1.2 Summary Page").[21] Again, this summary page contains tables reflecting a "Monthly Summary" and "Weekly Schedule" respectively.[22]

18 More specifically, the "Monthly Summary" for PO1.2 reads as follows:

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19 1AB 15–54; SOC-A1 at para 8 and D&C-A3 at para 13.

20 1AB 54.

21 1AB 57–101; SOC-A1 at para 9 and D&C-A3 at para 13.

22 1AB 101.

Monthly Summary:

Ex-factory Month	Number of Orders	#Cases	#Gloves	Order value
June	30	100,500	100,500,000	$ 8,291,250.00
July	60	201,000	201,000,000	$ 16,582,500.00
August	60	201,000	201,000,000	$ 16,582,500.00
September	60	201,000	201,000,000	$ 16,582,500.00
October	60	201,000	201,000,000	$ 16,582,500.00
November	60	201,000	201,000,000	$ 16,582,500.00
December	60	201,000	201,000,000	$ 16,582,500.00
Grand totals:	**390**	**1,306,500**	**1,306,500,000**	**$ 107,786,250.00**

19 By a Proforma Invoice, which was also dated 16 June 2020, SGI accepted PO1.2 ("1st PI").[23] The 1st PI contains a table setting out the amounts due to be paid by FSH to SGI on various dates: upon issuance of the orders, as well as on the first and last day of each month from 30 June 2020 to 31 December 2020.[24]

20 The 1st PI also contains some "Remarks/Special Instruction[s]" pertaining to the delivery of and payment for the gloves:[25]

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23 1AB 55–56; SOC-A1 at para 10 and D&C-A3 at para 13.

24 1AB 55.

25 1AB 56.

> 1. Delivery starting from June till December 2020.
>
> 2. Payment term is 80% down-payment upon PI confirmation, 20% before shipment booking for 1st 3 months and subsequently monthly.
>
> 3. Customer will need to pay 80% down-payment from June / July / August upon PI confirmation, and 20% upon delivery done.
>
> 4. Then in July, customer will pay 20% for June shipment and need to place order for September, make down-payment 80% (September PO) and subsequently follow on by monthly.
>
> …

21 The 1st PI also stipulates that in the event of late payment by FSH, "interest at the rate of 1.5% per month is chargeable for any invoiced amount not paid in accordance with the agreed payment terms from its due date to the date of payment …".[26]

22 On 17 June 2020, pursuant to PO1.2 and the 1st PI, FSH transferred US$33,165,000 to SGI.[27]

23 On 29 June 2020, SGI issued a revised Proforma Invoice ("Revised 1st PI"). The terms in the Revised 1st PI remain largely similar to those in the 1st PI, save that some revisions were made to the schedule of payments.[28]

24 Subsequently, on 21 August 2020, FSH issued a further revised purchase order revising the size mix per container for the 1,306,500,000 pieces of 3mil gloves ("PO1.3"), comprising 390 orders, as well as a summary page headed

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[26] 1AB 56.

[27] SOC-A1 at para 12 and D&C-A3 at para 18.

[28] See 1AB 102–103 *cf* 1AB 55; PCS at para 18.

"Summary of Orders for Blue Nitrile 3Mil PF Disposable Gloves" ("PO1.3 Summary Page").[29] FSH requested for the change of size mix earlier the same month.[30]

25 The PO1.3 Summary Page contains at least three material differences from the summary pages in the previous two purchase orders. First, the revised size mix for certain containers were stipulated.[31] More specifically, whereas the PO1.2 Summary Page provided that each container was to contain 670 cases of small-sized gloves, 1,675 cases of medium-sized gloves and 1,005 cases of large-sized gloves, the PO1.3 Summary Page provided that for 297 out of the total 390 orders, the containers were to contain 100 cases of small-sized gloves, 1,400 cases of medium-sized gloves, 1,200 cases of large-sized gloves, and 650 cases of extra-large-sized gloves.[32]

26 Second, the table containing the "Monthly Summary" (see [18] above) became relabelled as the "Orginal [sic] Monthly Summary", though its contents remained the same.[33]

27 Third, the table which was originally inserted under the "Weekly Schedule" was struck out. In its place, the following line was inserted:

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29 1AB 129–175; SOC-A1 at para 14 and D&C-A3 at para 18.

30 DCS at para 101.

31 1AB 175.

32 1AB 175.

33 1AB 175 *cf* 1AB 101.

> Weekly Schedule: Please see email from Yeoh for agreed weekly production plan.

The reference to "Yeoh" is to Mr Yeoh Yao Zhi ("Mr Yeoh"), a Customer Service Executive from SGI.[34]

28 From this juncture, I will refer to PO1, PO1.2 and PO1.3 collectively as the "1st PO". Between June 2020 and April 2021, several transactions took place under the 1st PO. The table below summarises these transactions. The parties agree to proceed on the contents stated in the table. However, the characterisation of the 80% paid upfront by FSH for each tranche of orders is disputed. While SGI contends that these are forfeitable deposits, FSH argues that these are refundable advance payments.[35]

Order Numbers	**Delivery status**	**80% already paid by FSH**	**20% balance**	**Total amount**
FSH16782 to FSH16942 and FSH17153 (162 orders)	542,700,000 of 542,700,000 gloves delivered	Paid in full	Paid in full	US$46,923,030 paid
FSH16943 to FSH16962 (20 orders)	67,000,000 of 67,000,000 gloves delivered	Paid in full	Not paid	US$4,422,000 paid; US$2,096,524 unpaid

[34] DCS at para 90(e).

[35] PCS at paras 23 and 24; Zheng's AEIC at paras 16–22.

FSH16963 to FSH17171 (208 orders)	696,800,000 of 696,800,000 gloves undelivered	Paid in full	Not paid	US$45,988,800 paid

29 Ultimately, SGI did not adhere to the delivery schedules set out in the PO1.3 Summary Page, although the parties are in dispute as to whether SGI was obligated to do so.

The 5mil purchase order

30 In July 2020, SGI and FSH further discussed the supply of 5 mil Nitrile Dark Smart Blue gloves to FSH.[36]

31 On 4 August 2020, FSH issued a purchase order to SGI for a total of 346,590,000,000 pieces of "Gen-X 5mil Dark Smart Blue Regular Cuff & One order for Long Cuff" gloves ("5mil gloves"), comprising 141 orders for regular cuff gloves (at US$86 per 1,000 gloves) and one order for long cuff gloves (at US$110 per 1,000 gloves), for a total sum of US$29,867,940.[37] FSH also issued a signed summary page headed "Summary of Orders for Gen-X 5mil Dark Smart Blue Regular Cuff & One order for Long Cuff". This summary page contains tables respectively reflecting a "Monthly Summary" and a "Weekly Schedule Regular Cuff".[38]

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36 SOC-A1 at para 30; D&C-A3 at para 33.

37 SOC-A1 at para 31; D&C-A3 at paras 33–34; 1AB 112 and 113.

38 1AB 104–113.

32 On 6 August 2020, FSH issued a revised purchase order for the 5mil gloves (the "5mil PO"), along with a signed summary page headed "Summary of Orders for Gen-X 5mil Dark Smart Blue Regular Cuff & One order for Long Cuff- now with updated Exfactory dates" (the "5mil PO Summary Page").[39] The two purchase orders differ in the details under the tables respectively reflecting the "Monthly Summary" and "Weekly Schedule Regular Cuff".[40]

33 Under the 5mil PO Summary Page, the "Monthly Summary" is reflected as such:

Monthly Summary:

Ex-factory Month	Number of Orders	#Cases	#Gloves	Order value
August	15	73,200	73,200,000	$ 6,295,200.00
September	31	65,880	65,880,000	$ 5,665,680.00
October	19	24,400	24,400,000	$ 2,098,400.00
November	10	19,520	19,520,000	$ 1,678,720.00
December	10	24,400	24,400,000	$ 2,098,400.00
January	9	21,960	21,960,000	$ 1,888,560.00
February	10	24,400	24,400,000	$ 2,098,400.00
March	12	29,280	29,280,000	$ 2,518,080.00
April	10	24,400	24,400,000	$ 2,098,400.00
May	12	29,280	29,280,000	$ 2,518,080.00
June	3	7,320	7,320,000	$ 629,520.00
Grand totals:	**141**	**344,040**	**344,040,000**	**$ 29,587,440.00**
Long cuff Glove order	1	2,550	2,550,000	$ 280,500.00
Grand totals:	**142**	**346,590**	**346,590,000**	**$ 29,867,940.00**

34 On 10 August 2020, SGI accepted the 5mil PO by issuing two proforma invoices for:[41]

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39 SOC-A1 at para 32; D&C-A3 at para 33; 1AB 114–123.

40 1AB 113 *cf* 1AB 123.

41 SOC-A1 at para 33; D&C-A3 at para 33; 1AB 124 and 127.

(a) 344,040,000 pieces of 5mil gloves (regular cuff) for US$29,587,440 (the "1st 5mil PI"); and

(b) 2,550,000 pieces of 5mil gloves (long cuff) for US$280,500 (the "2nd 5mil PI").

35 On 5 October 2020, SGI issued a revised Proforma Invoice (the "Revised 1st 5mil PI"), under which the prices of the 5mil gloves (regular cuff) were revised so that the total sum is US$31,036,800.[42]

36 In the 1st 5mil PI, 2nd 5mil PI, and Revised 1st 5mil PI (collectively, the "5mil PIs"), the following "Remarks/Special Instruction[s]" are stated:[43]

> …
>
> 2. Payment term is 80% down-payment upon PI confirmation, 20% before shipment booking for 1st 3 months and subsequently monthly.
>
> 3. Customer will need to pay 80% down-payment from Aug / Sep / Oct upon PI confirmation, and 20% upon delivery done.
>
> 4. Then in September, customer will pay 20% for August shipment and need to place order for November, make down-payment 80% (November PO) and subsequently follow on by monthly.
>
> …
>
> **PLEASE NOTE THAT PRICE STATED IN THIS PROFORMA INVOICE IS SUBJECT TO CHANGE AND THE FINAL PRICE**

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42 SOC-A1 at para 34; D&C-A3 at para 33; 1AB 176–177 *cf* 1AB 126–127.

43 1AB 125, 127 and 177.

> **WILL BE NOTIFIED TO THE BUYER PRIOR TO THE CONFIRMED DATE OF DELIVERY.**
>
> [emphasis in original]

37 All three Proforma Invoices also contain a late payment interest clause similar to that found in the 1st PI (see [21] above).

38 Between September 2020 and April 2021, several transactions took place under the 5mil PO. The table below summarises these transactions. Again, parties agree to proceed on the contents stated in the table, and are only disputing the characterisation of the 80% of monies already paid by FSH.[44]

Order Numbers	Delivery status	80% already paid by FSH	20% balance	Total amount
FSH17219 to FSH17348 (130 orders)	2,550,000 of 2,550,000 long cuff and 314,760,000 of 314,760,000 regular cuff gloves delivered	Paid in full	Paid in full	US$30,307,990.80 paid
FSH17349 to FSH17360 (12 orders)	29,280,000 of 29,280,000 regular cuff gloves delivered	Paid in full	Not paid	US$2,014,464 paid; US$1,406,828.80 unpaid

[44] PCS at paras 32 and 33; Zheng's AEIC at paras 34–37.

The second purchase order

39 Between June and November 2020, while the 1st PO and the 5mil PO were being performed, SGI and FSH discussed the further supply of 3mil gloves for 2021.[45] In November 2020, FSH informed SGI that it was looking to order at least 50 containers of gloves per month, in addition to the original orders under the 1st PO.[46]

40 On 19 November 2020, FSH therefore issued a purchase order for an additional 469,000,000 pieces of 3mil gloves at US$93.50 per 1,000 gloves for a total of US$43,851,500 (the "2nd PO"), comprising 140 orders. FSH also issued a signed summary page headed "Summary of Orders for Gen-X 3mil Nitrile Baby Blue" (the "2nd PO Summary Page").[47]

41 In the 2nd PO, unlike in the 1st PO and the 5mil PO, the column titled "Estimated Ex-Factory Date From Smart" was left blank.[48]

42 Moreover, there was no "Weekly Schedule" table reflected in the 2nd PO Summary Page.[49] There was, however, still a "Monthly Schedule" table:

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45 SOC-A1 at para 20; D&C-A3 at para 25.

46 SOC-A1 at para 21; D&C-A3 at para 25.

47 SOC-A1 at para 22; D&C-A3 at para 25; 1AB 181–190.

48 PCS at para 36; see, *eg*, 1AB 189.

49 PCS at para 36; 1AB 190.

Monthly Summary:

Ex-factory Month	Number of Orders	#Cases	#Gloves	Order value
December	20	67,000	67,000,000	$ 6,264,500.00
January	20	67,000	67,000,000	$ 6,264,500.00
February	20	67,000	67,000,000	$ 6,264,500.00
March	20	67,000	67,000,000	$ 6,264,500.00
April	20	67,000	67,000,000	$ 6,264,500.00
May	20	67,000	67,000,000	$ 6,264,500.00
June	20	67,000	67,000,000	$ 6,264,500.00
Grand totals:	**140**	**469,000**	**469,000,000**	**$ 43,851,500.00**

43 On 20 November 2020, SGI accepted the 2nd PO through a Proforma Invoice (the "2nd PI").[50] The 2nd PI stipulated the following "Remarks/Special Instruction[s]":[51]

> 1. Delivery starting from December 2020.
>
> 2. Customer will need to pay 80% down-payment for December 2020 / January 2021 / February 2021 upon PI confirmation, and 20% upon delivery done.
>
> 3. Then in End of December 2020, customer will pay 20% balance payment for December shipment and need to place order for March 2021, make down-payment 80% (March2021 PO) and subsequently follow on by monthly.
>
> …
>
> **PLEASE NOTE THAT PRICE STATED IN THIS PROFORMA INVOICE IS SUBJECT TO CHANGE AND THE FINAL PRICE WILL BE NOTIFIED TO THE BUYER PRIOR TO THE CONFIRMED DATE OF DELIVERY.**
>
> [emphasis in original]

44 The 2nd PI also contained a similar late interest payment provision as the other Proforma Invoices previously issued (see [21] and [37] above).[52]

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50 SOC-A1 at para 23; D&C-A3 at para 25; 1AB 191–192.

51 1AB 192.

52 1AB 192.

45 Between November 2020 and April 2021, several transactions took place under the 2nd PO. The table below summarises these transactions. Again, the parties agree to proceed on the contents stated in the table, and only dispute the characterisation of the 80% paid upfront by FSH.[53]

Order Numbers	**Delivery status**	**80% already paid by FSH**	**20% balance**	**Total amount**
FSH17556 to FSH17596 (41 orders)	137,350,000 out of 137,350,000 gloves delivered	Paid in full	Paid in full	US$13,825,030 paid
FSH17597 to FSH17620 (24 orders)	80,400,000 out of 80,400,000 gloves delivered	Paid in full	Not paid	US$6,013,920 paid; US$1,624,032 unpaid
FSH17621 to FSH17695 (75 orders)	All 251,250,000 gloves undelivered	Paid in full	Not paid	US$18,793,500 paid

46 Ultimately, SGI did not adhere to the delivery schedules set out in the 2nd PO Summary Page, although the parties disagree whether it was SGI's obligation to do so.

[53] PCS at paras 39 and 40; Zheng's AEIC at paras 23–33.

FSH's 20 April 2021 termination email and the events leading up to it

47 On 20 April 2021, Mr Matthew Simpson ("Mr Simpson"), a "Hand Protection Specialist" from FSH, sent an email to Ms Angeline Hew ("Ms Hew") of SGI's Business and Development Department, purporting to "cancel all of [FSH's] existing 3mil orders" (the "20 April 2021 Email"):[54]

> …
>
> I am so very sorry to have to inform you that we are left with no option but to cancel all of our existing 3mil orders in boxes of 100 - the price is around $10-$13 above the market price now and we simply cannot sell the gloves at this price.
>
> We are getting offers from various manufacturers now from $80-$85. These offers are not from only Chinese manufacturers but also Malaysian and some of the main players in the industry. The market price across the UK & Europe has dropped like a stone and we simply cannot compete and are already starting to see containers build-up in our warehouses and as you cannot supply at the $80-$85 mark then we are left with no choice.
>
> Our customers are all buying at our cost price or lower now so it is not sustainable. Shiah will be in touch later today with regards to the cancelled P.O.'s.
>
> The 250 & 300 pricing is still high but not as bad as the 100 pricing and as that is for the Australian market we are currently reviewing the pricing structure we need for that market as it too has dropped but not to the level of the UK & Europe. So we will revert to you about possibly switching some orders over to the

[54] Agreed Bundle of Documents (Volume 20 of 52) ("20AB") 349.

> Australian configuration of 250 or 300 once we know we can sell and the same scenario isn't going to occur.
>
> The 5mil we have no choice but to continue with as we are contracted to NHS Scotland even though we are now losing money on each container !!!
>
> Thank-you for all your support over the last months and am sorry it has come to this but we simply have no choice as we cannot sell at a loss.

48 Prior to this email being sent, certain events happened which are material to the proceedings. Apart from SGI's non-adherence to the delivery schedules set out in the 1st PO Summary Page and 2nd PO Summary Page (see [29] and [46] above), the prices of both the 3mil gloves and 5mil gloves were also revised upwards several times, and FSH had requested for SGI to produce the EN455 shelf life certification for certain batches of 3mil and 5mil gloves pursuant to cl 3.2 of the Supply Agreement (see [14] above).

49 More specifically, between September 2020 and April 2021, SGI sought to revise the price of 3mil gloves to be supplied each month, which FSH accepted at each relevant time. Although the surrounding circumstances and the validity of the revision of prices are disputed, the actual revision of prices are not, and can be summarised as follows:[55]

Month	**Price per 1,000 gloves**
September 2020	US$82.50 (original price stated in the Supply Agreement)
October 2020	US$87.50

[55] D&C-A3 at paras 40–41; Reply and Defence to Counterclaim (Amendment No. 3) ("R&DC-A3") at paras 38–39; DCS at para 112; PCS at para 546.

November 2020	US$87.50
December 2020	US$93.50
January 2021	US$99.00
February 2021	US$103.00
March 2021	US$106.42
April 2021	US$104.20

50 The prices of 5mil gloves were also revised upwards during a similar period, which FSH had accepted at each relevant time.[56] Again, the parties disagree over the surrounding circumstances and the validity of the price increases, but not the fact of the increases.

51 Separately, on 19 March 2021, FSH's Quality Assurance/Quality Control Manager, Ms Esther Barrows ("Ms Barrows"), wrote to SGI's Ms Hew to ask about the shelf life of certain 3mil and 5mil gloves which had been delivered under lots GT20J01 and GT20K02:[57]

> …
>
> Please can you help clarify the correct shelf life of Gen-X nitrile 3mil and 5mil gloves as we have received deliveries of gloves with the same lot number but different expiry dates, and also product with expiry dates which have been over labelled (photos attached). We recently received an accelerated aging test report

56 DCS at paras 112–113; PCS at paras 453, 458, 462, 465 and 468.

57 Agreed Bundle of Documents (Volume 21 of 52) ("21AB") 38–39.

> (2017) concluding the gloves had been given a 3 year shelf life and that any extension would be based on real time data.
>
> Please could you:
>
> • Confirm correct shelf life of 3mil and 5 mil Gen-X gloves.
>
> • Confirm correct shelf life for lots GT20J01 and GT20K02
>
> • Provide updated shelf life reports if applicable to support extension to 5 years.

52 On the same day, Ms Hew replied Ms Barrows stating that she would "revert … by next week", and attached a "Technical Report for Three Year Shelf Life for 9" (3 mil) Powder Free Nitrile Gloves (EN455-4) [Stability Study Under Accelerated Aging Condition]" dated 12 February 2019.[58]

53 There was further correspondence on this matter, both externally, between FSH and SGI, as well as internally, within FSH and SGI. Subsequently, on 1 June 2021, SGI provided FSH with the required EN455 shelf-life certifications for the 3mil and 5mil gloves.[59]

Events following FSH's 20 April 2021 Email

54 Following the 20 April 2021 Email, FSH began declining to take delivery of 3mil gloves.[60] However, the parties continued corresponding to negotiate the price of 3mil gloves, although they disagree whether such negotiations went towards the possibility of concluding a fresh agreement

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58 Agreed Bundle of Documents (Volume 19 of 52) ("19AB") 227 and 230.

59 DCS at para 262; PCS at para 488.

60 SOC-A1 at para 42; D&C-A3 at para 49.

(which is FSH's position), or whether the negotiations came under the existing Supply Agreement, 1st PO and/or 2nd PO (which is SGI's position).[61]

55 On 6 July 2021, FSH's Procurement and Supplier Relationship Manager, Ms Shiah Yoong ("Ms Yoong") sent an email to SGI's Ms Hew ("6 July 2021 Email"), stating that FSH wished to "cancel all the open POs":[62]

> …
>
> Following various conversations you had with Sarah for the last few weeks, disappointingly, we didn't manage to reach an agreement on the pricing of the 3 mil nitrile gloves. We have left with no option but to cancel all the open POs. Can you please arrange a refund of deposit of USD $59,654,915.20 to reach our account by Friday 9th July 2021?

56 While Ms Yoong's email has quantified the 80% of purchase price which FSH already paid to SGI for 3mil gloves which remain undelivered at US$59,654,915.20, parties accept that this amount is in fact US$64,782,300, being the total amount under the 1st PO (*ie*, US$45,988,800) and the 2nd PO (*ie*, US$18,793,500) (see [28] and [45] above).[63] To date, this sum remains with SGI.[64]

57 On 22 January 2022, SGI commenced the present suit against FSH. Apart from defending the claim, FSH lodged a counterclaim.

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61 PCS at para 78; DCS at paras 310–311.

62 Agreed Bundle of Documents (Volume 23 of 52) ("23AB") 638.

63 D&C-A3 at para 61; R&DC-A3 at para 68.

64 D&C-A3 at para 61; R&DC-A3 at para 68.

The parties' cases

58 I now summarise SGI's claims against FSH, FSH's defence and counterclaim against SGI, as well as SGI's defence to FSH's counterclaim and FSH's reply.

SGI's claims

59 SGI's primary case is that FSH has committed a breach and/or repudiatory breach of the Supply Agreement, the 1st PO and the 2nd PO.[65] SGI was always ready, willing and able to fulfil its obligations under these agreements.[66] However, after sending the 20 April 2021 Email, FSH:

(a) failed, refused, and/or neglected to arrange for shipment of some 77,050,000 and 15,509,000 pieces of 3mil gloves which SGI had produced under the 1st PO and the 2nd PO respectively (totalling 92,559,000 pieces), and/or to take delivery of them;[67]

(b) repeatedly demanded price reductions for the 3mil gloves under the Supply Agreement, 1st PO and 2nd PO, for gloves which have yet to be shipped (the "open orders"), as well as for these price reductions to apply retrospectively to gloves already shipped, and threatened to otherwise cancel all open orders;[68] and

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65 SOC-A1 at paras 47–48.

66 SOC-A1 at para 45.

67 SOC-A1 at paras 42, 47, 48 and 50.

68 SOC-A1 at paras 41, 43, 44, 47 and 48.

(c) sent the 6 July 2021 Email.[69]

60 SGI has not accepted FSH's repudiation of the Supply Agreement, the 1st PO and the 2nd PO, and continued to perform, and/or remained ready, willing and able to perform the same,[70] by procuring the production of the remaining 619,750,000 and 235,741,000 pieces of 3mil gloves under the 1st PO and the 2nd PO respectively (totalling 855,491,000 pieces).[71]

61 In light of FSH's alleged breaches, SGI seeks specific performance of the Supply Agreement, the 1st PO and the 2nd PO.[72] In this regard, while SGI pleads that they require FSH to "take delivery of and pay for the remaining 3mil Gloves produced and/or procured by [SGI], and/or to be produced and/or procured",[73] it appears from their written submissions that they only claim for specific performance in relation to the 855,491,000 pieces of 3mil gloves which remain unproduced.[74]

62 Further and alternatively, SGI seeks damages caused by FSH's alleged breach of the Supply Agreement, the 1st PO and the 2nd PO.[75]

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69 SOC-A1 at paras 46–48.

70 SOC-A1 at paras 49–50.

71 SOC-A1 at para 50.

72 SOC-A1 at para 51; PCS at para 608.

73 SOC-A1 at para 51.

74 PCS at paras 532 and 608.

75 SOC-A1 at paras 52 and 53; PCS at para 532.

FSH's Defence and Counterclaim

63 FSH denies that it committed any breach. Instead, FSH's case is that through the 20 April 2021 Email (reiterated again in the 6 July 2021 Email), FSH was merely terminating the Supply Agreement, the 1st PO and the 2nd PO after accepting SGI's repudiatory breaches of the same, which comprise:[76]

(a) SGI's failure to use all reasonable endeavours to meet all orders in accordance with the agreed delivery schedules under the 1st PO and the 2nd PO;[77]

(b) the increases in prices of the gloves;[78] and

(c) SGI's failure to supply the EN455 shelf-life certificate within reasonable time following FSH's request for the same.[79]

64 FSH also appears to argue that SGI committed these breaches in relation to the 5mil PO,[80] although I observe that FSH's position in this regard is not entirely clear. While FSH pleads that SGI breached the 5mil PO by its "failure to make delivery of the 3 and 5 mil Gloves",[81] and while FSH's expert, Mr Watts, opines that FSH "potentially incurred increased purchase and shipping costs" as a result of SGH's "alleged failure to meet the contractually agreed

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76 D&C-A3 at paras 43 and 45.

77 D&C-A3 at para 43; DCS at paras 182–188.

78 See also D&C-A3 at para 40; DCS at para 114.

79 D&C-A3 at paras 46–47; DCS at paras 261–265.

80 D&C-A3 at paras 40 and 43; DCS at paras 114 and 261–265.

81 D&C-A3 at paras 61 and 62.

delivery schedule",[82] FSH does not appear to have argued in their written submissions or closing submissions that the 5mil PO was breached by SGI in terms of the timing of deliveries or prices of the 5mil gloves.[83] Be that as it may, I will, in my reasons below, also consider if SGI breached the 5mil PO.

65 Further, on SGI's second alleged repudiatory breach concerning the price increases, I note that FSH originally pleads that SGI "was also in breach and/or repudiatory breach of the Supply Agreement due to … increases of the cost price of Gloves and the increases in *shipping costs* in relation to Gloves which should have been delivered prior" [emphasis added].[84] However, I agree with SGI's observation that FSH's actual case is not that the increases in shipping costs *per se* constituted a breach, but that this was a loss which flowed from SGI's other alleged breach concerning the delays in deliveries.[85] I proceed on this basis.

66 Following its purported termination of the agreements on 20 April 2021, FSH argues that it was no longer obligated to accept any delivery of gloves or to make further payments for any undelivered gloves.[86]

67 FSH also denies that it committed a repudiatory breach of the Supply Agreement, the 1st PO and the 2nd PO by seeking price reductions. It explains that these requests were made due to SGI's increases in price despite being in

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82 Watt's AEIC at p 33 para 4.6.

83 See, *eg*, DCS at para 31.

84 D&C-A3 at para 43.

85 PCS at paras 85–86.

86 D&C-A3 at paras 22, 23, 29, 30 and 49.

breach and/or repudiatory breach of the same agreements, which caused FSH to need to pay more to SGI for the gloves, and/or to need to sell the gloves when market prices had fallen substantially.[87]

68 Finally, FSH accepts that it has not paid the remaining sum of US$5,127,384.80 due under the 1st PO, the 5mil PO and the 2nd PO for gloves already delivered.[88] However, its position is that these amounts should be set off against the monies paid to SGI in relation to any undelivered gloves (*ie*, US$45,988,800 under the 1st PO and US$18,793,500 under the 2nd PO)[89] which are refundable "advance payments".[90] The balance should then be refunded to FSH.

69 Alternatively, FSH argues that it is entitled to restitution of these sums because SGI has been unjustly enriched by them.[91] Beyond seeking a refund of the monies it paid to SGI, FSH also claims that, as a result of SGI's breaches, it has suffered losses.

SGI's defence to FSH's counterclaim and FSH's reply

70 In its defence, SGI denies any breach of the Supply Agreement, the 1st PO, the 2nd PO and the 5mil PO. In any event, any breach of these contracts was waived by FSH. On the other hand, FSH denies any waiver on its part.

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87 D&C-A3 at para 48.

88 D&C-A3 at para 42; DCS at paras 353 and 419.

89 D&C-A3 at para 61.

90 DCS at para 419.

91 D&C-A3 at para 61A; DCS at para 407.

Issues to be determined

71 Based on the parties' cases as canvassed above, the following broad issues arise for my determination:

(a) whether SGI committed a breach of the Supply Agreement, the 1st PO, the 2nd PO and/or the 5mil PO;

(b) if SGI committed a breach, whether the breach was repudiatory in nature;

(c) if SGI committed a repudiatory breach, whether FSH waived its consequent rights as an innocent party;

(d) if FSH did not waive its consequent rights, whether and when FSH validly terminated the contracts breached by SGI;

(e) whether FSH committed a breach and/or repudiatory breach of the Supply Agreement, the 1st PO and/or the 2nd PO;

(f) if any party committed a breach and/or repudiatory breach of any of the three contracts, what the appropriate remedies would be; and

(g) whether the monies paid to SGI by FSH are refundable.

Preliminary issue: relationship between the Supply Agreement, and the 2nd PO and the 5mil PO

72 Before addressing these substantive issues, there is a preliminary question which I must first address − the relationship between the Supply Agreement, and the 2nd PO and the 5mil PO. This issue is important because it

determines whether the parties can rely on the terms in the Supply Agreement to argue their cases concerning the 2nd PO and the 5mil PO.

Parties' arguments

73 FSH's position is that the Supply Agreement was the master agreement governing the 1st PO, the 2nd PO and the 5mil PO.[92] It relies on the Court of Appeal decision of *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd* [2017] 2 SLR 372 ("*Sintalow*") (at [46] and [59]) to argue that the Supply Agreement, being the first contractual document signed by FSH and SGI, is the master document setting out the general terms and conditions governing the intended supply of gloves under purchase orders issued by FSH and accepted by SGI.[93]

74 FSH further highlights that the conclusion of the Supply Agreement was contrary to SGI's usual practice, and was specifically done to safeguard SGI's interests given the size of FSH's intended orders.[94] It also argues that to hold otherwise would contradict SGI's pleaded case.[95]

75 On the other hand, SGI contends in its closing submissions that the Supply Agreement only applied to the 1st PO, but not the 2nd PO and the 5mil PO.[96] It relies on the wording in the 2nd PO, the 2nd PI, the 5mil PO, and the

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92 DCS at paras 39 and 44.

93 DCS at para 39.

94 DCS at paras 40–44.

95 DCS at paras 45–46.

96 PCS at para 438.

5mil PIs.[97] It further relies on the facts that the use of formal supply agreements runs contrary to SGI's usual business practice,[98] and that the Supply Agreement served a different commercial purpose from the 2nd PO and the 5mil PO.[99] It also seeks to analogise the present case to *Saha Ram Krishna and others v Tan Tai Joum (acting in his capacity as the personal representative of the estate of Tan Hee Liang, deceased)* [2024] SGHC 9 ("*Saha Ram*"), and to distinguish the present case from *Sintalow*.[100]

My decision

76 I turn first to consider the 2nd PO. In this regard, I agree with FSH that this case should proceed on the basis that the 2nd PO was governed by the terms of the Supply Agreement. This is so for at least two reasons.

77 First, and importantly, I find that SGI's case is not entirely consistent. For instance, in response to FSH's pleaded allegation that by failing to meet the delivery schedule for the 2nd PO, SGI was "in breach and/or repudiatory breach of the Supply Agreement and the [2nd PO]",[101] SGI merely responds that it was "not in breach and/or repudiatory breach of the Supply Agreement and/or the [2nd PO]".[102] There was no denial that the Supply Agreement did not apply. Further, in its closing submissions, while it takes the position that the Supply

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97 PCS at paras 431–436.

98 PCS at para 438.

99 PCS at para 439.

100 Transcript for Closing Oral Submissions on 7 October 2024 ("Transcript") at p 55 lines 27–32 and p 56 line 1.

101 D&C-A3 at para 27.

102 R&DC-A3 at para 30.

Agreement did not apply to the 2nd PO and 5mil PO (see [75] above), it in fact repeatedly relies on the terms of the Supply Agreement to argue that it did not breach the 2nd PO (without framing this as an alternative argument). For instance, it relies on:

(a) Clause 4.4 to argue that it should be excused from the delays in deliveries of 3mil gloves under both the 1st PO and the 2nd PO because they were caused by reasons beyond SGI's control;[103] and

(b) Clause 3.2 to argue that there was no implied term in relation to the provision of the EN455 shelf-life certificates.[104]

From SGI's broader case, SGI seems to proceed on the basis that the 2nd PO is governed by the Supply Agreement.

78 Second, I find that throughout their performance of the contract, parties have proceeded on the mutual understanding that the 2nd PO was governed by the Supply Agreement, notwithstanding that the contracts did not make any express reference to each other. Apart from SGI's repeated reliance on the provisions in the Supply Agreement as highlighted in the preceding paragraph, this is most clearly evidenced by how SGI approached FSH's request for the EN455 shelf-life certificates.

79 When asked to clarify on the shelf-life of certain 3mil gloves delivered, the ambit of the request included gloves delivered under the 2nd PO, *eg*, the batch GT20J01, which included gloves delivered under order number

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103 See generally PCS at Section VI.C, and, *eg*, paras 158, 207 and 217.

104 PCS at paras 481 and 485.

FSH17581 of the 2nd PO.[105] Yet, in its contemporaneous response (and throughout the course of proceedings), SGI did not seek to distinguish its obligations relating to the EN455 certificates under the 1st PO and the 2nd PO. It did not make the point that it was not required under the 2nd PO to provide the certificates within reasonable time because it was not governed by the Supply Agreement, and hence Clause 3.2.[106]

80 I hence proceed on the basis that the 2nd PO is governed by the terms of the Supply Agreement. In coming to this finding, I note again that nothing in the Supply Agreement contemplates the 2nd PO, and that nothing in the 2nd PO and the 2nd PI refers to the Supply Agreement. In this regard, it might be said that the present case is analogous to *Saha Ram*.

81 In *Saha Ram*, two tenancy agreements were concluded between the plaintiff tenants and the defendant landlord. An issue which arose was whether the plaintiffs took their tenancy under a single contract or under two independent contracts (*Saha Ram* at [45]). The High Court agreed with the defendant that the two tenancy agreements were separate, explaining that nothing in either tenancy agreement made any reference to the other, each agreement was commercially workable on its own terms, each agreement served a separate (albeit complementary) commercial purpose, and the plaintiffs themselves treated the two agreements as independent (*Saha Ram* at [49]–[52]). I note that the first plaintiff tenant's appeal was later allowed in part. However, the High Court's findings in this regard remained undisturbed.

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105 21AB 52.

106 Agreed Bundle of Documents (Volume 22 of 52) ("22AB") 700 and 711–717.

82 While at first glance, the facts of the present case might appear analogous to those in *Saha Ram*, it must be highlighted that in that case, the defendant had, from the outset, consistently pleaded that the two tenancy agreements were separate (see *Saha Ram* at [35]). The defendant had also informed the plaintiffs from the outset that they would have to enter into separate tenancy agreements for the first storey, and for the second and third storeys of the premises (*Saha Ram* at [49]). However, as earlier explained, these factors are absent here. Therefore, *Saha Ram* does not assist SGI.

83 For completeness and clarity, while I agree with FSH that this case should proceed on the basis that the 2nd PO is governed by the Supply Agreement, I disagree that this is so because the parties had, from the outset when concluding the Supply Agreement, intended for it to govern all future contracts between SGI and FSH. Relatedly, I also disagree that this case is analogous to *Sintalow*.

84 In *Sintalow*, the parties signed a letter which contained the general terms and conditions applicable to the supply of sanitary ware by the plaintiff supplier, Sintalow, to the defendant purchaser, OSK (the "Master Contract") (*Sintalow* at [15(e)]). The Court of Appeal held that the Master Contract contained the default terms intended to apply to any specific agreements which were subsequently concluded, subject to any terms set out in these specific agreements (*Sintalow* at [46] and [58]–[59]).

85 The present Supply Agreement is distinguishable from the Master Contract in *Sintalow*. There, the Master Contract contemplated the conclusion of the specific contracts subsequently entered into (see *Sintalow* at [15(e)], [48] and [52]). However, the Supply Agreement was not concluded in contemplation

of the 2nd PO. To give a more specific example, whereas the Master Contract in *Sintalow* neither mentioned any quantity nor expressly imposed obligations on either party to place and/or accept orders (*Sintalow* at [15(e)]), Clauses 1.1 and 2.1 of the Supply Agreement expressly contemplate the quantity and price of the gloves respectively, which coincide with those under the 1st PO. It is improbable that the parties could have intended for the Supply Agreement to also apply to the 2nd PO *from the outset*. However, this does not contradict my finding that *at the time of concluding the 2nd PO*, parties agreed that the Supply Agreement would (to the extent that it was not overwritten by more specific provisions in the 2nd PO) govern the 2nd PO.

86 I turn next to consider the 5mil PO, which I also find to be governed by the Supply Agreement. This is supported by the context against which it was entered into (see [30]−[34] above). By SGI's own case, not long after the 1st PO was concluded, and:[107]

> … whilst SGI and FSH were in discussions over the supply of additional 3mil Gloves under the 2nd PO, SGI and FSH *also* discussed the supply of 9" 5mil Nitrile Dark Smart Blue gloves to FSH… [emphasis added]

87 Even when the 5mil PO was concluded on 10 August 2020, discussions on the 2nd PO were also still ongoing (see [39] above). The proximity in time between the conclusion of the 5mil PO, and that of the 1st PO and the Supply Agreement, coupled with the overlapping discussions between the 5mil PO and the 2nd PO (which I have just found to be governed by the Supply Agreement), suggest on balance that the 5mil PO was, in general, similarly governed by the terms of the Supply Agreement.

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107 Long's AEIC at para 71.

88 From all of the above, the implication is that the parties can rely on the general provisions in the Supply Agreement to advance and/or defend their cases with respect to the 1st PO, the 2nd PO and the 5mil PO. On the other hand, any argument to the effect that the provisions of the Supply Agreement do not apply to the 2nd PO or the 5mil PO would fail, unless it can be shown that these general provisions were overwritten by more specific provisions in the 2nd PO and the 5mil PO.

Issue 1: whether SGI breached the Supply Agreement, the 1st PO, the 2nd PO and/or the 5mil PO

89 I now consider whether SGI breached the Supply Agreement, the 1st PO, the 2nd PO and/or the 5mil PO. In this regard, FSH submits that SGI committed three main breaches:

(a) SGI failed to use all reasonable endeavours to meet the delivery schedules under the 1st PO, the 2nd PO and (seemingly – see [64] above) the 5mil PO;

(b) SGI increased the prices of the gloves; and

(c) SGI failed to produce the EN455 certificates for certain orders under the 1st PO, the 2nd PO and the 5mil PO within reasonable time upon FSH's request.

90 I will now address each of these alleged breaches in turn.

Whether SGI used all reasonable endeavours to meet the delivery schedules

The applicable principles

91 In *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 ("*KS Energy*"), the Court of Appeal held (at [62]) that an "all reasonable endeavours" clause should be interpreted similarly to a "best endeavours" clause. As such, the standard which the former imposes is similar to that imposed by the latter, which is established in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 ("*Travista*").

92 More specifically, the Court of Appeal in *KS Energy* summarised the substance of this standard as follows:

> 47 *Travista* lays down the following propositions regarding a "best endeavours" obligation:
>
> (a) The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of *the obligee* … and anxious to procure the contractually-stipulated outcome within the available time, would have taken.
>
> (b) The test for determining whether a "best endeavours" obligation has been fulfilled is an objective test.
>
> (c) In fulfilling its obligation, the obligor can take into account its own interests.
>
> (d) A "best endeavours" obligation is not a warranty to procure the contractually-stipulated outcome.
>
> (e) The amount or extent of "endeavours" required of the obligor is determined with reference to the available time for procuring the contractually-stipulated outcome; the obligor is not required to drop everything and attend to the matter at once.

> (f) Where breach of a "best endeavours" obligation is alleged, a fact-intensive inquiry will have to be carried out.

…

93 … we also endorse the guidelines below *vis-à-vis* the operation and extent of both "all reasonable endeavours" and "best endeavours" clauses:

> (a) Such clauses require the obligor "to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted" (see *Yewbelle (HC)* ([75] *supra*) at [123] and *Yewbelle (CA)* ([79] *supra*)), or "to do all that it reasonably could" (see *Jet2 (CA)* ([84] *supra*) at [31]).
>
> (b) The obligor need only do that which has a significant (see *The Talisman* ([71] *supra*)) or real prospect of success (see *Yewbelle (HC)* and *Yewbelle (CA)*) in procuring the contractually-stipulated outcome.
>
> (c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved (see *Yewbelle (CA)*).
>
> (d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations (see *CPC Group* ([82] *supra*)), but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice (see *Jet2 (CA)*).
>
> (e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken (see *EDI* ([59] *supra*)).
>
> (f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those

> steps were not reasonably required, or that those steps would have been bound to fail (see *EDI*).
>
> [emphasis in original]

There was no breach under the 5mil PO

93 As alluded to earlier (at [64]), it appears that FSH is no longer pursuing its claim arising from SGI's late deliveries in relation to the 5mil PO. In any event, there was no breach of Clause 1.2 for SGI to use all reasonable endeavours to ensure punctual deliveries under the 5mil PO. The orders were in fact completed ahead of schedule. This was conceded by Mrs Stoute at trial.[108] As such, I turn next to consider the 1st PO and the 2nd PO.

Parties' arguments in relation to the 1st PO and the 2nd PO

94 It is not disputed that SGI did not meet the delivery schedules set out in the 1st PO and the 2nd PO (see [29] and [46] above). SGI argues in its defence that:

(a) it was not obliged to strictly adhere to the schedules;

(b) the schedules were adjusted and superseded with FSH's agreement;

(c) the delays were caused by reasons beyond SGI's control, relying on Clause 4.4 of the Supply Agreement; and/or

(d) SGI had in any event already exercised all reasonable endeavours to perform the contracts.

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108 Notes of Evidence for 4 July 2024 ("040720 NE") at p 46 lines 2−6.

95 More specifically, with regards the penultimate argument, by providing a monthly account of events, SGI explains that the delays were caused by issues beyond its control, including shipping-related issues caused by FSH,[109] utility disruptions,[110] issues relating to the supply of packaging materials,[111] FSH's request to prioritise the production of 5mil gloves over 3mil gloves,[112] FSH's request to revise the size mix per container of 3mil gloves to include a higher proportion of L and XL gloves coupled with the delay in the supply of formers (*ie,* moulds) required to produce L and XL gloves,[113] and a mechanical breakdown of one of the thermal oil heaters in one of SGC's plants.[114]

96 FSH accepts that SGI's obligation with regard to the adherence to delivery schedules under the 1st PO is qualified by Clause 1.2 of the Supply Agreement to "use all reasonable endeavours".[115] However, it submits that SGI did not use all reasonable endeavours to fulfil its obligations because:

(a) it over-sold its capacity to produce gloves and diverted production capacity away from FSH;[116] and

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109 See, *eg*, PCS at para 165.

110 See, *eg*, PCS at para 170.

111 See, *eg*, PCS at para 175.

112 See, *eg*, PCS at para 181.

113 See, *eg*, PCS at paras 189–190.

114 PCS at para 195.

115 DCS at para 65; Transcript at p 15 lines 19–31 and p 16 lines 1–7. See also Defendant's Aide-Memorie ("DAM") at Annex C paras 1–4.

116 DCS at paras 205 to 208.

(b) it failed to use all reasonable endeavours to address the shortage of formers.[117]

97 More specifically, FSH alleges that SGI should have, among other things, approached alternative former suppliers,[118] built up stockpiles of formers to ensure it was able to meet FSH's orders,[119] rearranged its production lines or re-allocated production capacity to other manufacturers who had adequate capacity to produce L and XL sized gloves,[120] and/or simply asked FSH if it was prepared to adjust the size mix slightly so that more containers could be filled.[121]

98 In response, after highlighting that the issue with formers is not easily surmountable,[122] SGI submits that it took all reasonable endeavours to resolve this issue, including doing its best to push its former supplier to deliver the formers,[123] sourcing for alternative former suppliers,[124] and actively exploring solutions with FSH and its other customers to resolve the issue.[125] SGI also argues that it had no obligation to source for alternative suppliers, and/or that such attempts would have been impracticable.[126] Neither did it need to have a

117 DCS at paras 214 to 260.

118 DCS at para 236.

119 DCS at para 246.

120 DCS at para 249.

121 DCS at para 255.

122 PCS at para 234.

123 PCS at para 240.

124 PCS at para 245.

125 PCS at para 248.

126 PCS at paras 242 and 244.

stockpile of formers,[127] nor to open additional production lines.[128] Finally, SGI argues that it prioritised FSH's orders to the extent that was reasonable, and that FSH was in fact satisfied with SGI's conduct.[129]

My decision

(1) SGI's obligations under the 1st and 2nd PO

99 To reiterate, FSH has accepted that the 1st PO is qualified by Clause 1.2 of the Supply Agreement.[130] Since I have found that the 2nd PO was similarly governed by the Supply Agreement (which would include Clause 1.2), I proceed on the basis that SGI did not need to strictly adhere to the delivery schedules under both the 1st PO and the 2nd PO, but nonetheless needed to use all reasonable endeavours to adhere to them. In other words, pursuant to Clause 1.2, the issue in question is whether SGI had "use[d] all reasonable endeavours to meet all orders … in accordance with the agreed terms of delivery" in relation to both the 1st PO and the 2nd PO.

100 This would mean that SGI's first broad contention – that it need not strictly adhere to the delivery schedules under the 2nd PO – has been addressed, with my finding being aligned with SGI's position (although SGI relied on different reasons). This would also mean that SGI's second broad contention – that the original schedules were adjusted and superseded with FSH's agreement – is rendered somewhat moot. Regardless of whether the original schedules

127 PCS at paras 250–259.

128 PCS at para 265.

129 PCS at paras 269 and 279.

130 Transcript at p 15 line 30−p 16 line 7.

were superseded, SGI's obligation under Clause 1.2 remained that of *using all reasonable endeavours* to punctually deliver the gloves. Put another way, even if there was any valid variation of the delivery schedules, SGI's obligation to satisfy the deliveries punctually using all reasonable endeavours remains unchanged. The focus remains on whether the endeavours undertaken by SGI were reasonable, rather than whether the gloves were delivered punctually. With that, I turn now to consider parties' remaining arguments.

(2) SGI's reliance on Clause 4.4

101 Clause 4.4 on force majeure is set out at [15] above, and it excuses parties from "any delay or failure in performance". Regardless of whether the reasons cited by SGI for the delays are true, they would, in themselves, be insufficient to excuse any breaches of Clause 1.2. This is because Clause 4.4 does not excuse SGI's obligation under Clause 1.2 to *use all reasonable endeavours* to deliver the gloves punctually. SGI's reliance on Clause 4.4 is thus misplaced. To be clear, this does not mean that the circumstances surrounding SGI's performance of the agreements are irrelevant. Instead, they would already be factored into the factual matrix when the court determines if SGI used all reasonable endeavours to deliver the gloves punctually. In this regard, I make two observations regarding the arguments made by SGI in reliance of Clause 4.4.

102 First, while SGI has detailed a variety of reasons explaining the delays, SGI has also conceded that most of these reasons were relatively temporary, and that the main reason causing the large-scale and persistent delays was FSH's request to change the size mix of each container, coupled with the lack of

formers. For instance, as highlighted by FSH, SGI's Mr Hew testified as follows:[131]

> Q. So the true reason for this long-term difficulty in producing for Full Support was issues arising from delays or limitations in the supply of formers, right?
>
> A. Formers, then the change of products. Of course, this utility is -- is comparative -- relatively –
>
> Q. Minor?
>
> A. -- not that -- not that big. Maybe --
>
> Q. Yes?
>
> A. -- maybe it could be 40-over container over a few months, uh -- mm.
>
> Q. And this 40-over containers over a few months is something that you could normally be able to recover, right, if not for the former issues?
>
> A. Giving the -- maybe I have the mould former. We can actually --
>
> Q. Make up for it?
>
> A. -- make up.

103 This is also confirmed by Mr Long's testimony:[132]

> Q. Okay. Now, if I could sum up my understanding of your evidence: the major case of delays and long-term production

131 Notes of Evidence for 28 June 2024 ("280624 NE") at p 113 line 23–p 114 line 15.

132 Notes of Evidence for 27 June 2024 ("270624 NE") at p 28 line 18–p 29 line 5.

> constraints was Smart Glove's inability to get former supplies; correct?
>
> A. Yes.
>
> Q. So I know we've spoken about utilities disruptions and breakdowns, but these in comparison would be temporary blips; right?
>
> A. Temporary, but it has an impact.
>
> Q. It has an impact, but not as much as your former constraints?
>
> A. Yes. After the -- I think that's after August when the sizes were changed.

104 More specifically, according to SGI, FSH had requested for a change in the size mix of each container in August 2020 to include more L and XL gloves (see [25] above).[133] However, SGG's supplier of formers, CeramTec Innovative Ceramic Engineering (M) Sdn Bhd ("CeramTec"), was affected by domestic Covid-19-related restrictions, and could not supply sufficient L and XL-sized formers to SGI.[134] This was made known to SGI on 20 August, when CeramTec told SGI that it had "a big challenge with the labor (skilled)".[135] There were thus delays in the delivery of 3mil gloves.

105 For reasons which I will come to in the next section, even if relevant, I am unable to accept the reliance on this reason.

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133 PCS at para 151.

134 See, *eg*, PCS at para 198.

135 Hew's AEIC at para 43(a) and p 204.

106 Second, I note that to justify the delay in 3mil gloves, SGI also points to FSH's requests to prioritise the delivery of the 5mil gloves in exchange for some delays in the delivery of the 3mil gloves.[136]

107 I accept that FSH told SGI multiple times that it could prioritise delivering the 5mil gloves over the 3mil gloves, and it could accept some delays in the delivery of 3mil gloves.[137] However, I find that the understanding between the parties was that such delays would be on a limited scale. Certainly, SGI did not indicate that it was willing to tolerate a large-scale delay of the deliveries of the 3mil gloves. This is evident, for instance, from how, in one of his earlier emails to SGI discussing the supply and purchase of 5mil gloves, FSH's Mr Simpson stated that FSH:[138]

> … would be happy to delay some of the [3mil gloves] *for a couple of weeks* if it means slotting in the 5mil production. [emphasis added]

108 On 3 August 2021, one day before the original purchase order concerning the 5mil gloves was issued (see [31] above), SGI's internal emails revealed that it was aware that FSH was not going to give it any purchase orders in respect of any 5mil gloves if SGI would default too heavily on its obligations under the 1st PO:[139]

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136 PCS at para 181. See also PCS at paras 138–150.

137 See PCS at para 140 and 148.

138 Agreed Bundle of Documents (Volume 6 of 51) ("6AB") 609.

139 Agreed Bundle of Documents (Volume 7 of 51) ("7AB") 49.

> …
>
> Customer [*ie*, FSH] informed me that *if we are not meeting the capacity that we promised them earlier and they are considering if they are going to give us the new order*.
>
> Please take note on this as customer mentioned that we are way behind schedule and also asking us what is our capable capacity and *if we cant fulfil we must inform them*.
>
> …
>
> [emphasis added]

109 This understanding of the limitation placed on FSH's concession was also conceded by SGI's Mr Long during the trial:[140]

> Q. And if you're telling -- if you're going to tell your customer "I can't even fulfil your 3 mil PO" do you think that they're going to enter into a new 5 mil PO with you?
>
> A. No.

110 Indeed, SGI does not appear to rely on this argument too heavily, except in relation to the delays in September 2020.

(3) Whether SGI oversold its capacity

111 I accept FSH's primary case that SGI oversold its capacity. Therefore, SGI cannot be said to have used all reasonable endeavours to deliver the gloves punctually; it breached Clause 1.2.

112 In coming to my decision, I note that the delays in SGI's delivery of 3mil gloves were large-scale and persistent. While this does not directly show

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140 Notes of Evidence for 26 June 2024 ("260624 NE") p 108 lines 7–11.

that SGI has breached Clause 1.2, it is relevant in supporting the *inference* of such a breach.

113 In this regard, my findings are summarised in the table below, where I compare the original agreed number of deliveries to be made as set out in the 1st PO Summary Page and the 2nd PO Summary Page (see [18] and [42] above respectively), to the actual number of deliveries made each month, up till April 2021.[141] I also set out, in italics, the anticipated numbers for the same categories after April 2021. These are based on an email sent by SGI's Mr Yeoh to FSH on 19 April 2021 (one day before FSH sent the 20 April 2021 Email) (the "19 April 2021 Schedule"), containing SGI's revised plan for the delivery of 3mil gloves from April 2021 to June 2021 (see [351] below).[142]

Month	**1st PO**		**2nd PO**	
	Originally agreed number of deliveries in Summary Page	**Actual number of deliveries**	**Originally agreed number of deliveries in Summary Page**	**Actual number of deliveries**
June 2020	30	0		
July 2020	60	16		
August 2020	60	48		
September 2020	60	42		

141 See PCS at para 318; DCS at para 198; D&C-A3 at paras 16 and 27.

142 20AB 257.

October 2020	60	16		
November 2020	60	12		
December 2020	60	6	20	6
January 2021		5	20	11
February 2021		8	20	15
March 2021		17	20	17
Up till 20 April 2021		8	20	12
Up till end-April 2021		4		4
May 2021		*21 expected*	20	*21 expected*
June 2021		*26 expected*	20	*26 expected*
Total (as at 20 April 2021)	**390**	**178**	**100**	**61**
Total	**390**	***229 expected***	**140**	***112 expected***

114 I make three observations from the table. First, even before the 20 April 2021 Email was sent by FSH, SGI did not once hit the number of deliveries originally envisioned by the parties. In fact, it persistently fell far short.

115 Second, by the time the 20 April 2021 Email was sent, SGI had merely delivered 178 out of 390 of the due containers (around 46%) under the 1st PO, and 61 out of 100 of the due containers (61%) under the 2nd PO. The parties

also agree that as of end-April, SGI had delivered 182 out of 390 of the due containers (around 47%) under the 1st PO, and 65 out of 100 of the due containers (65%) under the 2nd PO.[143]

116 Third, even after June 2021, SGI would, if the projected deliveries in May 2021 and June 2021 were adhered to, still be short of 161 out of 390 of the due containers (around 41%) under the 1st PO, and 28 out of 140 of the due containers (20%) under the 2nd PO. Assuming that SGI's projected deliveries in the first week of July are similar, the state of affairs would remain similar at the time when FSH sent the 6 July 2021 Email.

117 Given these, I find that regardless of what SGI's obligations pertaining to the delivery schedules were, it can hardly be disputed that SGI was underperforming for the most (if not whole) period, especially after October 2020. But was that the case *despite* SGI having employed all reasonable endeavours to meet the original deadlines? I do not think so.

118 Pertinently, between June 2020 and July 2021, SGI's production output had, in fact, curiously increased:[144]

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143 PCS at para 318; DCS at para 289.

144 Agreed Bundle of Documents (Volume 30 of 52) ("30AB") 364.

Production output June '20 till June 21

Months	Plant Production output ('000, pieces)					Total Production all plant ('000 pcs)
	SGC	GX2	PGI	Sigma	GX3	
June-20	-	74,200	95,299	109,544	104,406	383,449
July-20	-	73,112	91,848	87,857	121,044	373,861
August-20	14,415	76,689	85,803	113,489	133,925	424,321
September-20	37,400	71,193	85,323	103,007	120,097	417,020
October-20	63,130	82,806	84,571	97,570	123,576	451,653
November-20	98,390	78,130	78,006	112,532	123,005	490,063
December-20	133,002	84,008	78,588	126,524	132,647	554,769
January-21	131,107	77,558	82,254	104,841	137,563	533,323
February-21	122,701	77,433	75,121	103,890	124,852	503,997
March-21	136,872	83,277	79,143	73,024	139,082	511,398
April-21	125,519	76,081	78,002	105,806	143,281	528,689
May-21	127,750	66,473	63,230	65,444	147,007	469,904
June-21	116,765	72,799	78,967	107,783	137,995	514,309
	-	-	-	-	-	-
Total	1,107,051	993,759	1,056,155	1,311,311	1,688,480	6,156,756

119 At trial, Mr Long initially testified that these gloves went towards fulfilling orders which were placed by SGI's customers which came in before FSH:[145]

> Q. Okay? So if you are telling me you are not taking new orders from June to June 2021 onwards, that means that all these -- the 6 billion gloves is going to existing customers only?
>
> A. Yes, and orders that came in before Full Support.

120 However, SGI did not, despite an order for the production of, *inter alia*, "Correspondence and Documents … relating to the allocations of [SGI's] stock and/or inventory of Gloves produced or supplied by the Glove Suppliers towards the two billion 3 and 5mil Gloves ordered by [FSH], for the period from

[145] 270624 NE at p 45 lines 15–19.

June 2020 to July 2021", produce any documentary evidence to explain how these gloves were being distributed amongst its customers.[146]

121 In fact, the documentary evidence suggests that Mr Long's initial testimony is untrue. In this regard, FSH highlights a total of 32 invoices which included orders for L and XL-sized 3mil gloves, even though these invoices were issued pursuant to purchase orders issued *after* SGI realised CeramTec's inability to change the size mix of formers to include more for L and XL-sized gloves on 20 August 2020 (see [104] above).[147] I have summarised the contents of these invoices in the table below:

Month	**No of invoices containing orders for both L and XL gloves**	**No of invoices containing orders for L gloves only**	**Total**
August, after 20 August 2020	2	0	2
September 2020	6	1	7
October 2020	6	1	7
November 2020	4	1	5
December 2020	3	2	5
January 2021	3	0	3
February 2021	1	0	1
March 2021	2	0	2

146 See DCS at para 195.

147 See DCS at para 205 and note 319.

Total	27	5	32

122 For completeness, in addition to the invoices summarised above, there was one more issued pursuant to a purchase order dated July 2020, and two more which were issued pursuant to undated purchase orders.

123 These invoices were disclosed by SGI in support of an unrelated point, *ie,* to show that it would collect deposits of 50% to 100% from its customers.[148] Indeed, there could be more invoices of a similar nature, including invoices issued pursuant to purchase orders dated up till and even after June 2021. In coming to this finding, I have drawn an adverse inference against SGI for failing to comply with the order to produce documentary evidence explaining how the gloves produced between June 2020 and July 2021 were distributed amongst its customers.

124 In other words, the evidence suggests that SGI continued to accept new orders (in fact, a large number of them) even after encountering issues with meeting FSH's orders under the 1st PO and the 2nd PO, and began to divert some of its production capacity towards fulfilling some of these new orders. By doing so, SGI caused itself to become severely overcommitted. Worse still, these new orders contained orders for L and XL-sized 3mil gloves. On SGI's *apparent* own case, the lack of formers for these sizes was the main reason limiting its timely deliveries under the 1st PO and the 2nd PO.

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148 DCS at para 205; 2nd Supplementary Affidavit of Evidence-in-Chief of Mr Ahmad Faizi Mohd Kamil ("Faizi's 2nd Supp AEIC") at para 17.

125 I place emphasis on the word "apparent", because it appears that SGI's position on this issue of fact changed over the course of proceedings. In this regard, SGI's Mr Hew originally testified that SGI was:[149]

> … informed that CeramTec was unable to supply more formers of the larger *M/L/XL sizes* and it would take CeramTec 4 to 5 months to supply new formers. [emphasis added]

126 However, during trial, Mr Hew seemed to suggest that it was mainly formers for the XL-sized gloves which were in shortage.[150] Then, in its closing submissions, SGI says that it was unable to procure sufficient formers to produce L and XL-sized gloves.[151]

127 That said, I do not need to comment on these inconsistencies. The fact remains that SGI accepted many more new purchase orders for 3mil gloves which included the size(s) for which it allegedly faced a shortage of formers. Applying the test in *Travista* (see [92] above), it can hardly be said that a prudent and determined man, acting in the interests of FSH and anxious to procure the deliveries of 3mil gloves under the 1st PO and the 2nd PO within the delivery schedules originally agreed between the parties, would have acted in the way SGI did. SGI has thus breached Clause 1.2, and such breach persisted, minimally, into July 2021.

128 In this regard, the additional authorities cited by FSH are also helpful.[152] In *Kea Investments Ltd v Watson and others* [2020] EWHC 2599 (Ch), Nugee

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149 Hew's AEIC at para 44.

150 280624 NE at p 142 line 10–p 143 line 22.

151 See, *eg*, PCS at para 198.

152 See DCS at para 202.

LJ held (at [43]) that one way a person could breach an obligation to use best endeavours is "if the person has not been genuine in his efforts to achieve the required objective". Similarly, in *Hospital Products Ltd v United States Surgical Corporation and Others* [1985] LRC (Comm) 411, the High Court of Australia held (at 428) that:

> The implied obligation to use best efforts to promote the sale of the goods necessarily imported the obligation not to take any deliberate steps to damage the market for those goods in Australia … [A]n express promise by an agent to use his best endeavours to obtain orders for another and to influence business on his behalf "necessarily includes an obligation not to hinder or prevent the fulfilment of its purpose": *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359, at p.378.

129 By continuing to overcommit itself at the expense of severely compromising its fulfilment of the 1st PO and the 2nd PO, I find that SGI has breached Clause 1.2 of the Supply Agreement. For clarity, in coming to this decision, I am not saying that SGI is obligated to reject *any* new orders after accepting the 1st PO and the 2nd PO. As held in *KS Energy*, an obligor is allowed to consider its own interests in fulfilling a best endeavours obligation. However, the *extent* to which this is allowed is not without limits. At the minimum, an obligor should not, in considering its own interests, actively be taking steps which harm the interests of the obligee in respect of the obligation it is precisely expected to take all reasonable endeavours to fulfil. Here, SGI has crossed the line.

(4) The endeavours SGI undertook to resolve the delays in deliveries

130 Given my findings above, I need not consider whether the steps taken by SGI to resolve the delays in deliveries of 3mil gloves under the 1st PO and the 2nd PO were sufficient. Any such steps would be overshadowed by SGI's

large-scale continued acceptance of purchase orders for 3mil gloves in the face of the multiple problems it was facing in fulfilling its obligations under the 1st PO and the 2nd PO. SGI should not be allowed to actively behave in a way which compromises its obligation to use all reasonable endeavours to punctually deliver the 3mil gloves, but yet be excused from liability just because it also took some remedial steps in other aspects.

SGI's increase in prices

131 The next breach which FSH alleges against SGI is SGI's increase in the prices of gloves.

Parties' arguments

132 SGI denies any breach, and argues that:

(a) it is entitled under the Supply Agreement, 1st PO, 2nd PO and/or the 5mil PO to increase the prices of the gloves, albeit for different reasons. Under Clause 2.1 of the Supply Agreement which only applied to the 1st PO, the price of gloves is "fixed for the full quantity unless there are extenuating circumstances beyond [SGI's] control that both parties agree warrants a change". Under the 2nd PO and 5mil PO, the stated prices are expressly subject to change in accordance with the 2nd PI and 5mil PIs;[153]

[153] PCS at paras 431–433.

(b) there were extenuating circumstances warranting an increase in price under Clause 2.1 of the Supply Agreement, such as the increase in price of raw materials;[154] and

(c) FSH had agreed to each increase in price.[155]

133 On the other hand, FSH argues that:

(a) pursuant to Clause 2.1 of the Supply Agreement, the price for 3mil gloves under the 1st PO was fixed;[156]

(b) there were no extenuating circumstances warranting an increase in price;[157] and

(c) while FSH had agreed to the price increases, this was done on the belief that there were in fact extenuating circumstances and that there would be no further delays in deliveries, which it was misled by SGI into believing.[158] SGI had also threatened to otherwise withhold deliveries.[159]

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154 PCS at paras 440–442.

155 PCS at para 450 and 453–470.

156 DCS at paras 110-111.

157 DCS at paras 116-121.

158 DCS at paras 112-114 and 121.

159 DCS at paras 122-124.

My decision

(1) Price increases under the 5mil PO and the 2nd PO

134 Since I have earlier found that there was no breach of Clause 1.2 in relation to the 5mil PO (see [93] above), there can be no corresponding breach of Clause 2.1 given the way FSH's case is framed:[160]

> It is not FSH's case in these proceedings that the price changes should be reversed. But ***because*** *the deliveries were late* and Smart Glove started increasing prices for shipments from October 2020, FSH was charged higher prices for many deliveries that should have arrived earlier… [emphasis added]

135 In any event, as I will now explain, SGI was entitled to increase the prices under the 2nd PO and the 5mil PO.

136 While I have found that the 2nd PO and the 5mil PO are governed by the Supply Agreement (see [76] and [86] above), I further find that Clause 2.1 of the Supply Agreement was overwritten by the more specific terms contained in the 2nd PI and the 5mil PIs. Specifically, these invoices contained the express term that the prices stated within them were "subject to change" (see [36] and [43] above). That the prices under the 2nd PO and the 5mil PO were indeed meant to be subject to change becomes clearer when one compares the 2nd PI and the 5mil PIs to the 1st PI, which does not contain a similar provision.

137 In this connection, the present case is analogous to *Sintalow* (see [84] above), where the Court of Appeal held that certain general terms in the Master

[160] DCS at para 114.

Contract were overwritten by more specific provisions in the agreements which were subsequently concluded (*Sintalow* at [119(d)]).

138 Thus, SGI was entitled to increase the prices under the 2nd PO and the 5mil PO, which were not fixed. Indeed, in FSH's submissions on this issue, it has only argued that "[t]he price for all orders under the 1st PO was fixed",[161] but not that the position was the same for orders under the 2nd PO or the 5mil PO. For completeness, I note that FSH also advances a related argument that increasing the price of gloves which were delivered late would, in and of itself, constitute a breach.[162] I do not agree. In the 2nd PI and the 5mil PIs, it is stated that "the final price will be notified to the buyer prior to the confirmed date of delivery" (see [36] and [43] above). This allowed SGI to change the price, even when a particular delivery is delayed, *until* the confirmed date of delivery, when the final price would be notified to the buyer. I therefore find that SGI was entitled to increase the prices under the 2nd PO and 5mil PO even for orders that should have been delivered earlier.

(2) Price increases under the 1st PO

139 On the other hand, under the 1st PO, any price increase would be contractually allowed under Clause 2.1 of the Supply Agreement only if: (a) there were extenuating circumstances beyond SGI's control; and (b) the parties agreed to it. I now consider if Clause 2.1 was engaged.

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161 DAM Annex C at para 10; DCS at paras 110–111.

162 DCS at para 114.

140 Essentially, SGI argues that the extenuating circumstances beyond its control were the significant increases in the price of raw materials. I disagree for two reasons.

141 First, I agree with FSH[163] that before the Supply Agreement was concluded, the parties had considered any potential increases in the price of raw materials during the duration of the 1st PO from June 2020 to December 2020, and SGI made a commercial decision to bear this risk. In a letter to FSH's Mr Simpson dated 9 June 2020, SGI's Ms Hew stated that:[164]

> … price inconsistence is mainly due to the *concern of material supply is still being unstable* in the market currently, hence we are facing difficulties to lock in the price as the *risk is quite high during this period*.
>
> However, as a good news to share, as a gesture of support to work this out with you as our first project with your esteem Company, after taking in consideration, we are willing to support you, and would look forward to *fix the price at USD82.50 per 1,000pcs for this whole entire order of 1.3 billion pcs glove* …
>
> [emphasis added]

142 In other words, before the Supply Agreement was concluded, SGI had acknowledged the "high" risks surrounding the cost of raw materials, and agreed to bear this risk moving forward. It would contradict the parties' intention to allow SGI to rely on the increase in price of raw materials to justify its increases in price.

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163 DCS at para 116.

164 1AB 411-412.

143 Second, it is doubtful if SGI's price increases truly reflected the increase in price of raw materials it had to bear. For a start, SGI's Mr Faizi testified that the raw materials used to produce the gloves would be procured beforehand in previous months, and that the prices for gloves charged each month reflected the prevailing market price for the raw materials in the month that the gloves were supposed to be shipped, instead of the actual cost price of the raw materials used to produce each batch of gloves.[165]

144 While there might not be anything inherently wrong with such an arrangement in a general commercial context, it puts into question here whether the increases in prices were in fact due to extenuating circumstances which would avail SGI of Clause 2.1.

145 Indeed, I am doubtful whether the price increases were truly caused by such extenuating circumstances. As set out at [49] above, SGI started increasing the price of 3mil gloves in October 2020 from US$82.50 to US$87.50. In an email to FSH's Mr Simpson on 24 September 2020,[166] Ms Nurini Marini Binti Alias ("Ms Marini"), SGI's Assistant Manager of Business Development, explained that SGI "can no longer absorb the [increased raw material] cost *or [SGI] will be operating at a loss*" [emphasis added], and sought to pass on US$6 of the US$12 increase in raw materials (per 1,000 pieces) to FSH for 3mil gloves due to be delivered in October 2020.

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165 Notes of Evidence for 2 July 2024 ("020724 NE") at p 5 line 25–p 6 line 20.

166 Agreed Bundle of Documents (Volume 12 of 52) 261−264.

146 This is curious. SGI's expert, Mr Tang, had assessed SGI's gross profit margin to be 3.87% in Financial Year Ending ("FYE") 2020,[167] and the SGG Manufacturers' weighted average contribution margin for related party sales (*ie*, (revenue – variable costs) / revenue)[168] to be 56.79% in FYE 2021.[169] Assuming that the SGG Manufacturers' average contribution margin in FYE 2020 was similar (which is supported by the fact that their general gross profit margin had merely increased from 42.96% to 45.56% between FYE 2020 and FYE 2021)[170], the Smart Glove Group (*ie*, SGI and the SGG Manufacturers) would collectively earn around 60% of the original price of US$82.50 per 1,000 gloves. That amounts to around US$50 of profits. With such a high profit margin, and without any other reason being put forth, it is questionable why SGI would not have been able to absorb a US$12 increase in latex costs for October 2020. It is thus doubtful if the price increase in October 2020 truly corresponded to any extenuating circumstances which would have triggered the operation of Clause 2.1.

147 This same observation applies to the subsequent price increases. SGI's Mr Faizi testified that the price of latex "increased significantly" from June 2020, peaking at US$2.7900 per kg from February 2021 to April 2021, as follows:[171]

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167 Tang's AEIC at p 113 para 150.

168 Tang's AEIC at p 134 para 161.

169 Tang's AEIC at p 136 para 166.

170 Tang's AEIC at p 93.

171 Faizi's AEIC at para 74.

Month	Unit price per kg (US$)
June 2020	1.0150
July 2020	1.0600
August 2020	1.1250
September 2020	2.0000
October 2020	2.2000
November 2020	2.5000

148 In September, when Ms Marini first stated the necessity for SGI to increase the price of 3mil gloves by US$6 due to a US$12-increase in the price of latex per 1,000 gloves, the unit price of latex had (on SGI's case, but which I do not make any finding on) increased by US$0.985 per kg (relative to the price of US$1.015 per kg in June 2020) to US$2 per kg. Given this, it is improbable that a subsequent increase in the price of latex to US$2.5000 per kg (*ie*, by US$0.5000) in November 2020 would trigger a further US$6 increase in the price of gloves which SGI would have needed to pass on to FSH for 3mil gloves due to be delivered in December 2020 (see [49] above). Similarly, it is improbable that a subsequent increase in the price of latex to US$2.7900 per kg (*ie*, by a mere US$0.2900) in 2021 would have triggered the subsequent price increases (to a price of US$106.42 in March 2021, *ie*, a further increase of US$12.92 per 1,000 gloves compared to the price of US$93.50 for gloves delivered in December 2020 – see [49] above). The increase in the latter is disproportionately higher than the increase in the former, and does not truly reflect increases in costs which SGI needed to pass on to FSH.

149 At this juncture, I note that SGI argues that its price increases were reasonable, and consistent with industry practice during the material time.[172] This misses the point. What Clause 2.1 requires before parties can agree to a change in price is the presence of *extenuating circumstances* beyond SGI's control, and not that any proposed increase in prices must be reasonable.

150 Before leaving this point, I also find, for completeness, that SGI should not be allowed to rely on any price increases in raw materials after December 2020 to justify its increases in the prices of 3mil gloves. This is because the 3mil gloves under the 1st PO should have been delivered by the end of December 2020, and the price increases were a result of delays occasioned by SGI. As I found that the delays were the result of SGI overselling its capacity, which is a situation eminently within SGI's control (see [111]–[129]) above), the price increases after December 2020 could not have been effected pursuant to extenuating circumstances beyond SGI's control.

151 Given my finding that there were no extenuating circumstances which would have triggered the operation of Clause 2.1, it is unnecessary for me to decide if FSH had agreed to any consequent price increases. Any agreement to increase the price of 3mil gloves pursuant to Clause 2.1 would have been based on an impermissible premise, given that, pursuant to the phrasing of Clause 2.1, an agreement must be premised on an extenuating circumstance. Hence, I find that SGI breached Clause 2.1 of the Supply Agreement by increasing the price of 3mil gloves delivered under the 1st PO.

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172 PCS at paras 443–449.

Whether SGI produced the EN455 certificates within reasonable time

152 The last breach allegedly committed by SGI is in failing to produce the EN455 certificates in relation to certain 3mil and 5mil gloves within reasonable time upon FSH's request. FSH's request was made on 19 March 2021,[173] and the certificates were provided by SGI on 1 June 2021.[174]

Parties' arguments

153 FSH argues that:

(a) there is an implied term in the Supply Agreement that SGI is to provide the EN455 certificates upon FSH's request forthwith or within a reasonable time of two days;[175] and

(b) SGI breached this term.

154 On the other hand, SGI argues that:

(a) there is no such implied term;[176] and

(b) SGI provided the certificates within a reasonable time in any event.[177]

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173 21AB 748–750.

174 PCS at para 488; DCS at para 262.

175 DCS at para 178.

176 PCS at paras 485–487.

177 PCS at para 488.

The applicable law

155 In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"), the Court of Appeal set out the three-stage process through which the implication of terms in fact should be considered:

> 101 It follows from these points that the implication of terms is to be considered using a three-step process:
>
> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

156 More specifically, under the first step of the framework, a "true" gap would only arise if parties did not contemplate the issue at all and so left a gap. There would be no gap if parties contemplated the issue but chose not to provide a term for it because they mistakenly thought that the express terms of the contract had adequately addressed it, or if parties contemplated the issue but chose not to provide any term for it because they could not agree on a solution (*Sembcorp Marine* at [93]–[97]).

My decision

157 Applying the framework in *Sembcorp Marine*, I find that there cannot be any implied term in the Supply Agreement, because there is no "true" gap. Clause 3.2 already provides that SGI is obligated to provide EN455 certificates upon FSH's request. While there is no specific timeline stipulated, this was probably the case because parties had mistakenly thought that the express terms of Clause 3.2 had adequately addressed this issue. As such, the proper remedy in this situation should be an equitable rectification of the Supply Agreement (*Sembcorp Marine* at [94(b)] and [96]).

158 In this regard, I find that the actual intention of parties was to impose on SGI an obligation to supply any EN455 certificates requested for by FSH within a reasonable time, which should be within a few days of FSH's request. Clause 3.2 of the Supply Agreement should thus be so rectified. This must be the case as a matter of common and commercial sense. Otherwise, Clause 3.2 would be rendered useless.

159 This also appears to have been conceded by SGI's Mr Long at trial:[178]

[178] 270624 NE at p 62 lines 8–17.

> Q. Yes. So I read the clause "Upon request" to mean that the supplier should provide immediately when asked.
>
> A. Reasonable time.
>
> Q. You would say it's a reasonable time. What is a reasonable time to you?
>
> A. A couple of days if it is (unclear).
>
> Q. Yes, a couple of days. So surely the -- I mean, it makes sense the purchaser can't be waiting two or three months to get these certifications; right?
>
> A. Yes.

160 While the remedy of equitable rectification is not pleaded by either party, given how this issue has been ventilated at trial, I see no prejudice to SGI in relying on this doctrine. I find that SGI breached its obligations under the rectified Clause 3.2 in relation to all the agreements by taking more than two months to provide the EN455 certificates upon FSH's request.

161 I add that the EN455 certificates were not, objectively speaking, particularly difficult to obtain, since they had been prepared sometime between 2012 and 2013, prior to FSH's request.[179] The certificates already existed. While SGI has explained that the delay was caused due to a high workload and internal miscommunications,[180] such internal issues do not excuse SGI's obligations under the rectified Clause 3.2. To hold otherwise would mean that parties can be excused from fulfilling their contractual obligations when they have internal operational issues. That cannot be right.

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179 See 22AB 700, 703 and 711.

180 PCS at paras 488–489.

Issue 2: whether SGI's breaches were repudiatory in nature

162 By the above, I have found that SGI committed three breaches:

(a) breach of Clause 1.2 of the Supply Agreement to use all reasonable endeavours to ensure punctual deliveries of gloves in relation to the 1st PO and the 2nd PO;

(b) breach of Clause 2.1 of the Supply Agreement for increasing the price of 3mil gloves between October 2020 and April 2021 in relation to the 1st PO; and

(c) breach of Clause 3.2 of the Supply Agreement for failing to produce the EN455 certificates in respect of gloves to be delivered under the 1st PO, the 2nd PO and the 5mil PO within a reasonable time upon FSH's request.

163 The next question is whether these breaches are repudiatory, in the sense that they would have entitled FSH to terminate the agreements. In this regard, I observe that only the 1st PO and 2nd PO were purportedly terminated by FSH (see [47] and [55] above). Thus, the focus will only be on SGI's breaches in relation to these two contracts.

The applicable law

164 In *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*"), the Court of Appeal set out the four situations entitling an innocent party to terminate a contract (at [113]):

(a) In a "Situation 1" case, the contractual term breached clearly states that, in the event of certain event or events occurring, the innocent party is entitled to terminate the contract.

(b) In a "Situation 2" case, the defaulting party renounces the contract by clearly conveying to the innocent party that it will not perform its contractual obligations at all.

(c) In a "Situation 3A" case, the defaulting party has breached a condition (as opposed to a mere warranty) of the contract. A "condition" is a term that parties intended, at the time of contracting, to be so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract (*RDC Concrete* at [97] and [100]). A "warranty" is a term that parties intended, at the time of contracting, to be not so important so that no breach will ever entitle the innocent party to terminate the contract (even if the actual consequences of such a breach are extremely serious) (*RDC Concrete* at [98] and [100]).

(d) In a "Situation 3B" case, which should only be applied after the condition-warranty approach in Situation 3A is applied, the defaulting party has committed a breach, the consequences of which will deprive the innocent party of substantially the whole benefit which it was intended that the innocent party should obtain from the contract.

165 Since parties are not relying on Situation 1, I will move on to analyse whether a Situation 2 scenario is made out.

Situation 2

Parties' arguments

166 FSH's case is that SGI's conduct by early to mid-April 2021 was a renunciation of the Supply Agreement, the 1st PO and the 2nd PO.[181] By not using all reasonable endeavours to meet the agreed delivery schedules, SGI demonstrated an intention to continue delivering the remaining orders under the 1st PO and the 2nd PO in a way that was radically different from what was agreed.[182]

167 FSH then argues that if a defaulting party evinces an intention to perform a contract, "but the performance proffered is substantially inconsistent with that party's obligations" under the contract (which I will refer to as committing a "substantial breach"), this amounts to evincing an intention not to perform, *ie*, a renunciation (*Chitty on Contracts* (Hugh G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2023) at paras 28-048; *RDC Concrete* at [93] and [95]–[96], *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 ("*Alliance Concrete*") at [59]; *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2017] 4 All ER 124 at [77] and [87]).[183]

168 On the other hand, SGI denies any renunciation of the contracts, arguing that it tried its best to work with FSH for the delivery of the gloves.[184] Relying on *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409

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181 DAM at Annex C para 5; DCS at paras 266–267.

182 DCS at para 270.

183 DCS at para 267.

184 PCS at para 287.

("*Aero-Gate*") and *Government of the City of Bueno Aires v HN Singapore Pte Ltd and another* [2023] SGHC 139 ("*Bueno Aires*"), SGI argues that the delays did not mean that SGI had renounced the contracts.[185] In fact, it remained ready to perform its contractual obligations at all times.[186]

My decision

169 I accept SGI's submission that it did not renounce the Supply Agreement, the 1st PO or the 2nd PO. While SGI had breached its obligation to use reasonable endeavours to ensure the punctual delivery of gloves in accordance with the agreed schedules, the evidence suggests that it continued to be committed to completing the deliveries, albeit at its own pace.

170 This can be gleaned from the emails which SGI sent FSH in early to mid-April 2021 (when SGI's conduct had allegedly evinced an intention to renounce the contracts). For instance, on 19 April 2021 (one day before FSH sent the 20 April 2021 Email), SGI's Mr Yeoh sent FSH the 19 April 2021 Schedule.[187] Such conduct is inconsistent with that of a party seeking to renounce a contract.

171 In this connection, I agree with SGI that analogies can be drawn to *Aero-Gate* and *Bueno Aires*. In *Aero-Gate*, the plaintiff engaged the defendant to fabricate and deliver ten diesel generators under two purchase orders (*Aero-Gate* at [8]). Under the first purchase order, the defendant had to deliver four

185 PCS at paras 287–288.

186 PCS at paras 289–290, 472 and 491.

187 20AB 257.

generators by, initially, 1 October 2011, and then subsequently after an extension of time was granted, end-January 2012 (*Aero-Gate* at [5] and [7]). Under the second purchase order, the defendant had to deliver six generators: four by 1 November 2011, and two more by 1 January 2012 (*Aero-Gate* at [6]). The defendant was later granted two extensions for the generators due under the second purchase order – first, to deliver two generators by 14 November 2011 and the remaining four by 1 January 2012; and subsequently, to deliver the first two generators by 21 November 2011 (*Aero-Gate* at [17]–[18]).

172 The defendant failed to meet its delivery deadlines under the second purchase order but continued work thereafter. It eventually delivered two generators pursuant to the second purchase order on 16 January 2012 (*Aero-Gate* at [19]). On 24 April 2012, the plaintiff terminated both purchase orders. At that time, the defendant was working on two more generators and had procured a further two generators to be worked on pursuant to the second purchase order (*Aero-Gate* at [20]). It had not started work on the first purchase order.

173 In finding that the defendant had not renounced the second purchase order, the High Court explained that:

> 109 … Its progress on the work was doubtless slow and in breach of contract. In March and April 2012 it did not respond to the plaintiff's repeated requests that it choose a completion date and commit to it … But in my opinion this failure does not amount to the defendant renouncing its contractual obligations. The *defendant might not have been willing to commit itself to deadlines, but I find that it remained ready to perform its*

> *contractual obligations and continued to do so, albeit at its own glacial pace.* [emphasis added]

174 In *Bueno Aires*, the plaintiff engaged the first defendant, HN Singapore, to import and supply 182,475 Covid-19 test kits by 26 April 2020 (*Bueno Aires* at [15]). HN Singapore failed to do so (*Bueno Aires* at [17]). Following that, between 27 April 2020 and 16 May 2020, the plaintiff repeatedly sought confirmation of the delivery date of the test kits. HN Singapore was unable to do so. However, its sole director and shareholder Mr Eng, the second defendant, stated that the defendants maintained the utmost dedication to seeing the deal through (*Bueno Aires* at [23]). HN Singapore was subsequently unable to import the test kits, and the plaintiff terminated the agreement on 27 May 2020 (*Bueno Aires* at [25]).

175 The High Court held that although HN Singapore had failed to deliver the test kits by 26 April 2020, this did not constitute a renunciation of the contract, because it did not evince an intention to no longer be bound by the contract:

> 88 In this case, there was no renunciation of contract by HN Singapore (*ie*, Scenario 1). Even after the non-delivery of the Test Kits on 26 April 2020, the defendants submit that HN Singapore continued to work with the plaintiff for the delivery of the Test Kits. Mr Eng even conveyed to the plaintiff that the defendants "maintained utmost dedication to seeing the deal through" and that they "remained committed … to ensure that the goods get … delivered as soon as possible". A reasonable person would not conclude that HN Singapore no longer intended to be bound by the Varied SPA (*San International Pte Ltd (formerly known as San Ho Huat*

> *Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20]).

176 Similarly, in the present case, while SGI repeatedly failed to meet the delivery timelines, its communications with FSH suggest that it remained committed to seeing the deal through (albeit at its own pace). A reasonable person would not conclude that SGI no longer intended to be bound at all by the provisions of the Supply Agreement, the 1st PO and the 2nd PO.

177 As for FSH's proposition that a substantial breach amounts to renunciation under Situation 2, I am unable to agree that it is supported by the local authorities. To begin with, this proposition is not consistent with the test for renunciation under Situation 2: whether the defaulting party conveys an intention that "it *will not perform its contractual obligations* ***at all***" [emphasis in italics in original; emphasis added in bold italics] (*RDC Concrete* at [93]; *Alliance Concrete* at [155]).

178 Indeed, in *RDC Concrete*, the Court of Appeal expressed a tentative preference of leaving the analysis pertaining to any substantial breaches to the next stage, under Situations 3A and 3B:

> 95 There is also a suggestion in a leading textbook that where a contracting party *deliberately* chooses and is, indeed, "determined" to perform its part of the contract "only in a manner substantially inconsistent with his obligations" (*per* Lord Wright in the House of Lords decision of *Ross T Smyth & Co, Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 at 72, which is termed "substantial breach" by the author) then that, too, will also justify the innocent party's termination of the contract (see Sir Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) at p 809 (and the authorities cited therein)). With respect, however, **and having regard to the substance of (and, more importantly, controversy in relationship between) *Situations 3(a) and 3(b)* below, the preferable view, in our opinion, appears to be that whether or not the**

> **innocent party is entitled to terminate the contract concerned will depend, in the final analysis, upon whether or not the tests pursuant to *Situations 3(a) and 3(b)* below are satisfied *and in the manner or order proposed below*.**
>
> 96 We acknowledge, however, that there is some merit in Prof Treitel's suggestion inasmuch as it can be argued that if the defaulting party chooses to perform the contract in a manner substantially inconsistent with its contractual obligations, it is, in *substance and effect*, renouncing the contract concerned. However, not having heard detailed arguments on this point, we will leave it open for further consideration should a suitable occasion arise in the future. It is interesting to note, however, that if the approach proffered below is adopted, the *same* result would, in *substance*, be achieved. In other words, and anticipating somewhat in advance the analysis that is to follow, if the party in breach had breached a condition of the contract, the innocent party would be entitled to terminate the contract but if the party in breach had breached a warranty instead, the innocent party would still be entitled to terminate the contract if there had been a *substantial breach*.
>
> [emphasis in original in italics; emphasis added in bold]

179 I acknowledge that in *Alliance Concrete*, the Court of Appeal seemed to suggest that a substantial breach could amount to a renunciation under Situation 2:

> 59 The test for renunciation was stated by this court in *San International Pte Ltd v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20] in the following terms:
>
> > … A renunciation of contract occurs when one party by words or conduct evinces an intention not to perform or expressly declares that he is or will be unable to perform his obligations in some material respect. Short of an express refusal or declaration *the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions*. **The party in default may intend in fact to fulfil the contract but may be determined to do so only in a manner substantially inconsistent with his**

> **obligations**, or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms[.] … [emphasis in original]

[emphasis in italics in original, emphasis added in bold]

180 However, the emphasis of the court in both *Alliance Concrete* and *San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 ("*San International*") was on the italicised portion, *viz*, whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions, and not on the portion in bold, which is what would have supported FSH's contention.

181 Indeed, in *Alliance Concrete*, the Court of Appeal proceeded on the basis that the test for renunciation was whether the appellant had evinced a clear intention to breach the contracts, and not on whether there had been a substantial breach:

> 105 In the first place, we are not satisfied that there is anything in the relevant correspondence between the parties prior to 6 February 2007 which evinces a clear intention on the part of ACS to breach the Contracts…

182 Similarly, in *San International*, the Court of Appeal framed the issue as follows:

> 26 The crux of the matter under this issue is whether San International's *refusal to undertake* the main office works unless they received additional payment and an extension of time (if so found) was sufficiently serious enough to justify

> Keppel Engineering terminating the subcontract on 29 November 1995… [emphasis added]

183 In *Bueno Aires*, the High Court also applied the test in *San International* in a similar way (see [175] above). Therefore, I find that FSH's proposition that a substantial breach amounts to renunciation under Situation 2 is not supported by local authorities. SGI did not commit a Situation 2 breach.

Situation 3A

184 FSH appears to have relied on a Situation 3A breach as an alternative argument only with regard to the 2nd PO in the event that it is not governed by the Supply Agreement.[188] In other words, FSH seems to accept that if the Supply Agreement governed the 1st PO and the 2nd PO, then the delivery schedules originally agreed between parties would not constitute conditions which would entitle it to terminate the agreements upon *any* breach by SGI.

185 Similarly, SGI's position is that the delivery schedules in the Supply Agreement, the 1st PO, and the 2nd PO were not conditions.[189]

186 Since I have found that the Supply Agreement governed the 1st PO and the 2nd PO, and, correspondingly, that the delivery schedules originally agreed between parties were qualified by the obligation in Clause 1.2 to use all reasonable endeavours (see [99] above), the parties' arguments in respect of a Situation 3A scenario are rendered moot. I thus make no further comments,

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188 DAM at Annex C para 7; DCS at para 295.

189 PCS at para 292.

except to note that FSH did not argue that Clause 1.2 of the Supply Agreement was itself a condition under Situation 3A.

Situation 3B

187 In considering whether SGI's conduct constituted a Situation 3B breach, the court should proceed in two steps. First, identify the exact benefit that parties intended the innocent party to derive from the contract. Second, examine the actual consequences of the defaulting party's breach that occurred at the time when the innocent party terminated the contract, to ascertain if the latter was indeed deprived of substantially the whole benefit of the contract (*Bueno Aires* at [90], citing *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 at [62]).

Parties' arguments

188 While FSH has pleaded three breaches committed by SGI, for which I have largely found in favour of FSH (see [162] above), it appears to only rely on SGI's breaches of Clause 1.2 and Clause 3.2 to argue that these two breaches collectively constitute a Situation 3B breach:[190]

> Smart Glove breached its undertaking in Clause 1.2 to use all reasonable endeavours to meet the agreed terms of delivery and its obligation under Clause 3.2 to provide the necessary EN455 certification, in the form of a compliant five-year shelf life report, upon request. These breaches were, taken collectively, repudiatory in nature. They deprived FSH of "*substantially the*

[190] DCS at para 285.

> *whole benefit which it was intended that [it] should obtain from the contract*" …

189 Specifically, FSH argues that the "entire commercial purpose" of the Supply Agreement, the 1st PO and the 2nd PO was for FSH to receive regular monthly deliveries of gloves within definite timeframes:

(a) 390 containers from June 2020 to December 2020 under the 1st PO; and

(b) 140 containers from November 2020 to June 2021 under the 2nd PO.

This would allow FSH to capture the wave of heightened market demand and prices during the pandemic, and to build a customer base in the second half of 2020 and first half of 2021.[191]

190 FSH further argues that SGI's breaches deprived FSH of substantially the whole benefit of the contracts, destroying the commercial benefit originally contemplated: to on-sell gloves to meet a specific commercial need under specific timeframes.[192] By early April 2021, the prices in the glove market started to decrease rapidly. Yet, 53% of the orders under the 1st PO remained undelivered four months after they were due, and only 65% of the orders under the 2nd PO due by April 2020 had been delivered,[193] with no fixed end point in sight.[194] FSH could not continue taking deliveries without making significant

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191 DCS at para 287.

192 DCS at para 292.

193 DCS at para 289.

194 DCS at para 290.

losses.[195] Moreover, FSH argues that SGI's late deliveries were also exacerbated by SGI's inconsistent and erratic delivery schedules, which hindered FSH from pre-selling or managing market risks.[196]

191 SGI rejects these arguments. Its position is that the benefit intended by the parties under the agreements was for FSH to receive delivery of the gloves, in accordance with the agreed terms of delivery (including any updated purchase orders). As of the date of FSH's purported termination of the agreements on 20 April 2021, FSH received, *inter alia*:

(a) 609,700,000 out of 1,306,500,000 pieces (or approximately 47%) of the Gloves under the 1st PO; and

(b) 217,750,000 out of 335,000,000 pieces (or 65%) of the Gloves under the 2nd PO, with two more months left for SGI to perform its obligations.

FSH therefore cannot be said to have been deprived of substantially the whole benefit of the contracts.[197]

192 SGI further argues, citing English and local authorities, that it is "intrinsically difficult" for the innocent party to establish a Situation 3 breach if the defaulting party is making an effort to perform the contract: *Astea (UK) Ltd v Time Group Ltd* [2003] All ER (D) 212 ("*Astea*") at [151]; *Tractors Singapore*

195 DCS at para 291.

196 DCS at para 289.

197 PCS at paras 318–319.

Pte Ltd v Pacific Ocean Engineering & Trading Pte Ltd [2021] 4 SLR 44 ("*Tractors Singapore*").[198]

193 SGI also argues that FSH's conduct at and after the time it purported to terminate the contract is relevant.[199] However, I consider this argument to be more appropriately dealt with below under the issue of waiver. In any case, the authority cited by SGI in support of this argument, *Valilas v Januzaj* [2015] 1 All ER (Comm) 1047 (at [66]), is one where the common understanding of parties from the outset was that time was not of the essence (at [29]). As I will soon explain, the situation in the present case is quite different.

194 Finally, in respect of SGI's breach of Clause 3.2 to provide the EN455 certificates within reasonable time, SGI submits that this breach did not deprive FSH of substantially the whole benefit of the contracts at the time when FSH terminated the contracts. As of 20 April 2021 (when FSH sent the 20 April 2021 Email), the consequences of any breach by SGI would have been minimal at best.[200] As of 6 July 2021 (when FSH sent the 6 July 2021 Email), the certificates had already been provided. FSH's right to elect to accept any repudiation by SGI in this regard would have ended.[201]

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198 PCS at paras 320–321.

199 PCS at paras 322–327.

200 PCS at paras 494–495.

201 PCS at para 496.

My decision

195 As will be explained below (at [284]−[290]), I find that FSH terminated the Supply Agreement, the 1st PO and the 2nd PO only on 6 July 2021 via the 6 July 2021 Email.

196 For present purposes, the implication of this is that FSH cannot rely on SGI's breach of Clause 3.2 to supply the EN455 certificates to terminate the contracts. The certificates were duly supplied on 1 June 2021 (see [53] above). Under such circumstances, I accept SGI's submission that any right which FSH had to terminate the contracts pursuant to this breach would have ended before 6 July 2021: see *Stocznia Gdanska SA v Latvian Shipping Co and others (No. 3)* [2002] EWCA Civ 889 at [87], which has also been cited with approval locally in *Singapore Airlines Ltd v CSDS Aircraft Sales & Leasing Inc* [2021] 5 SLR 26 (at [81]).

197 I turn now to consider if SGI's breach of Clause 1.2 constituted a Situation 3B breach.

(1) The benefit intended for FSH

198 I accept FSH's characterisation of the benefit which parties intended for FSH to gain under the Supply Agreement, the 1st PO and the 2nd PO (see [189] above). This is evident from the parties' negotiations surrounding the entry into the Supply Agreement.

199 In FSH's first enquiry email to SGI, FSH's Mr Simpson stated that

> … it has become obvious that despite the huge global shortage of [gloves] it is still something we [*ie*, FSH] wish to pursue as

> the number of enquiries we receive daily is huge and even the UK NHS is in real need of support if we can provide it. …

He also stated that FSH had "a large amount of money available to buy product immediately".[202] In other words, from the outset, FSH had already emphasised the urgency of its prospective order for 3mil gloves.

200 When SGI's Ms Marini first told FSH's Mr Simpson on 28 May 2020 that SGI's production capacity for 3mil gloves was fully booked until March 2021,[203] Mr Simpson's reply again made it clear that FSH was trying to ride on the booming market demand for gloves at that time:[204]

> Unfortunately the lead time for the gloves is just too long for us currently … sadly *our clients including the NHS in the UK cannot wait until March '21*.
>
> It is unfortunate as we feel we offer the right company *a huge opportunity once the Covid-19 situation has calmed down* particularly with supply into hospitals and others in the UK …
>
> [emphasis added]

201 FSH's other emails to SGI also made this same message clear. On 2 June 2020, Mr Simpson stated in his email to SGI that the UK Government had put in an official request for 500 million gloves in June 2020, 500 million gloves in July 2020, and at least 200 million gloves per month in subsequent months. He then stated that FSH:[205]

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202 1AB 401–402.

203 1AB 399.

204 1AB 398.

205 1AB 438.

> … fully understand the challenges involved in this type of volume and the *immediate timescales* involved … We fully understand that it may not be possible to offer the full capacity therefore we will listen to all offers and proposals *in order to achieve the above* [targets]. [emphasis added]

202 Clearly, FSH was communicating the urgency of its prospective order to SGI. This was again clear from Mr Simpson's later email the same day, when he even offered to pay a premium to gain SGI's orders urgently:[206]

> We have had further conversations with the Cabinet Office in the UK Govt. today and they have re-emphasised the need that they have and that is a *real opportunity* for someone to become a UK NHS supplier outwith the contract which really never happens.
>
> I fully respect and understand that you will have committed your capacity - if there was any way you could move some of it around to free some up to help with this I know it would be looked on favourably - *even if there was a slight price premium to 'gain the capacity'*.
>
> [emphasis added]

203 On 6 June, which was a Saturday, Mr Simpson wrote to SGI again to effectively chase for an update on SGI's proposed payment terms:[207]

> I know it is the weekend and I am aware it is a holiday in Malaysia this Monday but I just wanted to highlight to you that

206 1AB 239.

207 1AB 377.

> I am working all weekend on various projects including hopefully gloves :)
>
> If you have any updates please feel free to let me know as I will be able to respond.

204 On 8 June, SGI's Ms Marini replied to confirm that SGI agreed to FSH's proposed six-month timeline,[208] to which Mr Simpson again emphasised that he "look[ed] forward to getting everything sorted and getting those P.O.'s over to [SGI] ASAP to get things rolling".[209]

205 It is against the above context that the Supply Agreement was concluded on 11 June. And the 1st PO was subsequently concluded pursuant to the Supply Agreement. As I have earlier found, the parties also had in mind the Supply Agreement subsequently when concluding the 2nd PO.

206 In fact, by then, it would have become even more obvious to SGI that the 2nd PO was time sensitive. On 5 November 2020, pursuant to discussions on the 2nd PO, Mr Simpson stated that:[210]

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208 1AB 375–376.

209 1AB 374.

210 Long's AEIC at p 1026.

> As you are probably aware Covid-19 has come back to the UK and Europe and the 2nd wave is hitting us hard right now and the demand we have created for your glove is 'off the chart'.
>
> There is a real opportunity to stamp Gen-X into the minds of so many people if you can help us in anyway with extra stock or bringing orders forward.
>
> Ideally we would like extra capacity (we are willing to pay a higher price than we do currently within reason) especially if it can be shipped this year and as you know we are good payers.
>
> Failing that if extra orders are not possible can you pull forward existing orders for us as the requirement is incredible again.
>
> Anything you can do to support us now will be greatly appreciated and I genuinely mean it when I say there is a real opportunity to ingrain the Gen-X brand in the minds of people for long after Covid-19 is no longer with us.

207 In her reply, SGI's Ms Marini acknowledged FSH's urgency, stating that SGI "understand[s] the urgency of this matter".[211]

208 Given all of the above, I find that throughout their contractual relationship, FSH and SGI had always understood the urgency of the Supply Agreement, the 1st PO and the 2nd PO. Thus, it was the parties' intention that FSH was to receive the gloves punctually.

209 At this juncture, I pause to note that SGI points to the terms in the actual Supply Agreement, the 1st PO and the 2nd PO, to argue that the words used in these agreements suggest that there was no absolute obligation to adhere to the delivery schedules set out therein.[212] As held above, I agree that any obligation to adhere to the delivery schedules originally set out under the 1st PO and the

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211 Long's AEIC at p 1025.

212 PCS at paras 88–99 and 106–107.

2nd PO is qualified by Clause 1.2, *ie*, the obligation to use all reasonable endeavours. However, this does not detract from the fact that the parties well understood that the agreements were time sensitive. It is with this understanding that SGI was obligated to use all reasonable endeavours to deliver the gloves punctually under Clause 1.2.

210 What then about SGI's argument that the parties understood that SGI would be constrained, *inter alia*, by the challenges and uncertainties brought about by the pandemic?[213] Again, while I can accept this argument, it does not negate my finding that the parties also understood that SGI was obligated to use all reasonable endeavours to deliver the gloves under Clause 1.2 under the time-sensitive 1st PO and 2nd PO.

211 In this regard, my finding is fortified by the fact that Mr Long knew of FSH's urgency with the Supply Agreement, the 1st PO and the 2nd PO, given the context in which they were concluded.[214] For example, Mr Long admitted to this in relation to the 1st PO:[215]

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213 PCS at paras 100–105 and 108 and 112.

214 See generally DCS at para 53.

215 Notes of Evidence for 25 June 2024 ("250624 NE") at p 24 line 22–p 25 line 7.

> Q. Now, at the time these purchase orders were issued and accepted, it was the height of the COVID-19 pandemic?
>
> A. Yes.
>
> Q. And, as you say, there was unprecedented demand for gloves; yes?
>
> A. Yes.
>
> Q. But a low supply?
>
> A. Yes.
>
> Q. And prices at the time of these gloves were very high because of this mismatch between demand and supply?
>
> A. Yes.

212 Similarly, in relation to the 2nd PO, Mr Long stated the following:[216]

> Ms Mak. … So it's clear from Mr Simpson's email that Full Support wants to meet an immediate demand for gloves; correct?
>
> A. Yes.
>
> Q. And these deliveries are time-sensitive to meet the demand caused by the second wave of COVID in the UK and Europe; correct?
>
> A. Yes.

213 Given the above, it cannot be the case that the benefit which the parties had intended for FSH to gain under the Supply Agreement, the 1st PO and the 2nd PO was simply the delivery of a certain quantity of gloves in accordance with timelines which the parties will, *without reservation*, continually revise and agree upon along the way. Instead, regard must be had to the time-sensitive

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[216] 260624 NE at p 162 line 23–p 163 line 5.

nature of the contracts, which were concluded for FSH to commercially exploit the simultaneous surge in demand and limitation in supply of gloves during the height of the pandemic. Hence, I accept FSH's characterisation of the intended benefit for it (see [189] above).

(2) Whether FSH was deprived of substantially the whole benefit of the agreements when it terminated them

214 I find that FSH was deprived of substantially the whole benefit of the Supply Agreement, the 1st PO and the 2nd PO. As explained above (at [113]–[117]), as at the date of termination on 6 July 2021 (see [290] below), FSH had practically not received any 3mil gloves in accordance with the delivery schedules originally contemplated under the 1st PO and the 2nd PO.

215 To reiterate, under the 1st PO, only 140 out of 390 containers (around 35.9%) were delivered by December 2020, when the orders under the 1st PO were originally envisioned by the parties to be fulfilled by. In no month did FSH receive the quantity of gloves originally intended by the parties for it to receive. Even by end-June 2021, there would, even assuming the projected May 2021 and June 2021 schedules presented under the 19 April 2021 Schedule were adhered to (see [351] below), still have been around 161 out of 390 containers (around 41%) undelivered. By this time, SGI would have taken twice as long as originally intended to fulfil the orders.

216 Given SGI's track record, it is also unlikely that this number would change significantly by 6 July 2021. Even if SGI might, as it had projected itself of being able to do in the last two weeks of June 2021,[217] delivered seven more

[217] 20AB 257.

containers in the first week of July, there would still be around 39.5% of orders which would have remained unfulfilled.

217 Similarly, under the 2nd PO, SGI fell short in its scheduled delivery in each month. Assuming the projected May 2021 and June 2021 schedules presented under the 19 April 2021 Schedule (see [351] below) were adhered to, there would still be around 28 out of 140 of orders (20%) unfulfilled by end-June 2021 (which was the original end date for the 2nd PO). Even if SGI delivered another seven containers in the first week of July (as it projected itself of being able to do in the last two weeks of June)[218], there would still have been 15% of orders left unfulfilled.

218 The contemporaneous evidence also suggests that by around April 2021, FSH lost the commercial benefit which parties had envisioned for FSH to gain from the time-sensitive agreements, *ie*, the capitalisation on the glove shortage and demand surge at the height of the pandemic for profits. By that time, the market price for gloves was decreasing sharply.

219 On 9 April 2021, FSH's Mr Simpson wrote to SGI's Ms Hew to seek updates on some ongoing discussions to change the packaging of the gloves from boxes of 100 to boxes of 250 or 300 for "cost saving[s]".[219] On 13 April, Mr Simpson sent a chaser, saying that he "really need some answers on this as well please as we need to make plans for the Australian market in light of the fact that *pricing in UK & Europe is making us uncompetitive*" [emphasis

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218 20AB 257.

219 20AB 379.

added].[220] The exchange culminated in the 20 April 2021 Email, which also explained that "[t]he market price across the UK & Europe has dropped like a stone and we simply cannot compete" (see [47] above).

220 I hence find that SGI's breach of Clause 1.2, which continued into July 2021 (see [127] above) resulted in consequences which deprived FSH of substantially the whole benefit which it was intended that FSH should obtain from the contracts. This was a Situation 3B breach, which would have entitled FSH to terminate the Supply Agreement, the 1st PO and the 2nd PO via the 6 July 2021 Email.

221 Before leaving this issue, I address SGI's contention that it is "intrinsically difficult" for an aggrieved party to establish a Situation 3 breach if the defaulting party is making an effort to perform the contract.

222 In *Astea*, the Technology and Construction Court of England and Wales held (at [151]) that:

> … In any case in which there has been any degree of performance before the alleged repudiation the application of the test requires a qualitative judgment of whether failure to perform the remainder of the obligations of the relevant party will deprive the other party of substantially the whole benefit of the contract judged against the commercial purpose of the contract. It is likely to be necessary to consider not only what has been done, but also the value of that to the other party if nothing else is done. However, a flat refusal to continue performance will probably amount to a repudiation however much work has been done. On the other hand, *if considerable work has been done in performance of a party's contractual obligations and what is alleged to amount to a repudiation is not a flat refusal to perform, but an indication of an intention to continue to perform at a speed considered by the other party to*

[220] 20AB 378.

> *be unreasonably slow, it may be very difficult to conclude that in those circumstances what is being offered will deprive the other party of substantially the whole benefit of the contract. On the contrary, it may appear that the innocent party will eventually gain exactly the benefit contemplated.* The question will be whether, by reason of the time which will need to elapse before that happens, in commercial terms the party entitled to performance will be deprived of substantially the whole of the benefit which it was intended he should derive from the contract. [emphasis added]

223 While the italicised portion of the quote seems to support SGI's contention at first glance, on closer analysis, it is not entirely helpful. As observed in *Aero-Gate*:

> 115 I begin with *Astea*. Perhaps, as Judge Seymour QC said, it "may be very difficult" to establish a repudiatory breach where the party alleged to be in breach is performing his contractual obligations, albeit at a pace which the other party considers to be unreasonably slow. But **the question ultimately to be asked is: whether, by reason of the time which will need to elapse before the benefit is delivered, in *commercial terms* the party entitled to performance will be deprived of substantially the whole of the benefit which it was intended he should derive from the contract**. …
>
> [emphasis in original in italics; emphasis added in bold]

224 Here, the benefit contemplated by parties that FSH would gain was not *simply* to have gloves delivered to it. Rather, the benefit was *time-sensitive* in nature. Given this, the broad proposition expounded in *Astea* is of limited assistance. Similarly, *Tractors Singapore* does not assist SGI. There, the High Court was considering a situation where time was not of the essence. Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, the High Court stated that "it will be *intrinsically difficult* for the aggrieved party to establish a Situation 3(b) breach if the party in breach is making an effort to perform the contract"

[emphasis in original] (*Tractors Singapore* at [133], citing *Shawton Engineering Ltd v DGP International Ltd* [2006] BLR 1). Again, in contrast, the contracts here are time sensitive ones. And based on the fact-sensitive inquiry undertaken above, I find that a Situation 3B breach of the agreements occurred.

Issue 3: whether FSH waived its rights consequent to SGI's repudiatory breaches

225 Having found that SGI breached Clause 1.2 (which breach was also repudiatory), as well as Clause 2.1 and Clause 3.2, the next issue which arises is whether FSH then waived its rights consequent to these breaches.

The applicable law

226 There are two forms of waiver: waiver by election and waiver by estoppel. As explained by the Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*"):

> 54 … This doctrine [of waiver by election] concerns a situation where a party has a choice between two inconsistent rights. If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election …
>
> …
>
> 57 Waiver by election is often distinguished from what is sometimes called waiver by estoppel … This refers to the doctrine of equitable (or promissory) estoppel. It requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the

> representor to go back upon his representation: *The Kanchenjunga* at 399 col 2. It is important to note that the requisite representation is different as between waiver by election and equitable estoppel. *A party making an election is communicating his choice whether or not to exercise a right which has become available to him. By contrast, a party to an equitable estoppel is representing that he will in future forbear to enforce his legal rights.* And as the Judge observed, this doctrine is premised on inequity, not choice, hence the requirement of reliance (Judgment ([4] *supra*) at [35]) …
>
> [emphasis added]

227 In other words, to establish waiver by election, the defaulting party needs to establish three elements (see also *Aero-Gate* at [42]):

(a) the innocent party must have acted in a manner consistent only with affirming the contract, *ie*, treating the contract as still alive;

(b) the innocent party must have communicated his election, *ie*, his choice to affirm the contract, to the party in breach in clear and unequivocal terms; and

(c) there must be sufficient knowledge on the part of the innocent party; it must minimally be aware of the facts giving rise to its right to terminate the contract, but it remains unclear if it needs to also be aware of the right to terminate itself.

228 On the other hand, to establish election by estoppel, the defaulting party needs to establish the following two elements (*Audi Construction* at [64] and *Aero-Gate* at [37]–[38]):

(a) the innocent party must have made an unequivocal representation that he will, in future, not insist upon his legal rights against the defaulting party; and

(b) the defaulting party must have relied on this representation to his detriment such that it would be inequitable for the innocent party to resile on his representation.

229 It is well-established that mere silence or inaction will not normally amount to an unequivocal representation. However, silence might amount to such a representation if there is a duty to speak (*Audi Construction* at [58]).

230 It should also be noted that when a party commits a repudiatory breach of a contract, the innocent party has at least two rights: the right to terminate the contract and the right to claim damages arising from the breach. A waiver of one right does not translate into a waiver of the other (see *Aero-Gate* at [120]–[121]).

SGI's repudiatory breach of Clause 1.2

231 As I have found at [220] above, SGI committed a Situation 3B repudiatory breach of Clause 1.2 in respect of the Supply Agreement, the 1st PO and the 2nd PO. Based on these breaches, FSH would have accrued the right to terminate these agreements and the right to claim damages arising from the breaches.

Parties' arguments

232 SGI argues that FSH waived all its rights consequent to its breach of Clause 1.2, whether it was by election or by estoppel.[221] SGI explains that the original delivery schedules were adjusted and superseded with FSH's agreement, to accommodate FSH's various requests.

233 Moreover, SGI argues that between June 2020 to April 2021, FSH did not once disagree with the revised schedules issued by SGI, but accepted them following regular discussion between parties.[222] FSH also did not, prior to the commencement of proceedings, once allege that SGI did not comply with the original delivery schedules in the Supply Agreement, the 1st PO and the 2nd PO.[223] By its conduct between June 2020 to April 2021, FSH waived all its rights.[224]

234 Finally, SGI highlights that FSH, in their contemporaneous emails to SGI, did not rely on the delay in deliveries as a ground for termination.[225]

235 On the other hand, FSH submits that there was no waiver because it did not have full knowledge of the facts, and was misled by SGI as to the reason for the delays.[226] Moreover, there was no waiver because the elements were not

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221 PCS at para 331.

222 PCS at para 332.

223 PCS at para 333.

224 PCS at para 334.

225 PCS at para 422.

226 DCS at paras 319–324.

made out on the facts.[227] In any event, FSH's conduct was, at best, a temporary waiver while it was assessing the consequences of SGI's breach, conditional upon SGI exercising all reasonable endeavours to catch up within a reasonable time.[228]

236 In addition to the above, FSH also relies on Clause 4.6 of the Supply Agreement on "waiver" (and Clause 4.5 on "variation"), the applicability of which SGI disputes.[229]

My decision

237 It is important to remember from the outset that SGI's breach was not in failing to adhere strictly to the original delivery schedules under the 1st PO and the 2nd PO. Rather, it was in failing to use all reasonable endeavours to do the same. This breach was a continuing one. With this in mind, I find that FSH did not waive any of its rights arising from SGI's repudiatory breaches of Clause 1.2 by election or estoppel. This is so for the following reasons.

(1) FSH did not have the requisite knowledge to waive its rights

238 First, FSH did not have the requisite knowledge to waive its rights. As held at [129] above, throughout the duration when the 1st PO and the 2nd PO were supposed to have been performed, SGI continued to take on a large number of new orders, thus overcommitting itself severely. This was something SGI did

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227 DCS at paras 325–343.

228 DCS at paras 344–347.

229 DCS at paras 81–82 and 328; PCS at paras 403–414.

not tell FSH, and which FSH only discovered by chance subsequently (see [123] above).

239 Indeed, an internal email from SGI's Mr Yeoh suggests that SGI had not been completely forthcoming with FSH with regard to the reason for SGI's delays:[230]

> We just ended a called with customer and they are unhappy that we are unable to deliver the promise 14 containers to them.
>
> The reason we gave customer is the shortage of raw materials due to CMCO, but customer is not convinced and request to know where our raw materials are coming from,
>
> We are not able to share this type detail information with customer but customer is requesting a concrete reason for delay.
>
> We did not receive any reason for delay from your end therefore we have no choice but to advise the customer the above.
>
> …
>
> We would like to request that if there's any delay of delivery of shipment, please kindly provide us with valid reason as customer has beginning to lose trust in us.

240 Without the requisite knowledge of SGI's breach in failing to use all reasonable endeavours to punctually deliver the gloves (*ie*, the fact giving rise to FSH's right to terminate the agreements), FSH could not have made any election to affirm the agreements.

241 Similarly, without such knowledge, there could have been no waiver by estoppel. This is because SGI, being the party with knowledge of the fact that it

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230 Agreed Bundle of Documents (Volume 13 of 52) ("13AB") 205.

was overcommitting itself, could not seriously have placed any detrimental reliance on any of FSH's representations.

242 In this regard, this case is analogous to *Lim Ah Mee and Another v Summerview Developement Pte Ltd (formerly known as Raymond Yong & Associates Pte Ltd) and Another* [1998] SGHC 87 ("*Lim Ah Mee*"). There, the plaintiffs executed an option to purchase a property in favour of the first defendant, Summerview (*Lim Ah Mee* at [7]). The option was however not validly accepted by Summerview in time (*Lim Ah Mee* at [74]).

243 Summerview seemingly argued that while this was the case, the plaintiffs were nevertheless estopped from contending that the option lapsed because Summerview had made various payments pursuant to the option and the plaintiffs knew that those payments were made (*Lim Ah Mee* at [90]). However, the High Court rejected this argument, explaining as follows:

> 92 … It is not in dispute that Summerview did pay off OCBC. Summerview has also incurred other expenses pursuant to the Option. *But was there any representation by the plaintiffs, either by conduct or otherwise, that they would not insist upon the strict compliance of the terms of the Option that it be accepted within 7 days of the in-principle approval? I cannot see how that could be asserted, bearing in mind that* ***Summerview knew the true position and the plaintiffs did not***. In my view there is much force in the following submission of the plaintiffs' counsel:-
>
> > '***Summerview incurred expenses out of self-interest, not because it allegedly relied on some representation***. So long as it harboured any intention or desire to accept the Option, it obviously wanted to do everything necessary to preserve its position. *Summerview was incurring expenses in anticipation that it might one day accept the Option, not because of any bizarre estoppel.*'

> Even Goh admitted as much that paying off OCBC was to ensure that the property would be available to Summerview.
>
> 93 As regards the argument that the plaintiffs, by passively allowing Summerview to incur those expenses, have led Summerview to believe that they would not be insisting on strict compliance, I do not think that is so. Those expenses were contemplated under the Option. *Those expenses were incurred not on account of any representation.* Admittedly, there were a few expenses which Summerview bore perhaps out of goodwill even though it was not obliged to, like the plaintiffs' previous solicitors' fee. ***Summerview knew that it should have accepted the Option by 22 January 1991. It chose not to do so. It did not inform the plaintiffs of the in-principle approval. It decided, quite deliberately, not to exercise the Option at the time because there were advantages in taking that approach*** - it did not have to pay up OCBC and the Commissioner all within two months; neither did it have the resources to pay all that. To say that in these circumstances estoppel could nevertheless apply would mean that Summerview could by stealth unilaterally alter the terms of an Option. It is true that after October 1992 Mee would have known that the in-principle approval had been obtained. But there could not be any waiver or estoppel when Mee kept asking Goh about the Acceptance Copy. Summerview was just taking advantage of its dominant position.
>
> 94 As pleaded by Summerview, it really amounts to saying that just because Summerview has incurred those expenses pursuant to the Option, they need not comply with the other terms thereof. With respect, I think that is untenable. ***I cannot see how Summerview could contend that it has been misled. It was the party with full knowledge of the facts. The plaintiffs were not.*** Summerview knew full well what it was doing. Surely, estoppel, being an equitable remedy should only assist those who have acted bona fide…
>
> [emphasis added in italics and bold italics]

244 In other words, there was no estoppel by the innocent party because unlike the defaulting party Summerview, which had full knowledge of its wrongdoing, the innocent plaintiffs did not. Summerview thus could not have detrimentally relied on any representations or conduct by the plaintiffs.

245 Similarly, in the present case, SGI, with full knowledge that it had continued to overcommit itself, could not have detrimentally relied on any representations by FSH (which had no knowledge of the same) in relation to any of SGI's breaches of Clause 1.2. Instead, SGI merely continued to produce the gloves under the 1st PO and the 2nd PO in pursuit of its self-interest. It hoped that it could continue to keep all its profits under these agreements, while not needing to adhere to Clause 1.2 of the Supply Agreement. There can be no waiver by estoppel.

(2) FSH's conduct does not suggest waiver

246 SGI cites several pieces of correspondence to suggest that FSH has "waived all its rights in respect of the delays in deliveries".[231] This argument is both misplaced and unsustainable.

247 Insofar as the argument is that FSH has waived its right to insist on strict adherence to the delivery schedules (which appears to be the case), it is misplaced, because SGI's obligation was not to ensure strict adherence to the delivery schedules. Again, I emphasise that SGI's obligation was to *use all reasonable endeavours* to ensure punctual delivery of the gloves.

248 SGI's argument is also unsustainable because the pieces of correspondence cited do not suggest that FSH waived its rights arising from SGI's breaches of this obligation. I deal with some of these.

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[231] PCS at para 334.

249 On 21 June 2020, FSH's Mr Simpson sent an email to SGI's Ms Marini, stating that:[232]

> … I appreciate that you have ordered the packaging now that you have received our payment, however it would be very useful to understand the potential available date of the first batch of orders placed as these were listed as w/c 22nd June. *If this is to be delayed that is OK* but we would need an approx. date if possible. [emphasis added]

250 I find that there was no waiver in this email. In fact, Mr Simpson was expecting an approximate date of delivery from SGI for the first batch of deliveries since SGI had resolved its issues. If anything, this suggests that FSH was expecting SGI to use all reasonable endeavours to make the deliveries as soon as it could *in light of* SGI's resolution of its internal issues.

251 On 1 July 2020, in response to Ms Marini's update on the expected delivery schedule for July 2020, Mr Simpson sent an email to Ms Marini saying "Many Thanks for the below updates - great news on the delivery schedule".[233] Again, this email does not suggest any waiver. Instead, I find that it is merely an expression of relief that deliveries were finally going to begin after no deliveries were made in June.

252 This becomes further evident from how Ms Marini's update email was sent in response to Ms Stoute's email highlighting the urgency of the situation:[234]

> … It is really important that we have a delivery schedule and we want to place more orders very quickly. We will need more

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232 Agreed Bundle of Documents (Volume 4 of 51) ("4AB") 644.

233 Agreed Bundle of Documents (Volume 5 of 51) ("5AB") 792–794.

234 5AB 794.

> volume in July as Government have underestimated their demand.
>
> Please can you send details of what gloves are ready end of this week, if this is when they are ready.

253 On 19 September 2020, FSH's Ms Zheng sent an email to SGI's Mr Yeoh asking SGI to "[p]lease continue [SGI's] delivery according to production plan".[235] At trial, Ms Zheng explained that she was "telling Smart Glove to please stick to their delivery schedule that they had just provided to [FSH]".[236]

254 Again, this does not suggest any waiver of SGI's breach of Clause 1.2. Instead, Ms Zheng was asking SGI to use all reasonable endeavours to adhere to the revised delivery schedule provided by SGI, which FSH thought SGI had come up with in the exercise of its best endeavours to adhere to the original delivery schedule as originally contemplated under the 1st PO.

255 On 14 September 2020, SGI's Mr Yeoh sent FSH a revised shipment schedule, under which the number of gloves to be shipped in September would be decreased.[237] In response, FSH's Ms Yoong replied to confirm that FSH:[238]

> … accept your [*ie*, SGI's] proposal to recoup the 5mil containers in October. As discussed in our meeting this morning, we cannot tolerate any further delay. Please ensure the factories

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235 Agreed Bundle of Documents (Volume 11 of 51) ("11AB") at 161.

236 Notes of Evidence for 5 July 2024 ("050724 NE") at p 24 lines 12–21.

237 Agreed Bundle of Documents (Volume 10 of 51) ("10AB") at 703–712; PCS at para 122.

238 10AB 725.

> stick to this plan 100%. We can't afford to fail our customer again. Hope you can understand.

256 Again, I am unable to see how this email would have constituted a waiver of SGI's breach of Clause 1.2. If anything, FSH was again re-emphasising that SGI needed to fulfil its obligations under Clause 1.2.

257 On 1 April 2021, SGI's Mr Yeoh sent FSH the revised delivery schedule for April 2021 to June 2021 (the "1 April 2021 Schedule").[239] In response, FSH's Ms Yoong stated:[240]

> Thank you for the revised schedule.
>
> Please ensure your shipping department secures the booking for May with K+N asap and provide an update mid next week.

258 While FSH appears to have accepted the revised schedule, *ie*, not insist on strict adherence to the original delivery schedules contemplated, there was again no indication that FSH suggested to SGI that it no longer needed to use all reasonable endeavours to adhere to the revised schedule, which FSH also believed was revised with the aim of fulfilling all the orders under the 1st PO and the 2nd PO as soon as possible.

259 Apart from those set out above, SGI also cites many more pieces of correspondence between SGI and FSH where FSH seemingly accepted the revised delivery schedules provided by SGI.[241] SGI also cites several instances

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239 20AB 259.

240 20AB 260.

241 See generally PCS at paras 335–400.

when Mrs Stoute, amongst other officers of FSH, had suggested during cross-examination that they accepted SGI's revised schedules.[242]

260 Regardless of whether FSH actually accepted the revised schedules, or treated the original delivery schedules as superseded, the fact remains that in none of these pieces of correspondence or evidence does FSH suggest, even remotely, that it is waiving any right to SGI's breach of Clause 1.2, or that SGI no longer needed to continue using all reasonable endeavours in delivering the gloves in accordance with the original delivery schedules.

261 In fact, the evidence demonstrates that FSH was constantly emphasising the urgency of the deliveries. FSH also made its displeasure with the delays known to SGI (see, *eg*, [239] above). Any concessions by FSH were made on the basis that SGI was doing its best to catch up with the original delivery schedules, in accordance with Clause 1.2.

(3) FSH's non-reliance on SGI's delays as a ground for termination

262 I accept that FSH did not appear, at any point in time, to have relied on SGI's delays in delivering the gloves, or on its breach of Clause 1.2 of the Supply Agreement, to terminate the Supply Agreement, the 1st PO and the 2nd PO. Such a ground was not raised in the 20 April 2021 Email or the 6 July 2021 Email. Neither was it raised in a letter of demand sent by FSH's Malaysian lawyers to SGI and GX.[243] The question is whether FSH would be precluded

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242 See, *eg*, PCS at para 371.

243 Agreed Bundle of Documents (Volume 25 of 51) ("25AB") 87–89.

from relying on the breach of Clause 1.2 as a ground for termination. I do not think so.

263 In *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 ("*Comfort Resources*"), the Court of Appeal endorsed the well-established principle that:

> 63 a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not.

264 This right is subject to two qualifications:

(a) First, a party who initially gives one ground for his refusal to perform may, by his conduct, be precluded from setting up a different ground later where it would be unfair or unjust to allow him to do so. This exception is premised on waiver and estoppel (*Comfort Resources* at [65]).

(b) Second, the innocent party will not be entitled to rely on a ground not raised at the time of termination if the party in breach could have rectified the situation had it been afforded the opportunity to do so (*Comfort Resources* at [67]).

265 In the present case, even if FSH had given a wrong reason to terminate the contracts, this does not deprive it of a justification which in fact existed, *viz*, SGI's breach of Clause 1.2, whether or not FSH was aware of it. As earlier explained, there can also be no question of waiver or estoppel. Neither does the evidence suggest that SGI could or would have rectified the situation had it been

afforded the opportunity to do so. The fact that FSH did not once raise SGI's delay in deliveries or breach of Clause 1.2 to justify its termination of the Supply Agreement, the 1st PO and the 2nd PO does not preclude it from doing so.

(4) Any waiver by FSH was only for the time being

266 For completeness, I find that even if FSH had waived any right consequent to any breaches by SGI (and even if SGI's original obligation was to adhere to the original schedules instead of just using all reasonable endeavours to ensure the same), this was only so *for the time being*, rather than for all time. The difference between these two situations was explained and illustrated in *Aero-Gate*, the background facts of which have been summarised (at [171]–[172]) above.

267 In that case, even though the plaintiff "continued to treat [the second purchase order] as alive" well after the defendants failed to meet the delivery deadlines, and "persistently pressured the defendant to carry on its work on [the remaining two generators due under the second purchase order] and to fix dates for testing them" (*Aero-Gate* at [122]), the High Court found (*Aero-Gate* at [124]) that this does not mean that the plaintiff irrevocably waived its right *for all time* to terminate the second purchase order.

268 Instead, the High Court explained that the plaintiff's waiver was only for the time being:

> 124 … Since determining whether a breach is a repudiatory breach necessitates an assessment of the actual consequences of the breach, parties must be entitled to wait and see what these consequences actually are: see *RDC Concrete* ([29] *supra*) at [100]. Hence, **it is not at all inconsistent for the innocent party to treat the contract as alive post-breach and then to**

> **terminate it *subsequently* when it transpires that the consequences of that breach operate to deprive him of substantially the whole benefit of the contract**. In this case, **the plaintiff's conduct in treating [the second purchase order] as alive can at best be an election to affirm the contract *for the time being*. It cannot be an election to affirm the contract *for all time, regardless of the consequences of the breach as they became apparent over time***. Therefore I hold that, however much the plaintiff's conduct might amount to a waiver by election of its right to terminate [the second purchase order] for breach of condition, assuming the term breached was indeed a condition, it did not amount to a waiver by election – or any other waiver – of its right to terminate [the second purchase order] for repudiatory breach. [emphasis in original in italics; emphasis added in bold]

269 Similarly, in *Bueno Aires* (see facts at [174]–[175] above), the High Court held (at [97]) that although the plaintiff continued to treat the contract as alive after the delivery deadline had lapsed, this did not amount to a waiver, and explained that:

> 100 … The plaintiff was entitled to treat the [contract] as alive to assess whether it had been deprived of substantially the whole benefit it intended to obtain from the [contract]. The fact that the plaintiff treated the [contract] as alive between 27 April 2020 and 27 May 2020 was, ***at best, an election to affirm the contract for the time being and not an election to affirm the contract for an indefinite period of time***. Subsequently, *when HN Singapore repeatedly postponed its estimated deadlines for delivery by a month, and given the climate of uncertainty and urgency, the plaintiff was entitled to terminate the* [contract]. [emphasis added in italics and bold italics]

270 In the present case, although FSH similarly made "commercial decisions" to keep the Supply Agreement, the 1st PO and the 2nd PO alive at multiple points in time,[244] and (as will be explained below at [290]) even up till just before the 6 July 2021 Email was sent, this does not mean that it waived all

[244] See, *eg*, PCS at paras 361, 371 and 392.

its rights pursuant to any breaches which SGI might have committed. Instead, FSH was entitled to keep the contracts alive *for the time being* to assess its position. It was also entitled to terminate the contract only at the point in time when it assessed that it had been deprived of substantially the whole benefit of the contracts.

(5) Clause 4.5 and Clause 4.6 of the Supply Agreement are inapplicable

271 Given that I have already found that there was no waiver by FSH under the common law, either by estoppel or election, and that the issue of variation of the delivery schedules is not relevant (see [100] above), I do not need to consider FSH's alternative arguments relying on Clause 4.5 and Clause 4.6 of the Supply Agreement (see [15] above), which respectively concern variation and waiver.

SGI's breach of Clause 2.1

272 As set out at [151] above, SGI breached Clause 2.1 in respect of the Supply Agreement and the 1st PO. However, FSH did not seek to argue that this constituted a repudiatory breach (see [188] above). Accordingly, consequent to this breach, I need only consider if FSH has the right to claim damages.

Parties' arguments

273 SGI argues that FSH waived all its rights in relation to this breach because it had agreed to and continued to accept deliveries at the increased prices from October 2020 to April 2021 without further protest. Neither did FSH

allege, until the commencement of the present suit, that SGI's price increases amounted to breaches of the Supply Agreement.[245]

274 FSH does not appear to have raised fresh arguments directly in response.

My decision

275 I am unable to accept SGI's arguments. There can be no waiver by election or estoppel again because of FSH's lack of the requisite knowledge. As earlier explained (at [145]), the reason given by SGI for the price increases was the increase in the price of raw materials, which SGI was no longer able to absorb without sustaining losses. However, as explained (at [143]–[148] and [149]–[151] above), this is, on the balance of probabilities, not true.

276 Applying a similar analysis regarding why FSH did not have the requisite knowledge to waive SGI's breaches of Clause 1.2, I similarly find that FSH did not have the requisite knowledge to waive its right to claim damages in respect of SGI's breach of Clause 2.1. This is so whether it is in relation to waiver by election or by estoppel (in the sense that SGI, as the party with knowledge of its own wrongs, could not have relied on any representations made by FSH).

277 There is also nothing in the evidence to suggest that FSH was not going to claim damages from SGI in respect of the price increases, or that FSH was satisfied with them. In fact, the evidence suggests otherwise.[246] This is evident, for instance, from the 20 April 2021 Email. Even before that, by 12 April 2021,

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245 PCS at paras 477–478.

246 See DCS at paras 272–274.

FSH was already voicing its concerns to SGI that SGI was "pricing [FSH] out of the market in both the UK and across Europe".[247]

278 These pieces of evidence, together with the continued price negotiations between SGI and FSH before FSH validly terminated the contracts on 6 July 2021 (see [284]−[290] below), also demonstrate that FSH had given SGI the opportunity to rectify the situation. SGI's argument that the price increases were not cited as a reason for terminating the contracts is thus, for the same reasons as why this argument fails in respect of Clause 1.2 (see [265] above), a non-starter.

SGI's breach of Clause 3.2

279 I have previously found (at [160]) that SGI breached Clause 3.2 in respect of the Supply Agreement, the 1st PO, the 2nd PO and the 5mil PO. I also found (at [196]) that FSH would not be able to rely on these breaches to terminate the 1st PO and the 2nd PO. Hence, FSH would only have accrued the right to claim damages arising from SGI's breaches of Clause 3.2.

280 The parties do not seem to have raised direct arguments on this. For completeness, I add that FSH did not waive its right to claim damages arising from the breaches of Clause 3.2. The contemporaneous evidence suggests that FSH was constantly pressing SGI for the EN455 certificates.[248]

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247 20AB 181–182.

248 See, *eg*, 21AB 34–37.

Issue 4: whether and when FSH validly terminated the Supply Agreement, the 1st PO, and the 2nd PO

281 While FSH did not waive its right to claim damages or to terminate the Supply Agreement, the 1st PO and the 2nd PO, an issue still arises as to whether FSH in fact terminated these contracts, and if it did, when it did so.

Parties' arguments

282 FSH argues that these contracts were validly terminated by the 20 April 2021 Email,[249] highlighting the various steps it took thereafter to effect the termination.[250]

283 On the other hand, as evident from its previous arguments on waiver, and as will become evident from its arguments in the next section, SGI's position is that it was FSH which committed repudiatory breaches of the contracts. This was done via the 6 July 2021 Email and by FSH refusing to take delivery of any gloves following the 20 April 2021 Email (which fact is not disputed: see [54] above).[251]

My decision

284 In my view, the 20 April 2021 Email cannot constitute an election to terminate the agreements by FSH. Crucially, following this email, there was

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249 DCS at paras 299–300.

250 DCS at para 301.

251 PCS at paras 78–79.

correspondence where parties negotiated the prices of 3mil gloves.[252] As such, FSH cannot possibly be said to have terminated the contracts on 20 April 2021.

285 If that was not the case, then FSH would be allowed to have it both ways. If, post-20 April 2021, the parties reached an agreement on price, FSH would have been able to "revoke" its termination of the contracts. Otherwise, it would have been able to continue treating the contracts as terminated as of 20 April 2021. This must be wrong.

286 FSH also suggests that the negotiations following the 20 April 2021 Email are for a fresh, independent contract.[253] I disagree. The parties' correspondence clearly indicates that they were operating on the basis that the Supply Agreement, the 1st PO and the 2nd PO were still alive.

287 For example, in an email sent on 1 May 2021, FSH's Mr Simpson stated that:[254]

> … unless the new price of $83.50 (or something very close to this no higher than $85) can be backdated for previous orders then *all future orders must be cancelled* and a *full refund* is required. [emphasis added]

288 If, as FSH claims, its price negotiations with SGI following the 1 April 2021 Email were in respect of a fresh contract, by 1 May 2021, there would be no subsisting "future orders" to "cancel" and no monies which were already paid by FSH that could be "refunded".

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252 See PCS at paras 78 and 384–400.

253 DCS at paras 310–312.

254 21AB 418-419.

289 In fact, even in the 6 July 2021 Email, FSH continued to use similar language. Thus, I find that the parties were still negotiating the prices under the Supply Agreement, the 1st PO and the 2nd PO following the 20 April 2021 Email. The 20 April 2021 Email did not validly terminate the agreements.

290 Instead, FSH only validly terminated the contracts via the 6 July 2021 Email. It was only after this email was sent that FSH unequivocally demonstrated by its behaviour that it had elected to terminate the contracts following SGI's repudiatory breaches by treating them as extinguished. The implication of this finding is that between 20 April 2021 to 6 July 2021, FSH's obligations under the contracts were still alive.

Issue 5: whether FSH committed a breach and/or repudiatory breach of the Supply Agreement, the 1st PO and/or the 2nd PO

291 As just alluded to, FSH's obligations under the contracts were still alive between 20 April 2021 to 6 July 2021. Therefore, FSH would be liable to SGI if it breached any of its obligations during this period of time.

292 Following the 20 April 2021 Email, FSH began declining to take delivery of 3mil gloves.[255] While FSH has explained that it did so following its termination of the contracts on 20 April 2021, I have found against FSH on this issue.

293 FSH's conduct between 20 April 2021 and 6 July 2021 clearly constitutes a Situation 2 breach, as FSH clearly conveyed to SGI that it will not perform its contractual obligations at all (to accept delivery of the delivered

255 SOC-A1 at para 42; D&C-A3 at para 49.

gloves). Pursuant to this breach, SGI would have accrued the right to terminate the Supply Agreement, the 1st PO and/or the 2nd PO, and to claim damages arising from the breaches. For clarity, the position I arrive at does not defeat FSH's right to subsequently terminate the contracts via the 6 July 2021 Email. This is because SGI's Situation 3B breaches had continued to persist (see [127] above). These breaches were also independent of FSH's own breaches. Also, SGI did not terminate the agreements following FSH's repudiatory breaches.

294 However, it would follow that FSH will be unable to make any claims for gloves which were supposed to have been delivered between 20 April 2021 and 6 July 2021. This is because any losses suffered by FSH during this period would have been a result of its own breaches by failing to take delivery of the gloves. It is well-established that absent an agreement to the contrary, a party cannot insist on his contractual rights when he had himself caused the non-performance of a contractual event. This is more commonly known as the "prevention principle": *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 ("*Mickey Ng*") at [69]−[82].

Issue 6A: the appropriate remedies arising from FSH's breaches

295 Having determined that FSH breached the Supply Agreement, the 1st PO and the 2nd PO, the next issue is what the appropriate remedies for SGI should be.

296 SGI's claims fall into three broad categories, which it seeks to prove through its expert, Mr Tang:[256]

[256] PCS at para 532.

(a) the amounts due under the unpaid invoices, as well as contractual interests at 1.5% per month, for all gloves already delivered (the "Unpaid Invoices Claim");

(b) the price and storage costs of the 3mil gloves which SGI has already produced, but which have not been delivered (the "Produced Gloves Claim"); and

(c) the specific performance of the open orders or damages in lieu of performance (the "Cancelled Gloves Claim").

297 I turn to consider these claims in detail.

The Unpaid Invoices Claim

298 Under the Unpaid Invoices Claim, SGI claims for the amounts due under the unpaid invoices totalling US$5,127,384.80, as well as contractual interests at 1.5% per month, comprising:[257]

(a) US$2,096,524 under the 1st PO;

(b) US$1,624,032 under the 2nd PO;

(c) US$1,406,828.80 under the 5mil PO; and

(d) contractual interests of US$2,871,860.96 from the due date of each invoice up to the time when Mr Faizi's affidavit of evidence-in-chief was filed on 23 January 2022, with interests continuing to accrue.

[257] PCS at paras 532 and 537.

299 FSH accepts that US$5,127,384.80 is outstanding under the 1st PO, the 2nd PO, as well as the 5mil PO, in respect of the delivered gloves. However, it argues that this should be set-off against the 80% advance payments it has already made.[258]

300 FSH also argues that Mr Tang's calculations are wrong because: (a) they wrongly assume that the outstanding invoices could not be set-off against the monies already paid by FSH as Clause 2.4 of the Supply Agreement permits otherwise;[259] and (b) they incorrectly assume that the "due date" of payment from which contractual interests run was the date of the commercial invoice issued by SGI, when the payment date for the 20% balance of each month's shipment was the last day of each month.[260]

301 Having considered this issue, I find that there should be no contractual interests awarded on the outstanding sum owed by FSH to SGI. As I will later explain (see [450] below), I find that the advance payments made by FSH to SGI in respect of the undelivered gloves were not deposits, but were refundable advance payments.

302 That being the case, the 80% payments advanced by FSH to SGI for gloves which were yet to be delivered (which were due from SGI to FSH) always exceeded the US$5,127,384.80 which FSH owed SGI. From the outset, FSH did not deny that it owed SGI the latter sum, but wanted to set-off the latter amount using the former amount. Indeed, this was expressly communicated by

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258 DCS at para 419.

259 DCS at paras 422–424.

260 DCS at paras 425–429.

FSH to SGI on 21 April 2021.[261] Put another way, FSH was not unwilling to make payment of the outstanding sums using monies which it had already advanced to SGI. Indeed, pursuant to Clause 2.4 of the Supply Agreement, SGI was entitled to effect such a set-off. Having refused to accept payment on this basis, SGI should not later attempt to claim contractual interests. I find that contractual interests did not accrue in SGI's favour.

303 I hence award US$5,127,384.80 to SGI under the Unpaid Payment Claim, with no contractual interest.

The Produced Gloves Claim

304 Under the Produced Gloves Claim, SGI claims for the price, as well as storage costs, for 92,559,000 gloves which were produced but not shipped to FSH under the 1st PO and the 2nd PO, respectively, comprising:[262]

> (a) US$8,028,610.00 or US$6,356,625 for 77,050,000 pieces of 3mil gloves which were produced but undelivered under the 1st PO, depending on whether the quantum is calculated using the last agreed selling price between parties before FSH started refusing to take delivery of the gloves as alleged by SGI, at US$104.20 per 1,000 pieces (the "Alleged Final Price") (see [49] above), or the original selling price stipulated in the Supply Agreement, at US$82.50 per 1,000 pieces (see [49] above);

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261 20AB 772–773.

262 PCS at paras 543, 552 and 563.

(b) US$1,616,037.80 or US$1,450,091.50 for 15,509,000 pieces of 3mil gloves which were produced but undelivered under the 2nd PO, depending on whether the quantum is calculated using the Alleged Final Price, or the original selling price stipulated in the 2nd PO, at US$93.50 per 1,000 pieces (see [40] above);

(c) RM789,101.50 for costs of storing the produced but undelivered gloves from May 2021 to the time when Mr Faizi's affidavit of evidence-in-chief was filed on 15 May 2024, with storage costs continuing to accrue at RM2,641.92 per month; and

(d) a *subtraction* of US$2,000,414.50, being the sum earned by SGI from selling 87,060,000 pieces of the produced but undelivered 3mil gloves to other third-party customers between March 2022 and April 2023 in mitigation of SGI's losses.

305 FSH disagrees with SGI on multiple fronts. I turn to consider each of these disagreements, which I will also address in turn.

Whether there is evidence that the gloves were produced for FSH

306 First, FSH argues that there is no evidence that the 92,559,000 pieces of 3mil gloves (being the sum of 77,050,000 gloves under the 1st PO and 15,509,000 gloves under the 2nd PO) were produced for FSH by 20 April 2021. On the day before, SGI had sent out the 19 April 2021 Schedule (see [351] below), projecting the delivery of only eight orders of 3mil gloves in the last week of April 2021 (or 26.8 million gloves). In fact, it is implausible that SGI

had the production capacity to produce this quantity of 3mil gloves, and the lack of evidence of production is fatal to SGI' case.[263]

307 I reject FSH's argument. Indeed, SGI produced copies of the relevant daily packing output records evidencing the production of these gloves by SGC.[264]

Whether SGI's claim should be limited to its net profits but for FSH's breach

308 Next, FSH argues that the losses claimed by SGI are, contrary to what was asserted by Mr Tang, not direct losses. FSH explains that by SGI's own case, SGI relies on the SGG Manufacturers to manufacture the gloves. SGI will then purchase and on-sell the gloves to its end customers through "back-to-back" arrangements. SGI would retain a profit of 5% from the selling price of the gloves, and the remaining 95% would be paid to the SGG Manufacturers as the selling price of the gloves to SGI.[265] FSH then argues that there is no evidence of SGI purchasing the 92,559,000 pieces of 3mil gloves from the SGG Manufacturers. SGI only suffered direct loss in the form of the 5% sales revenue it lost the opportunity to earn (less the variable costs of sales).[266]

309 In other words, while SGI claims for the *revenue* (or gross profit) it would have earned from FSH under the 1st PO and the 2nd PO, FSH's position is that SGI should only be entitled to claim its (net) *profits* under the same. To determine the correct approach, the case of *Intertek Testing Services*

263 DCS at para 434; 20AB 257.

264 Hew's AEIC at para 22.

265 DCS at para 435.

266 DCS at para 436.

(Singapore) Pte Ltd v Haidir bin Mohamad Khir [2023] SGHC 320 is instructive. There, the High Court explained that:

> 23 To begin with, the apparent contest between the Profit Method and the Revenue Method relates to how the plaintiff's *expectation* loss is to be calculated. The plaintiff's expectation loss, if proven at trial, may be characterised from either the "gross" or "net" points of view. In other words, *the plaintiff's expectation loss may be measured by: (a) its loss of* ***gross profit****, which is its profit before it deducts its expected expenses, and therefore appears to be* ***the Revenue Method****; or (b) its loss of* ***net profit****, which is its profit after it deducts its expected expenses, which appears to be* ***the Profit Method****.* Indeed, as the Court of Appeal held in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 (at [125]), a plaintiff's expectation loss "would encompass the plaintiff's *total (or gross)* loss – including the expected (or net) *profit* that the plaintiff would have received had there been no breach of contract as well as his expected *expenses*, which he would have recouped if the contract had been performed" [emphasis in original].
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> 24 A helpful illustration of the distinction between the "gross" or "net" points of view was provided by the High Court in *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 ("*Smile Inc*") (at [56]):
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> > A hypothetical scenario aptly demonstrates this. In the hypothetical, an entity owns a shop. The cost of the entity's permanent staff and its rental is $8 per month. For expending the fixed expenses of $8 a month, the entity makes $10 per month in total revenue, thereby earning a monthly net profit of $2. If, due to another entity's breach (eg, defective works), the entity is unable to open its shop for a month, the entity would still have to expend $8 a month in paying its permanent staff and rental, as such expenses are fixed expenses which do not depend on whether the shop is opened or not. This $8 would be wasted fixed expenditure, as the entity would not be able to generate any revenue while its shop is closed due to the other entity's defective works. If the entity is only allowed to claim for its loss of net profit in this case, the entity's claim would be $2, which would not even cover the entity's wasted fixed expenditure of $8. Hence, to ensure that the entity is put in the same position as it would have been but for the breach, the

> damages due to the entity ought to be $10, being the sum of the entity's net profits and wasted fixed expenditure. This $10 would be used to offset the entity's wasted fixed expenditure of $8, leaving the entity with the $2 net profit which it would have earned but for the other entity's breach.
>
> 25 However the plaintiff's expectation loss is characterised, the key concern is ensuring that it is not compensated for loss that it did not actually suffer, or that it is compensated twice over for the same loss (see also the Appellate Division of the High Court decision of *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd and other appeals* [2023] 1 SLR 536 ("*Crescendas*") at [205]). Using the illustration in *Smile Inc*, a plaintiff may claim for loss of its gross profit of $10, which comprises its net profit of $2 and wasted expenses of $8. But a plaintiff may not claim, *eg*, a sum of $18, comprising its gross profit of $10 *and* wasted expenses of $8. This would result in over-compensation because its gross profit of $10, when broken down, already includes the wasted expenses of $8 and a net profit of $2 (see *Crescendas* at [205]).
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> [emphasis added in italics and bold italics]

310 Viewed another way, in the illustration above, the innocent entity would, but for the defaulting entity's breach, have earned a net profit of $2 (being its revenue minus its costs). In reality, the innocent entity only incurred costs of $8. It hence suffered a loss of $10 (which is termed gross profits, and is effectively its revenue). At first glance, this analysis would appear equally applicable to the Produced Gloves Claim since it involves a similar situation: but for FSH's breach, SGI would have earned its net profits; in reality, SGI had merely incurred costs comprising 95% of the selling price it would have paid to the SGG Manufacturers, as well as its "variable costs of sales".

311 Upon closer examination, the present case is distinguishable from the above-explained hypothetical scenario. This is because the evidence suggests

that most of the costs associated with producing the gloves were borne by the SGG Manufacturers, and not SGI. By SGI's own case:[267]

> … Once the orders for FSH are allocated to the SGG Manufacturers, the *SGG Manufacturers* have to take steps to prepare for the production of the gloves, including the Cancelled Orders. This includes *purchasing materials and securing, amongst others, the necessary labour*. Further, by accepting SGI's orders for the Cancelled Orders, the *SGG Manufacturers* would have to give up their capacity to take on orders from third-party customers and related companies. Further, as Faizi explained on the stand, the factories start committing their capacity once the orders are allocated to them internally, and not only after purchase orders are issued… [emphasis added]

312 Even for the latex purchased for the purposes of producing the gloves, by SGI's own case, while this was first paid for by SGI, the SGG Manufacturers "would have to reimburse the cost of the latex to SGI".[268]

313 Further, and importantly, I agree with FSH that as of 6 July 2021, SGI has probably not purchased any of the gloves under the Produced Gloves Claim from the SGG Manufacturers. As FSH highlights, SGI has not produced evidence to show any such purchase. In fact, I would observe that the evidence adduced by SGI suggests that no such purchase had occurred. Instead, the practice was for SGI to only purchase the gloves from the SGG Manufacturers *after* they are shipped to the end-customer.

314 As explained by Mr Faizi, between early 2020 and mid-2021, "SGI had initially issued 129 POs to the SGG Manufacturers, and the SGG Manufacturers had issued corresponding PIs, for 129 out of 389 containers *shipped to FSH*

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267 PCS at para 579.

268 Faizi's AEIC at para 68.

under the 1st PO, the 2nd PO and the 5mil PO" [emphasis added].[269] More tellingly, 27 of the purchase orders issued by SGI to the SGG Manufacturers in respect of gloves shipped to FSH were dated 14 September 2021,[270] which was well after 6 July 2021.

315 Given these, the correct analysis of FSH's losses under the Produced Gloves claim would be that but for FSH's breach, SGI would have earned a net profit based on 5% of the selling price (less any "variable costs of sales"). But in reality, SGI did not earn such profits, *simpliciter*. Any costs in relation to the production of gloves would have been incurred by the SGG Manufacturers (which are separate legal entities), and not SGI. SGI also did not incur any costs in purchasing the gloves from the SGG Manufacturers.

316 Hence, I find that on the Produced Gloves Claim, SGI should, without more, only be awarded damages amounting to its net profits (*ie*, 5% of the selling price, less any "variable costs of sales" incurred). On such variable costs, FSH has not led evidence in relation to the gloves under the Produced Gloves Claim. Thus, I am prepared to find that SGI's total losses, *ie,* its net profits, would simply be the 5% of the selling price.

317 For completeness, I observe that SGI is not able to make any claims for the losses suffered by virtue of potential claims from the SGG Manufacturers, or for any loss of its performance interest. While these arguments were not made in relation to the Produced Gloves Claim, SGI has raised these arguments in

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269 Faizi's AEIC at para 13.

270 Faizi's AEIC at para 13, and pp 146, 263, 266, 269, 272, 275, 278, 281, 284, 287, 290, 293, 296, 299, 302, 305, 308, 311, 314, 317, 320, 323, 326, 329, 332, 416 and 425.

relation to the Cancelled Gloves Claim,[271] and FSH has addressed them.[272] I thus deal with this issue next.

(1) Potential claims from the SGG Manufacturers

318 Under the Cancelled Gloves Claim, SGI seeks to claim "losses from potential claims for loss of profits from the SGG Manufacturers" due to the cancelled orders.[273] In response, FSH argues, *inter alia*, citing *Freight Connect (S) Pte Ltd v Paragon Shipping Pte Ltd* [2015] 5 SLR 178 ("*Freight Connect*"), that the courts will not grant an indemnity against hypothetical claims.[274] These arguments could similarly be raised in relation to the Produced Gloves Claim.

319 On this issue, I agree with FSH. In *Freight Connect*, the Court of Appeal held (at [53]−[54]) that where a claimant faces a potential claim against a third party who has not made the claim, it would be inappropriate to order an indemnity against the defendant. Instead, the issue should be reserved with liberty to apply for directions when the real issues can be determined and damages quantified. I grant SGI liberty to apply for directions when any real issues, *ie*, how any claims by SGG Manufacturers against SGI would translate into damages which SGI can claim against FSH, can be determined and damages quantified.

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271 PCS at paras 576−591.

272 DCS at para 480−481.

273 PCS at para 576.

274 DCS at para 480.

(2) Claim for loss of performance interest

320 Under the Cancelled Gloves Claim, another argument made by SGI is that it should be allowed to claim substantial damages pursuant to the "broad ground" as canvassed in the case of *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 ("*Family Food Court*"), since it had a genuine and reasonable expectation interest that FSH would fulfil all the orders under the 1st PO and the 2nd PO.[275]. This argument could equally be made in relation to the Produced Gloves Claim.

321 However, I am unable to accept this argument. In *Family Food Court*, the Court of Appeal observed (at [51]) that two exceptions to the general rule that a claimant can only recover nominal damages for breaches of contract where he has suffered no loss, referred to as the "narrow ground" and the "broad ground", are recognised locally:

(a) The "narrow ground" allows a claimant to recover substantial damages on behalf of a third party, and applies where it was in the contemplation of the contracting parties that the proprietary interest in the contractual subject matter may be transferred from the claimant to the third party after the contract had been entered into and before the defendant's breach occurred (*Family Food Court* at [31] and [40]).

(b) The "broad ground" allows a claimant to recover substantial damages for his own loss, in the form of his performance interest, *ie*, his interest in the contract being performed and (consequently) his receiving

[275] PCS at paras 587−590.

the benefit which he had contracted for (*Family Food Court* at [31] and [34]).

322 The two grounds are conceptually inconsistent with each other and cannot apply simultaneously (*Family Food Court* at [56]). In relation to the "broad ground", which is what SGI relies on, the Court of Appeal further held (at [53]) that the performance interest claimed by the claimant must be a genuine one. In this regard, the applicable test is an *objective* test of *reasonableness* to the performance interest claimed so as to curb what would otherwise be a windfall accruing to the claimant. There is no need for the claimant to demonstrate any intention to utilise the damages sought to realise the performance interest which was the subject matter of the contract.

323 Applying the objective test of reasonableness to the Produced Gloves Claim, I find that SGI should not be entitled to this head of loss on the "broad ground". To hold otherwise would confer a windfall upon it. To understand why this is so, it would be helpful to examine instances when the courts have allowed losses to be claimed under the "broad ground". This is helpfully illustrated in *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 ("*Ho Chee Kian*"), where the High Court held (at [59]) that:

> Second, and in any event, the Court of Appeal in *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 (at [51]) endorsed the so-called "broad ground" for the recovery of damages as laid out in the House of Lords decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (see also the Court of Appeal decision of *Sun Electric Pte Ltd and another v Menrva Solutions Pte Ltd and another* [2019] SGCA 51 at [4]). By this "broad ground", the claimant can claim substantial damages arising from the loss of his performance interest. As the High Court in *Motor Insurers' Bureau of Singapore and another v AM General Insurance Bhd (formerly*

> *known as Kurnia Insurans (Malaysia) Bhd) (Liew Voon Fah, third party)* [2018] 4 SLR 882 (at [118]) acknowledged, *the "broad ground" enables a claimant to sue for damages where the loss of his performance interest cannot be framed in purely financial terms, such as if his objective in contracting was not to make a profit but to benefit other persons altruistically. This is precisely the situation in the present application.* It is therefore clear that the claimant can claim more than just nominal damages even though the ultimate beneficiary may well be a third-party charity. [emphasis added]

324 In *Ho Chee Kian*, the beneficiary was a third-party charity. The present case is distinguishable. SGI's losses under the Produced Gloves Claim can be framed in purely financial terms, and that is the profits it would have earned from the produced but undelivered gloves, which I have already determined above. There is thus no more room for a further claim on the "broad ground".

The price which should be used to calculate SGI's losses

325 Moving on, FSH argues that the Alleged Final Price was never agreed on. FSH explains that SGI's Mr Faizi had conceded at trial that "the prices from May 2021 would depend on the parties' discussions and how the market turned", and highlights that between April to June 2021, SGI had offered FSH several lower prices: (a) on 16 April 2021, a price of US$98 per 1,000 gloves; (b) on 19 May 2021, a price of US$79 per 1,000 gloves; and (c) on 10 June 2021, a price of US$64 per 1,000 gloves. However, none of these prices were accepted by FSH.[276] FSH also highlights that SGI had in fact applied the price of US$83.50 per 1,000 gloves for the last two sets of invoices issued on 15 April 2021, for the last two shipments it had made under the 1st PO and the 2nd PO.[277]

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276 DCS at paras 437–442.

277 21AB 628-663; DCS at para 439.

326 In my view, any attempt to assess SGI's actual losses under the Produced Gloves Claim would contain some degree of speculation. Nonetheless, I find that it would be appropriate to calculate SGI's but-for revenue using a value of US$82.50 per 1,000 pieces for the 77,050,000 gloves produced under the 1st PO, and using a value of US$83.50 per 1,000 pieces for the 15,509,000 gloves produced under the 2nd PO.

327 As I have earlier found (at [151] above), SGI's price increases under the 1st PO were in breach of the Supply Agreement and the 1st PO. SGI should not be allowed to base its claims under the 1st PO at a price higher than the originally stipulated price of US$82.50 per 1,000 pieces. On the other hand, while FSH had, on 9 May 2021, requested for the price of US$62 per 1,000 gloves, and while SGI had, on 19 May 2021 and 10 June 2021, offered the lower prices of US$79 and US$64 per 1,000 gloves respectively, these negotiations had only taken place *after* FSH's breach started on 20 April 2021.[278] They should be disregarded for purposes of assessing the Produced Gloves Claim. FSH should not be allowed to benefit from its own breach.

328 The lowest price offered by SGI, before FSH had breached the contracts, was thus US$83.50 per 1,000 gloves. This was in relation to the last two sets of invoices issued by SGI for shipments under the 1st PO and the 2nd PO on 15 April 2021.[279] Since the prices under the 2nd PO were not fixed, and in any event this price is lower than the originally agreed price of US$93.50 per 1,000 gloves, it would be appropriate to adopt this price for the 3mil gloves produced under the 2nd PO.

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278 DCS at para 439.

279 DCS at para 439.

329 Given my findings thus far, SGI's losses under the Produced Gloves Claim would *prima facie* be US$382,581.325:

	Quantity	**Price per 1,000 pieces US$**	**Total US$**	**SGI's loss 5% US$**
1st PO	77,050,000	82.50	6,356,625.00	317,831.25
2nd PO	15,509,000	83.50	1,295,001.50	64,750.075
Total	92,559,000		7,651,626.50	382,581.325

Whether SGI incurred storage costs

330 FSH's next argument is that SGI did not incur any storage costs, highlighting that the relevant invoices disclosed by SGI show that it was one of the SGG Manufacturers, Sigma, which was incurring the storage costs.[280] FSH also argues that it was unreasonable for SGI to have continued incurring storage costs from May 2023 onwards, since any remaining gloves at that point in time were probably no longer sellable and should have been disposed of.[281]

331 I accept FSH's argument that the storage costs were not incurred by SGI, but by Sigma, which remains a separate legal entity from SGI. This is borne out by the storage-related invoices exhibited by Mr Faizi, which are all addressed to Sigma.[282] I therefore disallow SGI's claim for storage costs.

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280 DCS at paras 444–445.

281 DCS at para 446.

282 Faizi's AEIC at para 34.

Whether SGI reasonably mitigated its losses

332 FSH's last argument is that by only starting to sell the 92,559,000 gloves in March 2022, SGI did not reasonably mitigate its losses.[283] Instead, SGI should have started selling the gloves in April 2021 (when FSH started refusing to take delivery of the gloves), or, at the latest, by July 2021, when it believed that FSH had terminated the contracts.[284] SGI should also have accepted more realistic prices for the gloves, instead of insisting on selling them at prices above the prevailing market value.[285]

333 I disagree. I instead accept SGI's explanation for the delays in selling the 3mil gloves. Between 20 April 2021 and 6 July 2021, the parties were still in negotiations on the prices, and the contracts were not validly terminated by FSH yet. There was therefore no obligation on SGI to have started any mitigation of its losses: *The Enterprise Fund II Ltd v Jong Hee Sen* [2020] 3 SLR 419 at [98].

334 Thereafter, SGI explains that it did not immediately sell off the 3mil gloves (or sell them at lower prices) even after 6 July 2021 for a few reasons:

(a) SGI had to decide whether to sell the gloves which were produced specifically for FSH, or to ship the gloves to FSH nonetheless and demand payment of the remaining sums (in other words, whether to elect to terminate or affirm the contracts).[286]

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283 DCS at para 448.

284 DCS at paras 449–450.

285 DCS at para 449(d)–(e).

286 PCS at para 556.

(b) The 92,559,000 gloves were produced at a time when material costs were high, and SGI wanted to avoid incurring losses from selling them to third parties. Given the volatile conditions of the market, it wanted to wait and see if another wave of the pandemic would hit and drive up demand (and hence prices) again.[287]

(c) SGI could not start selling off the 92,559,000 gloves for too low a price as it would have a negative knock-on effect on SGI's other businesses.[288]

335 I accept that these reasons, when taken together, show that SGI did not act unreasonably in delaying its sale of the 92,559,000 gloves. These were legitimate commercial considerations that could reasonably have operated on SGI's mind when FSH breached the 1st PO and the 2nd PO. As SGI argues, the High Court in *OCBC Securities Pte Ltd v Phang Yul Cher Yeow and another action* [1997] 3 SLR(R) 906 observed (at [86]), after surveying the cases and academic authorities, that the standard of reasonableness required is not a high one, and SGI is under no "obligation to do anything other than in the ordinary course of business".

336 I accept SGI's argument that it would be appropriate to subtract the sum of US$2,000,414.50 (and not more), being the sum earned by SGI from selling 87,060,000 pieces of the produced but undelivered 3mil gloves to other third-party customers between March 2022 and April 2023 in mitigation of SGI's losses. Based on my analysis at [329] above, this sum should be deducted from

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287 PCS at para 557.

288 PCS at para 559.

US$7,651,626.50 to arrive at US$5,651,212. Further, given my finding that SGI is only entitled to claim for 5% for its net profit, SGI's loss is, therefore, US$282,560.60 (this is also derived by reducing US$382,581.325 by US$100,020.725).

337 For completeness, I note Mr Watts' observation that the total quantity of gloves in the invoices displayed by Mr Tang to evidence SGI's mitigation efforts is larger than the quantity of gloves which Mr Tang has assessed SGI to have sold in mitigation, and that the sale of XS gloves has been excluded from Mr Tang's assessment even though the exhibited invoices include some XS gloves.[289] Mr Watts also states that had SGI's revenue been calculated on a strict adherence to the figures displayed in the exhibited invoices, this value would have been US$416,293 more.[290]

338 In my view however, these discrepancies do not mean that Mr Tang's calculations are wrong, for two related reasons. First, FSH did not order any XS-sized 3mil gloves under the 1st PO and the 2nd PO.[291] SGI therefore would not have produced such gloves for FSH, or sold them in mitigation of FSH's breach. Second, the 3mil gloves which SGI sold in mitigation following FSH's breach could simply have been a subset of the total quantity of gloves sold under the invoices exhibited by Mr Tang. Mr Watts' observation therefore does not necessarily translate into an error with Mr Tang's calculations of SGI's

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289 Reply Affidavit of Evidence-in-Chief of Oliver Alexnader Richard Watts ("Watts' RAEIC") at p 14 paras 2.19 and 2.20.

290 Watts' RAEIC at pp 154–155.

291 1AB 175 and 190.

mitigation efforts. Indeed, FSH does not appear to have pursued this point in its written submissions.

The Cancelled Gloves Claim

339 Finally, SGI seeks the specific performance of the open orders under the 1st PO and the 2nd PO (comprising 619,750,000 pieces of gloves under the 1st PO and 235,741,000 pieces of gloves under the 2nd PO, for a total of 855,491,000 pieces of gloves − see the combined figures at [28] and [45] above of 948,050,000 undelivered gloves less the 92,559,000 gloves produced but undelivered)[292] or damages in lieu of performance, comprising:[293]

(a) SGI's loss of profits due to the cancellation of orders;

(b) potential claims for loss of profits by the SGG Manufacturers against SGI; or

(c) in the alternative to these two heads of damages, the difference between the price which SGI would have made under the 1st PO and the 2nd PO for the remaining gloves as compared to the prevailing market price; and

(d) in addition to the above heads of damages, the costs wasted by SGI on purchasing latex to produce the remaining gloves.

340 FSH has raised arguments targeting each of these components. I turn first to address the arguments on specific performance.

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292 Tang's AEIC at p 96 para 97(c).

293 PCS at paras 567, 568 and 592.

Specific performance

341 FSH argues that specific performance should not be granted because it is impracticable, and because SGI has not proven that damages will not be an adequate remedy.[294]

342 I agree. Since the contracts have been validly terminated by FSH on 6 July 2021 following SGI's Situation 3B breach of Clause 1.2, they no longer subsist, and there can be no specific performance.

343 I also reject SGI's explanation as to why damages would not be an adequate remedy. Specifically, SGI argues that but for FSH's breach, "SGI would not only earn its profit, it would procure for the SGG Manufacturers, the revenue and profits that it was intended that they would obtain". SGI then points out that FSH has however taken the position that SGI is not entitled to claim substantial damages in respect of losses suffered by the SGG Manufacturers or under the alternative computation based on the difference in price. Damages would, according to SGI, therefore not be sufficient to restore SGI to the position it would otherwise have been in but for FSH's breach.[295]

344 This position is wholly untenable. The question of whether damages are an adequate remedy should only be answered in relation to the party itself (*ie*, SGI), and not any other party (*ie*, the SGG Manufacturers). To hold otherwise would allow specific performance to be used to override well-established principles on the privity of contract.

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294 DCS at paras 398 and 401.

295 PCS at paras 610–611.

Damages in lieu of performance

345 As specific performance is not appropriate, I turn to consider damages in lieu of performance. Preliminarily, I highlight again that FSH's breach was from 20 April 2021 to 6 July 2021, after which the 1st PO and the 2nd PO were validly terminated pursuant to SGI's repudiatory breaches of Clause 1.2 of the Supply Agreement.

346 It is well-established that when an innocent party terminates a contract following the defaulting party's repudiatory breach, all outstanding primary obligations cease to exist (*The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 17.304; see also *Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar (administratrix of the estate of Anil Vassudeva Salgaocar, deceased) and another and another suit* [2024] SGHC 276 at [56]). It follows that all primary obligations under the Supply Agreement, the 1st PO and the 2nd PO would cease following the 6 July 2021 Email.

347 Given this, the only pieces of gloves under the open orders which are relevant under the Cancelled Gloves Claim are those which were produced during the period of FSH's breach. In this regard, SGI's case is that all gloves under the open orders "would be produced and delivered similarly to the produced but undelivered [g]loves if not for the cancellation of the open orders" by May 2021.[296]

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296 Tang's AEIC at p 98 para 106(f).

348 FSH disagrees.[297] Mr Watts instead offers three alternative situations:

(a) that SGI would have delivered the remaining gloves *at the same average rate* that it delivered the gloves to FSH before the purported termination of the contracts on 20 April 2021, *ie*, 82,745,000 pieces (or 24.7 orders) per month;

(b) that SGI would have delivered the remaining gloves *at the same rate* that it delivered the gloves to FSH in April 2021, again just before the purported termination on 20 April 2021, *ie*, 93,800,000 pieces (or 28 orders) per month; and

(c) that SGI would have delivered *at the same rate as in August 2020*, when it had the highest delivery rate, *ie*, 160,800,000 pieces (or 48 orders) per month.[298]

FSH argues that the first situation is the most probable, given "the known unreliability" of SGI's deliveries.[299]

349 On the other hand, SGI does not appear to have made arguments on this particular point.[300]

350 Even so, I do not entirely agree with FSH. As will be explained below under Issue 6B, when presented with a situation where both parties are in

297 DCS at para 461.

298 Watts' RAEIC at p 17 para 2.32.

299 DCS at para 462.

300 See PCS at para 569.

breach, the court should, when assessing each party's damages, take into account each party's *own* breaches.

351 Here, the closest indication of SGI's projected schedule during the period of FSH's breach from 20 April 2021 to 6 July 2021 would be the 19 April 2021 Schedule (see [113] above). The schedule states as follows:[301]

[301] 20AB 257.

Week	April 2021	May 2021	June 2021
Week 1	1st PO: 4 (shipped)	1st PO: 5 (ETD – 3 May 2021)	1st PO: 7 (ETD – 7 June 2021)
	2nd PO: 4 (shipped)	2nd PO: 5 (ETD – 3 May 2021)	2nd PO: 7 (ETD – 7 June 2021)
	5mil PO: 4 (shipped)	5mil PO: 0	5mil PO: 0
Week 2	1st PO: 4 (shipped)	1st PO: 5 (ETD – 10 May 2021)	1st PO: 7 (ETD – 14 June 2021)
	2nd PO: 4 (shipped)	2nd PO: 5 (ETD – 10 May 2021)	2nd PO: 7 (ETD – 14 June 2021)
	5mil PO: 2 (shipped)	5mil PO: 0	5mil PO: 0
Week 3	1st PO: 0	1st PO: 6 (ETD – 17 May 2021)	*End of 19 April 2021 Schedule*
	2nd PO: 4 (shipped)	2nd PO: 6 (ETD – 17 May 2021)	
	5mil PO: 0	5mil PO: 0	
Week 4	1st PO: 4 (Estimated Time of Departure ("ETD") – 22 April 2021)	1st PO: 6 (ETD – 24 May 2021)	
	2nd PO: 4 (ETD – 24 April 2021)	2nd PO: 6 (ETD – 24 May 2021)	
	5mil PO: 2 (ETD – 24 April 2021)	5mil PO: 0	

Week 5	1st PO: 5 (ETD – 29 April 2021)	1st PO: 6 (ETD – 31 May 2021)	
	2nd PO: 5 (ETD – 29 April 2021)	2nd PO: 6 (ETD – 31 May 2021)	
	5mil PO: 0	5mil PO: 0	

352 In my view, it would be most appropriate and least speculative to adopt the quantities stated for the whole of May and the first two weeks of June, and to proceed on the basis that in the last two weeks of June and the first week of July, SGI will, similar to the first two weeks of June, continue to produce and ship seven orders' worth of 3mil gloves under the 1st PO and the 2nd PO each. Thereafter, no more gloves will be produced and shipped, since FSH had validly terminated the contracts on 6 July 2021.

(1) Mitigation

353 With that, I turn to consider an important preliminary argument which FSH raises: that SGI in fact suffered no losses under the Cancelled Gloves Claim because it fully mitigated its losses by re-allocating its production capacity to satisfying new orders. SGI fails to prove any loss beyond that which it recouped by re-allocating its production capacity, which is limited to the difference between the profits it would have earned and the profits under the new orders. In so arguing, FSH cites the English case of *Charter v Sullivan* [1957] 2 QB 117 ("*Charter*").[302]

302 DCS at paras 453 and 456.

354 I accept this argument. In *Charter*, the defendant ordered a "Hillman Minx" car from the plaintiff dealer, but refused to accept delivery of the same (*Charter* at 132). The car was put back into the plaintiff's showroom and was sold within a week or ten days at the same retail price to another customer (*Charter* at 133). The plaintiff sought damages for the defendant's breach, arguing that but for the breach, he would have earned the profits for two cars: one sold to the defendant and another to the other customer (*Charter* at 132). However, the plaintiff's sales manager gave evidence that he could sell all the "Hillman Minx" cars he could get (*Charter* at 134).

355 The court rejected the plaintiff's argument and awarded him only nominal damages (*Charter* at 136), explaining (at 134–135, *per* Sellers LJ) that:

> If it could be proved that there were in effect unlimited supplies of "Hillman Minx" cars and a limited number of buyers in the circumstances in which a dealer was trading then it would appear that the dealer could establish a loss of profit which could not be mitigated. On the other hand most dealers in cars (and in many other commodities), it might be visualised, either have a quota fixed by their supplier or a supply fixed by their own trading limits governed by their scope of trading. In such a case, ***if in a given trading period all the goods the dealer had available for sale had been sold, or would in all probability be sold, then the fact that one or more purchasers had defaulted and had been or would be replaced by others would not reduce the dealer's maximum profits***.
>
> The matter cannot of course be worked out ad infinitum but would be decided on the probabilities of the case and having regard to the nature, extent and circumstances of the dealer's trading. ***If a dealer has 20 cars available for sale and 25 potential buyers he still would make his full profit if he***

> ***sold the 20 cars notwithstanding that two or three purchasers defaulted***.
>
> [emphasis added in bold italics]

356 In a similar vein, the Court of Appeal held in *The "Asia Star"* [2010] 2 SLR 1154 (at [24]) that:

> … the aggrieved party who goes beyond what the law requires of it and avoids incurring any loss at all will not be entitled to recover any damages (see *McGregor on Damages* at para 7-097 and *British Westinghouse Electric* at 689–690). In such a case, the aggrieved party's efforts will in effect confer a gratuitous benefit on the defaulting party.

357 Here, I am satisfied that on the evidence adduced by FSH, SGI indeed mitigated its losses under the Cancelled Gloves Claim fully.

358 First and most tellingly, the evidence shows that even after 20 April 2021, SGI's production output remained relatively consistent at around 500,000,000 pieces of gloves each month (see the table at [118] above).[303]

359 As FSH highlights, Mr Long has agreed that production of around 500,000,000 pieces of gloves a month is "stable".[304] Mr Hew also agreed that the quantities summarised in the table referenced above reflect the capacity SGI expected to reach.[305] Thus, it appears that SGI's production output did not materially decrease, suggesting, on a balance of probabilities, that it had managed to mitigate its loss by re-allocating production lines to producing gloves for other customers.

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303 30AB 364.

304 DCS at para 455(a); 270624 NE at p 38 lines 21–23.

305 280624 NE at p 181 lines 4–5.

360 Indeed, on 23 April 2021, Mr Long wrote to SGI's Business Development team to state:[306]

> (BD team, there is still capacity for May dipping. Please proceed to get orders in)
>
> The team is working with costing team to resolve FSH on-hold orders.

361 This was in response to an internal email by GX stating that:[307]

> Due FSH order on hold until further notice & new order for 9" 3.5g C1 Baby Blue still pending, below are open capacity for May- Dec for 9" 3.5g C1 Baby Blue.
>
> For May, production need another 315m more for this item to fill up.
>
> Kindly check/ advise any potential Cust want this order we can plan ASAP in May.

362 In fact, as FSH highlights, on 14 June 2021, SGI contracted with another customer to supply it with 1.82 billion gloves, and shipped a total of 202 orders' worth of gloves from August 2021 to September 2021 pursuant to this agreement.[308] When posed with the proposition that SGI "did re-allocate its capacity for [FSH's] orders to other customers after April 2021", Mr Faizi could only say that he "cannot comment".[309] These matters strengthen my finding that SGI had managed to successfully re-allocate its manufacturing capacity.

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306 20AB 586.

307 20AB 586.

308 Notes of Evidence for 1 July 2024 ("010724 NE") at p 83 line 1−p 85 line 25.

309 010724 NE at p 87 lines 13−17.

363 As FSH points out, the Smart Glove Group promptly filled up its spare capacity arising from FSH's breaches by "diverting the capacity that would have been used for FSH's cancelled orders to new orders".[310] Since SGI has also not proven that it earned lesser profits under the new orders as compared to the cancelled orders, it has not proven that it suffered any loss, beyond that which may be recovered from the re-allocation of its production capacity. That being so, SGI has fully mitigated its losses, and it would not have needed to change any orders with the SGG Manufacturers, or wasted any latex costs. I therefore also reject these other heads of losses claimed by SGI.

Summary

364 In summary, SGI should be awarded damages totalling US$5,409,945.40:

(a) under the Unpaid Invoices Claim: US$5,127,384.80;

(b) under the Produced Gloves Claim: US$282,560.60; and

(c) under the Cancelled Gloves Claim: US$0.

Issue 6B: the appropriate remedies arising from SGI's breaches

365 I turn to the next issue. FSH's claims broadly fall into four categories:

(a) losses due to SGI's late deliveries under the 1st PO and the 2nd PO, as well as the need to quarantine the gloves (the "Late Delivery Claim");[311]

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310 DCS at para 456.

311 DCS at para 354.

(b) storage costs due to SGI's failure to provide the EN455 certificates within a reasonable time (the "Storage Claim");[312]

(c) liberty to seek an indemnity for any claims from United Medical Supply A/S ("UMS"), one of FSH's customers (the "Indemnity Claim");[313] and

(d) pre-judgment interests.[314]

366 I turn to examine these claims in detail.

Late delivery claim

Agreed formula to calculate FSH's losses

367 Under the Late Delivery Claim, FSH's expert, Mr Watts, has computed FSH's losses using the following formula:[315]

> FSH's actual profits (comprising: (a) FSH's total ***revenue*** from sale of the delivered 3mil gloves – (b) ***amount paid*** to SGI for all 3mil gloves – (c) associated ***shipping costs***) (the "Actual Scenario") – FSH's profits but for SGI's breaches, *ie*, if all deliveries had been made punctually and were not quarantined (comprising the same three components) (the "But For Scenario")

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312 DCS at para 384.

313 DCS at paras 390–392.

314 DCS at para 393.

315 DCS at paras 354–355; Watts' AEIC at p 24 para 3.1 and p 25 at para 3.6.

368 SGI's expert, Mr Tang, confirms that he has "no comments" on this formula *per se*.[316] Similarly, I accept this formula.

369 Before turning to apply this formula, I note that SGI argues that FSH should not be allowed to make any claims for losses suffered under the 2nd PO after it terminated the contracts, which SGI has taken to be 20 April 2021.[317] Since this argument would only be relevant to the counterfactual (*ie*, the but for revenue, procurement costs and shipping costs) which will be used to assess FSH's losses, I will address it when discussing the But For Scenario below (see [387] onwards). With that, I turn to consider the Actual Scenario.

The Actual Scenario

(1) The quantities of gloves delivered and received

370 Under the Actual Scenario, FSH summarises the number of gloves delivered and when FSH received the gloves, under the 1st PO and the 2nd PO respectively, as follows:[318]

316 Supplementary Affidavit of Evidence-in-Chief of Dawin Tang Keng Wai ("Tang's Supp AEIC") at p 21 paras 25 and 29.

317 PCS at paras 641−642.

318 Watts' AEIC at p 25 para 3.8.

Figure 3.1 - Actual 3mil gloves received by FSH

Month	PO1- gloves Ex-factory delivered (million)	PO2- gloves Ex-factory delivered (million)	Total gloves Ex-factory delivered (million)	PO1- gloves received (million)	PO2- gloves received (million)	Total gloves received (million)
Jun-20	0.000000	0.000000	0.000000	0.000000	0.000000	0.000000
Jul-20	53.600000	0.000000	53.600000	0.000000	0.000000	0.000000
Aug-20	160.800000	0.000000	160.800000	40.200000	0.000000	40.200000
Sep-20	140.700000	0.000000	140.700000	157.450000	0.000000	157.450000
Oct-20	53.600000	0.000000	53.600000	157.450000	0.000000	157.450000
Nov-20	40.200000	0.000000	40.200000	40.200000	0.000000	40.200000
Dec-20	20.100000	20.100000	40.200000	36.850000	0.000000	36.850000
Jan-21	16.750000	36.850000	53.600000	3.350000	0.000000	3.350000
Feb-21	26.800000	50.250000	77.050000	40.200000	33.500000	73.700000
Mar-21	56.950000	56.950000	113.900000	30.150000	53.600000	83.750000
Apr-21	40.200000	53.600000	93.800000	50.250000	63.650000	113.900000
May-21	0.000000	0.000000	0.000000	40.200000	53.600000	93.800000
Jun-21	0.000000	0.000000	0.000000	10.050000	13.400000	23.450000
Jul-21	0.000000	0.000000	0.000000	3.350000	0.000000	3.350000
Total	609.700000	217.750000	827.450000	609.700000	217.750000	827.450000

371 Mr Tang confirms that these quantities match those under SGI's records.[319] I will hence proceed on the basis that these quantities are accurate.

(2) FSH's revenue

372 Based on the above-mentioned figures (at [370] above), FSH argues that its revenue earned was US$60,853,122.92, based on the following sales quantities sold and prices:[320]

319 Tang's Supp AEIC at p 22 para 31.

320 Watts' AEIC at p 26 para 3.9; DCS at para 357.

Figure 3.2 - Actual 3mil revenue from resale

	Month	Gloves sold (million)	Weighted average price per 1000 gloves (USD)	Revenue (USD million)
#	Jun-20	0.000000	0.00	0.00000000
#	Jul-20	0.000000	0.00	0.00000000
#	Aug-20	15.176000	109.21	1.65743111
#	Sep-20	50.117000	113.58	5.69216801
#	Oct-20	181.064000	116.91	21.16809618
#	Nov-20	121.471000	108.89	13.22676950
#	Dec-20	24.133000	121.76	2.93851105
#	Jan-21	30.945000	122.96	3.80490133
#	Feb-21	23.263000	145.09	3.37531451
#	Mar-21	1.285000	160.92	0.20677917
	Apr-21	3.660000	114.89	0.42051020
	May-21	0.026000	96.72	0.00251462
	Jun-21	29.671000	77.03	2.28568962
	Jul-21	0.000000	83.62	0.00000000
	Remaining sales, August 2021 to May 2023	345.534000		6.07443760
	Total	826.345000	-	60.85312292

373 Mr Tang does not dispute these figures.[321] Mr Tang also highlights that based on these figures, the weighted average price per 1,000 pieces of 3mil gloves for gloves sold between August 2021 and May 2023 would have been US$17.34, which is derived from taking the rounded total revenue divided by the rounded number of gloves sold.[322] Mr Watts confirms that this approach is reasonable.[323]

374 Given that the parties agree that FSH paid US$135,966,280 to SGI for the gloves and US$1,432,279 as shipping costs (see [380] and [383] below),

321 Tang's Supp AEIC at p 23 para 32.

322 Notes of Evidence for 11 July 2024 ("110724 NE") at p 31 lines 12–19.

323 110724 NE at p 51 lines 6–22.

FSH argues that it has suffered a loss of US$76,545.436 on the 3mil gloves.[324] I shall deal with these costs further below.

375 For now, I turn to SGI's argument that FSH's loss is too remote under both limbs of the test set out in *Hadley v Baxendale* (1854) 9 Exch 341 ("*Hadley*") (see [377] below). Specifically, SGI argues that SGI contracted with FSH on the basis that FSH had a fixed contract with the NHS, which turned out to be untrue, and SGI would not have expected that the fluctuations in market price would cause loss to FSH if it was behind on the deliveries.[325]

376 In response, FSH argues that its loss is not too remote since FSH never communicated to SGI that the potential contracts with NHS England would be on a fixed price basis, and FSH's losses in profits arising from the inability to sell the gloves are a direct and natural consequence of SGI's protracted delays regardless of who FSH's customer was. The first limb of the *Hadley* test is thus fulfilled.

377 In *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623, the Court of Appeal summarised (at [81]–[82]) the test for both limbs of the *Hadley* test:

> (a) Damage which falls under the first limb of *Hadley* (which may be termed "ordinary" damage) ought to be well within the reasonable contemplation of all contracting parties concerned. Put another way, the damages which an innocent party ought to receive in respect of a

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[324] DCS at para 357.

[325] PCS at para 635.

contractual breach should be such as may fairly and reasonably be considered as either arising naturally, *ie*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it (*Hadley* at 355).

(b) Damage which falls under the second limb of *Hadley* (*ie*, "extraordinary" or "non-natural" damage) is not, by its very nature, within the reasonable contemplation of the contracting parties. However, if the contracting parties, having had the opportunity to communicate with each other in advance, had actual knowledge of the special circumstances which resulted in the "extraordinary" or "non-natural" damage, then it is neither unjust nor unfair to hold the contract-breaker liable in damages for such damage.

378 I accept FSH's arguments that the first limb of the test in *Hadley* is satisfied for two related reasons. First, I accept that there was no mention by FSH that under its contracts with NHS, the price for gloves would be fixed. Second and relatedly, the loss of profits by FSH arose naturally, and would well have been within the contemplation of parties. They were not by any means extraordinary. The first limb of the test in *Hadley* is thus satisfied, and I will proceed on the revenue figures agreed by parties' experts (see [372]−[373] above).

(3) FSH's costs incurred for the 3mil gloves

379 Next, FSH submits that, in terms of costs for the 3mil gloves, it has paid US$135,966,280 under the 1st PO and the 2nd PO to SGI.[326] This comprises:

(a) US$46,923,030 and US$4,422,000 for gloves already delivered under the 1st PO, as well as US$45,988,800 for undelivered gloves under the 1st PO (see [28] above); and

(b) US$13,825,030 and US$6,013,920 for gloves already delivered under the 2nd PO, as well as US$18,793,500 for undelivered gloves under the 2nd PO (see [45] above).

380 Mr Tang does not dispute these figures *per se*, but opines that the amounts already paid by FSH for the undelivered gloves (comprising US$45,988,800 and US$18,793,500) should be excluded because this sum may be forfeited to SGI. Mr Tang also opines that the monies which FSH owes SGI for gloves which have already been delivered (comprising US$2,096,524 under the 1st PO and US$1,406,828.80 under the 2nd PO) should be excluded.[327] This would bring the sums paid by FSH for the 3mil gloves to US$67,680,627.20.

381 In my view, it would be neater to account for the amounts already paid by FSH to SGI for the undelivered gloves in the next section, since it involves a separate legal issue. I therefore exclude these amounts (comprising US$45,988,800 and US$18,793,500). Similarly, it would be neater to account for the outstanding monies owed by FSH to SGI separately. To this end, I have

326 DCS at para 357(b).

327 Tang's Supp AEIC at p 26 para 34.

already accounted for this above (at [303] above), and will continue to ignore this sum for the purposes of calculating FSH's costs incurred for the 3mil gloves in the Actual Scenario here. This would bring the amount paid by FSH to SGI for the 3mil gloves under the Actual Scenario to US$71,183,980 (*ie*, US$135,966,280 − US$45,988,800 − US$18,793,500).

(4) FSH's shipping costs incurred

382 Lastly, in terms of shipping costs, FSH estimates this to total US$1,432,279,[328] based on the monthly quantity shipped, as well as an index of monthly shipping costs per container constructed by Mr Watts using freight invoices provided to him. An overview of these costs is as follows:[329]

Figure 3.3 Actual 3mil shipping costs

Month	Gloves ex-factory delivered (million)	Average shipping price per 1000 gloves (USD)	Shipping cost (USD million)
Jun-20	0.000000	0.46	0.00000000
Jul-20	53.600000	0.46	0.02468102
Aug-20	160.800000	0.46	0.07404305
Sep-20	140.700000	0.45	0.06300000
Oct-20	53.600000	0.64	0.03433333
Nov-20	40.200000	0.69	0.02781600
Dec-20	40.200000	1.12	0.04488282
Jan-21	53.600000	2.80	0.14998769
Feb-21	77.050000	3.19	0.24603185
Mar-21	113.900000	3.92	0.44593902
Apr-21	93.800000	3.43	0.32156444
Total	827.450000		1.43227924

328 DCS at para 357(c).

329 Watts' AEIC at p 27 para 3.10.

383 Mr Tang confirms that "there appears to be no variance between [SGI and FSH's] records in terms of ex-factory date and shipping date". However, Mr Tang highlights a computation error in the average shipping price for May 2021, which however "does not appear to have a significant impact on [Mr Watts'] computations and conclusions".[330]

384 I agree with Mr Tang on the computational error, but observe that the error was made with respect to average prices per container in May 2021, which is not material in the present issue. Since SGI does not dispute any other figure associated with FSH's shipping costs as submitted by FSH, I will adopt Mr Watts' calculations on FSH's shipping costs in relation to the Actual Scenario.

(5) Loss suffered by FSH

385 In sum, under the Actual Scenario, FSH has made a *loss* of US$11,763,136.08 (US$60,853,122.92 – US$71,183,980 – US$1,432,279).

(6) FSH's net gain under the 5mil PO

386 For completeness, I note that in his expert report, Mr Watts also opines that FSH has, due to SGI's initial late delivery of the 5mil gloves, made a net gain of around US$1,255,598.42, which Mr Watts has used to offset against FSH's other losses.[331] I do not consider such set off to be appropriate. These gains relate to a different contract, *ie*, the 5mil PO, and for which I have found no breach of Clause 1.2 by SGI (see [93] above).

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330 Tang's Supp AEIC at p 24–25 para 33 and p 31−32 para 41(e); see also Watts' AEIC at p 195 item 68.

331 Watts' AEIC at p 34 para 4.11; DCS at para 361.

The But For Scenario

(1) Whether FSH should be allowed to claim damages arising after 20 April 2021

387 Before proceeding to consider the But For Scenario, an important preliminary issue must first be addressed. As earlier alluded to (at [369] above), SGI argues that FSH should not be allowed to make any claims for losses suffered under the 2nd PO after it had terminated the contracts, which SGI has taken to be 20 April 2021.[332] FSH does not appear to have made any arguments directly in response. Instead, its primary case is that it did not breach the contracts, but merely terminated them following SGI's repudiatory breaches.

388 However, FSH's primary case is no longer tenable since I have found that it only validly terminated the contracts on 6 July 2021, and committed a repudiatory breach which spanned from 20 April 2021 to 6 July 2021. Thus, the preliminary issue whether FSH should be allowed to claim for losses it purportedly suffered between 20 April 2021 and 6 July 2021 arises.

389 To resolve this issue, the case of *Saha Ram* (see [81]−[82] above) is instructive. There, one of the claims made by the defendant landlord was the loss of future rent under the second tenancy agreement. This is the rent which would have fallen due from the plaintiff tenants to the defendant under the second tenancy agreement for the 34 months and 28 days from 3 January 2020 to 30 November 2022 (*Saha Ram* at [118]). However, the defendant himself had breached an implied term under the same agreement warranting that the third storey of the building was constructed lawfully (*Saha Ram* at [66]).

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[332] PCS at paras 641−642.

390 The High Court disallowed the defendant's claim in this regard, and explained that in assessing the damages accruing to one party, the court must also consider that party's own breaches of contract:

> 121 To my mind, the answer to this oddity lies in the formulation of the test for expectation loss. A party claiming expectation loss – the defendant in this case – is not entitled to be put in the position he would have been in if his contractual counterparty had performed his obligations under the contract in some purely notional or abstract sense. **A party claiming expectation loss is entitled to be put in the position he would have been in if the counterparty had performed *this* contract in accordance with the *specific* circumstances surrounding *this* breach of contract**.
>
> 122 This formulation means that I cannot assess the defendant's expectation loss arising from the plaintiffs' breach of the second tenancy agreement while ignoring the defendant's own breach of the implied term in the second tenancy agreement. If the plaintiffs had performed their obligation to pay rent under the second tenancy agreement after August 2019, they would have paid the rent of $6,000 due every month to the defendant in compliance with that primary obligation. But as soon as the plaintiffs had paid that rent to the defendant, the defendant would have come under a secondary obligation – by reason of his own breach of the implied term in the second tenancy agreement – to pay damages to the plaintiffs equivalent to the sum he had just received from them as rent, being the plaintiffs' reliance loss for the defendant's breach of contract.
>
> 123 The result is that the plaintiffs' primary obligation to pay rent to the defendant under the second tenancy agreement from September 2019 until November 2022 is entirely set off by the defendant's secondary obligation to pay those same sums back to the plaintiffs as their reliance loss arising from the defendant's breach of the implied term in the second tenancy agreement. This leaves nothing owing to the defendant for his

> expectation loss for the plaintiffs' breach of the second tenancy agreement.
>
> [emphasis in original in italics; emphasis added in bold]

391 Similarly, in my view, FSH's losses here must be assessed in light of its own breaches. This also harkens back to the prevention principle which I have alluded to earlier (see [294] above). In the Actual Scenario, FSH wrongfully refused to take deliveries of the 3mil gloves during the period from 20 April 2021 to 6 July 2021. *In light of its own breaches*, no gloves were delivered to FSH during this period, and no revenue was earned by FSH (see [370] above). To account for FSH's own breaches, for the calculation of FSH's revenue in the But For Scenario, I will discount the following quantities of gloves meant for delivery to FSH during this period of FSH's breach (see [398] below):

(a) two-fifths of the 3mil gloves due to be shipped in April 2021, being the gloves which should have been shipped between 20 April 2021 and 30 April 2021 (since there are five Fridays in that month, and Mr Watts' calculations are based on the assumption that the orders would be delivered evenly over every Friday of each month – see [396(a)] below);

(b) all the 3mil gloves due to be shipped in May 2021 and June 2021; and

(c) one-fifth of the 3mil gloves due to be shipped in July 2021, under the 2nd PO, being the gloves which should have been shipped on the first Friday of July 2021 (collectively, the "Excluded Gloves").

392 As FSH's failure to earn revenue on the Excluded Gloves is wholly attributable to its own breach, no account should be taken of any revenue which might have been generated in relation to the Excluded Gloves in the But For Scenario. I shall say more of this shortly (see [397]−[398] and [424] below). Further, and additionally, due to the operation of the prevention principle, the costs incurred by FSH for procuring and shipping the Excluded Gloves should still be included in the But For Scenario. This will be explained below (at [430]−[433] and [436]).

393 For clarity, while I have assessed that SGI suffered no loss in respect of the Cancelled Gloves Claim (which would include orders for the Excluded Gloves), this is on the basis that SGI fully mitigated its losses (see [363] above). It does not change my analysis that FSH should not be allowed to claim for the period when it was in breach of its obligations. With that in mind, I turn to consider the But For Scenario proper.

394 Under the But For Scenario, FSH argues that it would have earned a profit of US$49,855,089 on the 3mil gloves.[333]

395 To this end, Mr Watts opines that the number of gloves delivered and received, under the 1st PO and the 2nd PO respectively, would have been as follows:[334]

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333 DCS at para 358.

334 Watts' AEIC at p 29 para 3.17.

Figure 3.5 - But-for 3mil gloves received by FSH, millions

Month	PO1- gloves ex-factory delivered (million)	PO2- gloves ex-factory delivered (million)	Total gloves ex-factory delivered (million)	PO1- gloves received (million)	PO2- gloves received (million)	Total gloves received (million)
Jun-20	100.500000	0.000000	100.500000	0.000000	0.000000	
Jul-20	201.000000	0.000000	201.000000	63.650000	0.000000	63.650000
Aug-20	201.000000	0.000000	201.000000	147.075806	0.000000	147.075806
Sep-20	201.000000	0.000000	201.000000	226.935484	0.000000	226.935484
Oct-20	201.000000	0.000000	201.000000	185.438710	0.000000	185.438710
Nov-20	201.000000	0.000000	201.000000	184.141935	0.000000	184.141935
Dec-20	201.000000	67.000000	268.000000	231.258065	0.000000	231.258065
Jan-21	0.000000	67.000000	67.000000	183.709677	38.903226	222.612903
Feb-21	0.000000	67.000000	67.000000	84.290323	60.516129	144.806452
Mar-21	0.000000	67.000000	67.000000	0.000000	80.044931	80.044931
Apr-21	0.000000	67.000000	67.000000	0.000000	62.600230	62.600230
May-21	0.000000	67.000000	67.000000	0.000000	61.668817	61.668817
Jun-21	0.000000	67.000000	67.000000	0.000000	76.653763	76.653763
Jul-21				0.000000	61.812903	61.812903
Aug-21				0.000000	26.800000	26.800000
Total	1,306.500000	469.000000	1,775.500000	1,306.500000	469.000000	1,775.500000

396 Mr Watts further explains that in arriving at these quantities, he has assumed that:[335]

(a) SGI would have delivered orders due in a given month evenly over each month, with delivery taking place on the Friday of each week; and

(b) it would take 40 days to ship the gloves to the UK from the date that SGI delivered them.

397 Mr Tang confirms that he has "no comment" on these figures,[336] which I will hence also proceed to adopt. However, as just alluded to (see [391]–[392] above), the But For Scenario should be assessed in light of FSH's own breach in refusing to accept gloves from 20 April to 6 July 2021. To this end, I will exclude any gloves that would have been *delivered* (as opposed to *received*)

335 Watts' AEIC at p 29 para 3.16.

336 Tang's Supp AEIC at p 27 para 37.

from 20 April 2021 to 6 July 2021, adopting Mr Watts' two assumptions in doing so.

398 Based on my computation, the relevant quantities would therefore be:

Month	PO1- gloves ex-factory delivered (million)	PO2- gloves ex-factory delivered (million)	Total gloves ex-factory delivered (million)	PO1- gloves received (million)	PO2- gloves received (million)	Total gloves received (million)
Jun-20	100.500000	0.000000	100.500000	0.000000	0.000000	0.000000
Jul-20	201.000000	0.000000	201.000000	63.650000	0.000000	63.650000
Aug-20	201.000000	0.000000	201.000000	147.075806	0.000000	147.075806
Sep-20	201.000000	0.000000	201.000000	226.935484	0.000000	226.935484
Oct-20	201.000000	0.000000	201.000000	185.438710	0.000000	185.438710
Nov-20	201.000000	0.000000	201.000000	184.141935	0.000000	184.141935
Dec-20	201.000000	67.000000	268.000000	231.258065	0.000000	231.258065
Jan-21	0.000000	67.000000	67.000000	183.709677	38.903226	222.612903
Feb-21	0.000000	67.000000	67.000000	84.290323	60.516129	144.806452
Mar-21	0.000000	67.000000	67.000000	0.000000	80.044931	80.044931
Apr-21	0.000000	40.200000	40.200000	0.000000	62.600230	62.600230
May-21	0.000000	0.000000	0.000000	0.000000	47.375484	47.375484
Jun-21	0.000000	0.000000	0.000000	0.000000	18.760000	18.760000
Jul-21				0.000000	0.000000	0.000000
Aug-21				0.000000	0.000000	0.000000
Total	1,306.500000	308.200000	1,614.700000	1,306.500000	308.200000	1,614.700000

These figures are obtained by (1) multiplying the "PO2- gloves ex-factory delivered (million)" for Apr 21 by 3/5 (accounting for the 2/5 which is supposed to be excluded by virtue of FSH's non acceptance of delivery from 20 to 30 April 2021); (2) changing the "PO2- gloves ex-factory delivered (million)" for May 21 and Jun 21 to 0, to account for FSH's non acceptance of delivery in these two months. The figures in the corresponding "PO2- gloves received (million)" and "Total gloves received (million)" cells are then derived by Mr Watts' built-in formula.

(2) FSH's revenue

399 Based on the above-mentioned figures submitted by Mr Watts (see [395] above), FSH argues that its revenue earned would have been US$206,589,032. Mr Watts arrived at this sum on two bases:[337]

(a) the assumptions stated at [396] above, as well as the assumption that FSH will be able to fully sell any gloves it receives in the same month when they arrive in the UK; and

337 Watts' AEIC at p 29 para 3.16.

(b) basing the sale price in each month on a monthly price index from August 2020 to June 2021, constructed based on the average monthly price of 3mil gloves sold by FSH (see [372] above).

400 According to Mr Watts, FSH's revenue of US$206,589,032 is derived as follows:[338]

Figure 3.6 - But-for 3mil revenue from resale

Month	Gloves received (million)	Weighted average price per 1000 gloves (USD)	Revenue (USD million)
Jun-20	0.000000	0.00	0.00000000
Jul-20	63.650000	109.21	6.95146878
Aug-20	147.075806	109.21	16.06273176
Sep-20	226.935484	113.58	25.77478504
Oct-20	185.438710	116.91	21.67954117
Nov-20	184.141935	108.89	20.05090052
Dec-20	231.258065	121.76	28.15871956
Jan-21	222.612903	122.96	27.37179293
Feb-21	144.806452	145.09	21.01050240
Mar-21	80.044931	160.92	12.88064160
Apr-21	62.600230	114.89	7.19235938
May-21	61.668817	96.72	5.96436875
Jun-21	76.653763	77.03	5.90498169
Jul-21	61.812903	83.62	5.16876058
Aug-21	26.800000	90.20	2.41747851
Total	1775.500000		206.58903267

401 Mr Tang disagrees with Mr Watt's first assumption (at [399(a)] above), opining that FSH has proven itself to be consistently unable to sell its 3mil

[338] Watts' AEIC at p 30 para 3.21.

gloves received from SGI.[339] Specifically, Mr Tang summarises the percentage of 3mil gloves sold by FSH as follows (the "Percentage Sales Summary"):[340]

Month	Opening Stock of Gloves	1st PO Gloves received	2nd PO Gloves received	Total Gloves received	Sales Quantity	Weighted average selling prices (USD per 1000 pieces)	Closing (million pieces)	Percentage of Gloves sold / (Gloves available) (%)
	(million pieces)							
	(a)	(b)	(c)	(d) = (b) + (c)	(e)		(f) = (a) + (d) - (e)	(g) = (e) / [(a) + (d)]
Aug-20	-	40.20	-	40.20	15.18	109	25.02	37.75%
Sep-20	25.02	157.45	-	157.45	50.12	114	132.36	27.47%
Oct-20	132.36	157.45	-	157.45	181.06	117	108.74	62.48%
Nov-20	108.74	40.20	-	40.20	121.47	109	27.47	81.56%
Dec-20	27.47	36.85	-	36.85	24.13	122	40.19	37.52%
Jan-21	40.19	3.35	-	3.35	30.95	123	12.59	71.07%
Feb-21	12.59	40.20	33.50	73.70	23.26	145	63.03	26.96%
Mar-21	63.03	30.15	53.60	83.75	1.29	161	145.50	0.88%
Apr-21	145.50	50.25	63.65	113.90	3.66	115	255.74	1.41%
May-21	255.74	40.20	53.60	93.80	0.03	97	349.51	0.01%
Jun-21	349.51	10.05	13.40	23.45	29.67	77	343.29	7.96%
Jul-21	343.29	3.35	-	3.35	-	84	346.64	-
Total up to Jul-21		**609.70**	**217.75**	**827.45**	**480.81**			
Aug-21 to May-23	346.64	-	-	-	345.53	17.58*	1.11^	100.00%

** Average selling price.*
^ No explanation was provided in the OP Report as to what is the status of this balance unsold stock.

402 Applying these percentages to the quantity of gloves which FSH would have received under the But For Scenario, Mr Tang opines that FSH would merely have earned US$77.54 million, broken down as follows:[341]

339 PCS at para 620.

340 Tang's Supp AEIC at p 23 para 32(a).

341 Tang's Supp AEIC at p 28 para 40.

Month	Opening Stock of Gloves	Total Gloves received	Sales Quantity	Weighted average selling prices	Closing	Revenue
	(million pieces)			(USD per 1000 pieces)	(million pieces)	(USD million)
	(a)	(b)	(c)	(d)	(e) = (a) + (b) - (c)	(f) = (c) x (d)
Jun-20	-	-	-	-	-	-
Jul-20	-	63.65	-	109.21	63.65	-
Aug-20	63.65	147.08	15.18	109.21	195.55	1.66
Sep-20	195.55	226.94	50.12	113.58	372.36	5.69
Oct-20	372.36	185.44	181.06	116.91	376.74	21.17
Nov-20	376.74	184.14	121.47	108.89	439.41	13.23
Dec-20	439.41	231.26	24.13	121.76	646.54	2.94
Jan-21	646.54	222.61	30.95	122.96	838.20	3.81
Feb-21	838.20	144.81	23.26	145.09	959.75	3.37
Mar-21	959.75	80.04	1.29	160.92	1,038.50	0.21
Apr-21	1,038.50	62.60	3.66	114.89	1,097.44	0.42
May-21	1,097.44	61.67	0.03	96.72	1,159.08	0.00
Jun-21	1,159.08	76.65	29.67	77.03	1,206.07	2.29
Jul-21	1,206.07	61.81	-	83.62	1,267.88	-
Aug-21 to May-23	1,267.88	26.80	1,294.68	17.58*	-	22.76
Total		**1,775.50**	**1,775.50**			**77.54**
Less: Defendant's costs to be paid to the Plaintiff^						(154.51)
Less: Shipping costs^						(2.22)
Profit/(loss)						**(79.19)**

* *Based on the average price at which the Defendant was able to sell the remaining 346 million 3mil Gloves during the same period in the 'Actual Scenario.' (see Paragraph 32)*
^ *Costs calculated by OW in the OP Report under the 'But-for Scenario' in* ***paragraph 3.23*** *of the OP Report.*

403 In its written submissions, SGI further highlights that Mr Watts and FSH's Ms White have conceded during the trial that despite the high demand, FSH was unable to sell all the 3mil gloves received.[342] Hence, "even if SGI had delivered all the [3mil gloves] on time, FSH would still not be able to sell more than they actually did".[343]

404 SGI further argues that there is no evidence that SGI's late deliveries caused FSH's reputation to become damaged. Neither is there evidence, or is it logical, for FSH to claim that "SGI's erratic and limited deliveries had disrupted its ability to make pre-sales, and that FSH ceased making pre-sales because of SGI's delays in deliveries".[344]

342 PCS at paras 621–622.

343 PCS at para 623.

344 PCS at paras 624–629.

405 In addition, SGI also disagrees with the second basis of Mr Watts' assessment of FSH's revenue in the But For Scenario (see [399(b)] above), arguing that FSH has not proven that it could sell the additional 3mil gloves at the same prices as it had done under the Actual Scenario.[345]

406 In response, FSH highlights that Mr Tang lacks the necessary relevant expertise,[346] and argues that Mr Tang's approach has mischaracterised FSH's sales figures. Instead, one should look at the total amount of gloves delivered by SGI cumulatively by a certain time, and the total cumulative amount sold by the corresponding time.[347] Read this way, FSH had sold 97% of 3mil gloves it received as at end January 2021.[348]

407 Further, FSH argues that but for SGI's late deliveries, FSH would have been able to supply all the 3 mil gloves in response to the UK Cabinet Office's initial request. FSH's ability to sell gloves was severely disrupted by SGI's erratic and limited deliveries beginning late-2020. Although FSH's actual sales slowed down from February 2021, these figures must be seen against the backdrop of FSH's earlier inability to commit to the pre-sales of whole containers due to SGI's late deliveries, and failure to produce the necessary EN455 certificates within a reasonable time. Mr Watts' assumption that FSH would have sold the 3mil gloves within the month of their arrival in the UK is thus reasonable and realistic.[349]

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345 PCS at para 637.

346 DCS at para 365.

347 DCS at para 367.

348 DCS at para 368.

349 DCS at paras 372–383.

408 Having considered the evidence and the parties' submissions, I do not entirely agree with either party's submissions.

409 First, on the selling price of the 3mil gloves, I accept the prices adopted by Mr Watts as being appropriate for calculating FSH's revenue in the But For Scenario. These prices represent the average (mean) of FSH's actual prices sold, and is fair in the circumstances. SGI has also provided no alternative.

410 Second, I disagree with FSH that had SGI delivered the gloves punctually, FSH would have secured the agreements with the UK NHS to sell *all* the 3mil gloves it received (at least under the 1st PO). The contemporaneous evidence suggests instead that the UK NHS had in any event become overstocked.[350]

411 For instance, on 13 August 2020, Mr Simpson had written to Mr Marini stating that "[s]ome not all of the goods which arrive from Sept. onwards will be sold to other customers due to the English NHS over-stocking themselves".[351] At this point in time, FSH did not view SGI's late deliveries as being so unacceptable as to deprive it of substantially the whole benefit of the 1st PO yet.[352] It is thus improbable that FSH would have, prior to this, refrained from committing itself to the NHS due to SGI's late deliveries in June and July.

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350 See Agreed Bundle of Documents (Volume 8 of 51) ("8AB") 1 and 6.

351 8AB 1.

352 Transcript at p 17 lines 17–21; DCS at para 350.

412 Third, the evidence suggests that in the But For Scenario, FSH would neither have sold off 100% of the 3mil gloves in the same month of their arrival to the UK, nor sold off a monthly percentage as low as that opined by Mr Tang.

413 This becomes clear when one examines, as FSH submits, the ***cumulative*** number of 3mil gloves sold by FSH each month as against the ***cumulative*** number of gloves received by FSH each month, which more accurately reflects FSH's sales figures. For clarity, a distinction also ought to be drawn between the percentage sales for 3mil gloves delivered under the 1st PO, and those delivered under the 2nd PO.

414 Under the 1st PO, it appears from the Percentage Sales Summary that from the time FSH first received deliveries under the 1st PO in August 2020, it took around four months (between August 2020 and November 2020) before FSH started consistently maintaining a percentage of *subtotal* gloves sold (as against the *subtotal* number of 3mil gloves received) at a general minimum rate of 90%. This percentage peaked in January 2021 at 97%, and started decreasing sharply from March 2021. In the first two months, this percentage was approximately one-third, and it increased to around two-thirds in the third month. These statistics are summarised in the table below (the "Revised Percentage Sales Summary"):

Month	3mil gloves received in month (million pieces)	3mil gloves received (subtotal) (million pieces)	3mil gloves sold in month (million pieces)	3mil gloves sold (subtotal) (million pieces)	Percentage of subtotal gloves sold / subtotal gloves received (%)
Aug 20	40.20	40.20	15.18	15.18	**37.76**
Sep 20	157.40	197.60	50.12	65.30	**33.05**
Oct 20	157.45	355.05	181.06	246.36	**69.39**
Nov 20	40.20	395.25	121.47	367.83	**93.06**
Dec 20	36.85	432.10	24.13	391.96	**90.71**
Jan 21	3.35	435.45	30.95	422.91	**97.12**
Feb 21	73.70	509.15	23.26	446.17	**87.63**
Mar 21	83.75	592.90	1.29	447.46	**75.47**
Apr 21	113.90	706.80	3.66	451.12	**63.83**
May 21	93.80	800.60	0.03	451.15	**56.35**
Jun 21	23.45	824.05	29.67	480.82	**58.35**
Jul 21	3.35	827.40	0.00	480.82	**58.11**
Aug 21 to May 23	0	827.40	345.54	826.36	**99.87**

415 Given this, and on the basis that FSH's monthly sale rates as calculated from the month it starts receiving gloves from SGI will remain the same in the But For Scenario (under which FSH will start receiving gloves a month earlier,

in July 2020 – see [398] above), I find that under the But For Scenario, FSH would have sold:

(a) one-third of the *subtotal* number of 3mil gloves each month in July 2020 and August 2020;

(b) two-thirds of the *subtotal* number of gloves in September 2020;

(c) 92% of the *subtotal* number of gloves each month from October 2020 to February 2021 (being the mean percentage of the subtotal number of gloves sold from November 2020 to February 2021 under the Actual Scenario); and

(d) all of the final 8% of the remaining gloves in March 2021.

416 By applying the selling prices adopted by Mr Watts (see [400] and [409] above), the sales percentages per month (see [415] above) to the quantities of 3mil gloves received by FSH under the 1st PO each month (see [398] above), I compute FSH's revenue to be US$154,971,955.17 as set out below:

Month	Opening stock	Gloves received in month	Subtotal gloves in month before sales	Gloves sold in month	Price (US$ per 1,000 pieces)	Revenue (US$)
Jul-20	0	63,650,000	63,650,000	21,216,667	109.21	2,317,072.17
Aug-20	42,433,333	147,075,806	189,509,140	63,169,713	109.21	6,898,764.39
Sep-20	126,339,427	226,935,484	353,274,910	235,516,607	113.58	26,749,976.22
Oct-20	117,758,303	185,438,710	303,197,013	278,941,252	116.91	32,611,021.78
Nov-20	24,255,761	184,141,935	208,397,697	191,725,881	108.89	20,877,031.16
Dec-20	16,671,816	231,258,065	247,929,880	228,095,490	121.76	27,772,906.84
Jan-21	19,834,390	183,709,677	203,544,068	187,260,542	122.96	23,025,556.29
Feb-21	16,283,525	84,290,323	100,573,848	92,527,940	145.09	13,424,878.84
Mar-21	8,045,908	0	8,045,908	8,045,908	160.92	1,294,747.49
Total		**1,306,500,000**		**1,306,500,000**		**154,971,955.17**

417 Next, from the Revised Percentage Sales Summary, one can glean that from March 2021, FSH's sale of 3mil gloves started declining sharply. It stagnated at around 57% between May 2021 to July 2021, before declining even more sharply thereafter, when it took 23 months to sell the remaining 3mil gloves, averaging 1.82% in terms of the percentage of subtotal gloves sold as against the subtotal gloves received each month. FSH was unable to sell more gloves thereafter.

418 While that is the case, I accept FSH's argument that it had, after realising that the NHS would not be taking the full quantity of 3mil gloves, originally started pre-selling the gloves to other customers, but that such pre-selling came to a halt subsequently following SGI's continuously late and erratic deliveries. FSH's Mr Mahli has adduced some contemporaneous evidence documenting such pre-selling, *ie,* spreadsheets dated October and November 2020 recording FSH's pre-sales and potential customers,[353] which probably also explains FSH's high rate of sales under the 1st PO.

419 I also find that this would have been the case for the remaining orders under the 2nd PO. While SGI purports to highlight that Mrs Stoute conceded at trial that even if SGI had delivered in accordance with the original delivery schedule in May 2021 and June 2021, FSH would still have lost money on these containers,[354] this must be read in context.

420 Properly understood, Mrs Stoute was not saying that FSH would have made losses on the 3mil gloves under the 2nd PO in May 2021 and June 2021

353 DCS at note 549.

354 PCS at para 643.

in the But For Scenario. Instead, she was saying that in the Actual Scenario, even if these gloves were delivered in accordance with the 1 April 2021 Schedule, FSH would still have made a net loss on all the 3mil gloves, because "cumulatively it's the same product as the first order [*ie*, the 1st PO], which was a 45% completion at that point".[355]

421 While SGI seeks to argue that by the time FSH had started pre-selling gloves, it already knew of the delays,[356] this is not inconsistent with how FSH could have ceased the pre-sales subsequently after the *extent* of the late deliveries became too serious.

422 The situation was exacerbated by SGI's late provision of the EN455 certificates, on 1 June 2021, following FSH's request on 19 March 2021.

423 Given these, I find that under the 2nd PO (for which FSH would have started receiving deliveries from January 2021), it would be appropriate to assess damages on the basis that FSH would have sold 92% of the *subtotal* number of gloves each month from the outset (*ie*, using the same mean monthly percentage of sales as was used in relation to the later months under the 1st PO), and the remaining 8% of the gloves in July 2021.

424 Again, I compute FSH's revenue under the 2nd PO using these sales percentages, the selling prices (see [400] and [409] above) and the quantities of 3mil gloves received by FSH under the 2nd PO each month (after excluding the

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355 040724 NE at p 38 line 19–p 39 line 19.

356 PCS at para 628.

Excluded Gloves to account for FSH's own breach: see [391]–[392] and [397]–[398] above), and arrive at US$39,327,841.47:

Month	Opening stock	Gloves received in month	Subtotal gloves in month before sales	Gloves sold in month	Price (US$ per 1,000 pieces)	Revenue (US$)
Jan-21	0	38,903,226	38,903,226	35,790,968	122.96	4,400,857.39
Feb-21	3,112,258	60,516,129	63,628,387	58,538,116	145.09	8,493,295.27
Mar-21	5,090,271	80,044,931	85,135,202	78,324,386	160.92	12,603,960.15
Apr-21	6,810,816	62,600,230	69,411,047	63,858,163	114.89	7,336,664.33
May-21	5,552,884	47,375,484	52,928,368	48,694,098	96.72	4,709,693.18
Jun-21	4,234,269	18,760,000	22,994,269	21,154,728	77.03	1,629,548.69
Jul-21	1,839,542	0	1,839,542	1,839,542	83.62	153,822.46
Total		**308,200,000**		**308,200,000**		**39,327,841.47**

425 In sum, under the But For Scenario, FSH's revenue would have been US$194,299,796.64 (being the sum of US$154,971,955.17 under the 1st PO and US$39,327,841.47 under the 2nd PO).

(3) FSH's costs incurred for the 3mil gloves

426 In terms of costs for the 3mil gloves, FSH argues that it would have paid SGI a total purchase price of US$154,513,390, based on the original agreed prices as set out in the 1st PO and the 2nd PO respectively (*ie*, US$82.50 per 1,000 pieces of gloves under the 1st PO and US$93.50 per 1,000 pieces of gloves under the 2nd PO).[357]

[357] DCS at para 358(b); Watts' AEIC at p 24 para 3.3.

427 Mr Tang disagrees with this approach, opining that it is "inconsistent with the actual scenario, where [SGI] had increased its prices and [FSH] had agreed to the increase in prices".[358]

428 As I have held (at [138] and [151] above), SGI has breached the Supply Agreement and the 1st PO by increasing the prices of the 3mil gloves under the 1st PO. There is no such breach in relation to the 2nd PO. It would hence be appropriate to adopt the price of US$82.50 per 1,000 pieces of 3mil gloves for gloves under the 1st PO, and the prices paid by FSH each month under the Actual Scenario in relation to gloves due under the 2nd PO. It is, in my view, also appropriate to proceed on the basis that the price of 3mil gloves under the 2nd PO would be US$83.50 for the months of May 2021 and June 2021, in line with my finding with regard to SGI's losses (see [325]−[328] above).

429 FSH would thus have incurred costs of US$152,885,290.00 (being the sum of US$107,786,250.00 under the 1st PO and US$45,099,040.00 under the 2nd PO) for the 3mil gloves in the But For Scenario. The tabulation is below:

358 Tang's Supp AEIC at p 27 para 38.

Month	PO1- gloves ex-factory delivered (million)	Price under PO1 per 1,000 gloves (USD)	Total cost under PO1 (USD)	PO2- gloves ex-factory delivered (million)	Price under PO2 per 1,000 gloves (USD)	Total cost under PO2 (USD)
Jun-20	100.500000	82.50	8,291,250.00	0.000000		
Jul-20	201.000000	82.50	16,582,500.00	0.000000		
Aug-20	201.000000	82.50	16,582,500.00	0.000000		
Sep-20	201.000000	82.50	16,582,500.00	0.000000		
Oct-20	201.000000	82.50	16,582,500.00	0.000000		
Nov-20	201.000000	82.50	16,582,500.00	0.000000		
Dec-20	201.000000	82.50	16,582,500.00	67.000000	93.50	6,264,500.00
Jan-21	0.000000			67.000000	99.00	6,633,000.00
Feb-21	0.000000			67.000000	103.00	6,901,000.00
Mar-21	0.000000			67.000000	106.42	7,130,140.00
Apr-21	0.000000			67.000000	104.20	6,981,400.00
May-21	0.000000			67.000000	83.50	5,594,500.00
Jun-21	0.000000			67.000000	83.50	5,594,500.00
Total	1,306.500000		**107,786,250.00**	469.000000		**45,099,040.00**

430 As earlier alluded to (see [391]–[392] above), even in the But For Scenario, costs for the Excluded Gloves should be included by operation of the prevention principle, because to hold otherwise would effectively allow FSH to profit from its breach by evading its obligation to pay the purchase price of the gloves it refused to accept. As observed in *Mickey Ng*, the prevention principle seeks to prevent a defaulting party from benefitting from its own breach in *two* ways: (a) *positively obtaining* a benefit; and (b) *avoiding* its existing obligations:

> 64 In *Alghussein Establishment v Eton College* [1988] 1 WLR 587 ("*Alghussein*"), the House of Lords considered that it is 'well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the other party' (at 591). **This principle applied whether a party was seeking to take advantage of his own wrong to obtain a benefit under a continuing contract or to avoid a contract and thereby escape his obligations** (at 594) …
>
> …
>
> 69 The prevention principle was first explicitly recognised by the Singapore courts in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 ("*Evergreat Construction*"), where VK Rajah J (as he then was) explained the principle as follows (at [51]):

> In essence, even if the parties expressly provide that the contract shall *ipso facto* determine upon the happening of a certain event, such a provision is to be construed subject to the principle that no man can take advantage of his own wrong, so that one party may not be allowed to rely on such a provision where the occurrence of the event is attributable to his own act or default; *Chitty on Contracts* at para 22-054. This principle is also referred to as the '*prevention principle*' and is wedded to notions of fair play and commercial morality. It **offends all sensible norms of commercial intercourse to allow a party in breach of its contractual obligations to rely on its very breach to either evade responsibility or, even more farcically, to assert that the other contracting party must also willy-nilly accept or sustain the consequences of that breach**. [emphasis in original]

[emphasis added in bold]

431 In this case, while I have earlier applied the prevention principle to prevent FSH from *positively obtaining* a benefit from its own breach by discounting any revenue it would have earned for the Excluded Gloves (see [397]−[398] and [424] above), there is still a need to apply the same principle to prevent FSH from benefiting from its breach by *avoiding* its existing obligations. At first glance, this might appear to *doubly* penalise FSH for its breach. However, such concerns are misguided.

432 To explain, FSH's obligation to pay for the gloves it had ordered from SGI, and hence, the costs it would have incurred for the gloves, remained subsisting *regardless* of whether SGI later earned any revenue (or, for that matter, any profits) on these gloves. The apparent oddity arises in the present case because FSH has made a claim against SGI. In any other case, where a purchaser makes no claim against the vendor but merely seeks to avoid its obligations to pay for the goods it has purchased (when it is in breach of the contract), it would immediately be apparent that the defaulting purchaser should

not be allowed to do so. This principle similarly applies here, with the result that FSH must continue to be held to its obligation to pay for the Excluded Gloves. To hold otherwise would allow FSH to benefit from its breach by avoiding this existing obligation. As for the discounting of any revenue it would have earned in the But For Scenario, this is technically not an active penalisation of FSH. Rather, it merely *prevents* FSH from "even more farcically" (see [430] above) asserting that SGI must sustain the consequences arising from FSH's *own* breach.

433 To further illustrate, consider a situation where, in the But For Scenario, FSH's costs (of, *eg*, $120) *exceeds* its revenue (of, *eg*, $100) in relation to the gloves during its period of breach, *ie*, it makes a net loss of $20. In such a situation, unless the prevention principle operates to hold FSH accountable for the full costs of the gloves (*ie*, $120), FSH would be allowed to benefit from its own breach by avoiding its existing obligations to pay for the gloves it has ordered. This is evident from the fact that it would have avoided the net losses (of $20, *ie*, $100 revenue - $120 costs) it would otherwise have incurred. That is, however, not to say that FSH should only be made to account for the $20 because the remaining cost of $100 has been offset by the revenue of the same amount. Otherwise, FSH would effectively be allowed to benefit from its own breach by *positively earning* its $100 revenue, which is then used to offset its $120 costs. On a proper application of the prevention principle, it seems to me that the court should, in the But For Scenario, *simultaneously* discount the revenue which FSH would have earned for the Excluded Gloves *and* account for the full costs which FSH would have needed to pay for the Excluded Gloves.

434 To avoid doubt, this is not inconsistent with my earlier finding (see [364] above) that SGI has failed to prove most of the damages it claims for. The issue of whether SGI has proven its losses (which is premised on principles relating to the quantification of damages) is independent from the issue of whether FSH would be allowed to benefit from its own breach (which is premised on the prevention principle). However, I note that I have awarded SGI US$282,560.60 for the Produced Gloves Claim (for gloves which effectively form a subset of the Excluded Gloves). This amount should be excluded from FSH's purchase price for the Excluded Gloves. To hold otherwise would confer a windfall upon SGI. I hence so exclude this amount, bringing FSH's costs incurred for the 3mil gloves in the But For Scenario to $152,602,729.40.

(4) FSH's shipping costs incurred

435 Finally, Mr Watts opines that FSH would have incurred US$2,220,553.30 in terms of shipping costs. This figure is achieved by multiplying the average monthly shipping price obtained under the Actual Scenario with the corresponding number of 3mil gloves expected to be delivered each month:[359]

[359] Watts' AEIC at p 30–31 para 3.22.

Figure 3.7 - But-for 3mil shipping costs

Month	Gloves ex-factory delivered (million)	Average shipping price per 1000 gloves (USD)	Shipping cost (USD million)
Jun-20	100.500000	0.46	0.04627691
Jul-20	201.000000	0.46	0.09255382
Aug-20	201.000000	0.46	0.09255382
Sep-20	201.000000	0.45	0.09000000
Oct-20	201.000000	0.64	0.12875000
Nov-20	201.000000	0.69	0.13908000
Dec-20	268.000000	1.12	0.29921882
Jan-21	67.000000	2.80	0.18748462
Feb-21	67.000000	3.19	0.21394074
Mar-21	67.000000	3.92	0.26231707
Apr-21	67.000000	3.43	0.22968889
May-21	67.000000	3.12	0.20875111
Jun-21	67.000000	3.43	0.22993750
Total	1775.500000		2.22055330

436 Mr Tang confirms that SGI has "no comments" on Mr Watts' assumed shipping costs.[360] Since SGI similarly does not dispute the number of gloves that would have been delivered and received under the 1st PO and the 2nd PO respectively (see [395] and [397] above), I proceed on the figures submitted by Mr Watts, *ie*, US$2,220,553.30. Again, it would be appropriate to include shipping costs even for the Excluded Gloves, because to hold otherwise would effectively allow FSH to profit from its breach by allowing it to avoid its obligation under cl 1.7(b) of the Supply Agreement, to bear the shipping costs, for the Excluded Gloves which it wrongfully refused to take delivery of (see [12] and [430]−[433] above).

360 Tang's Supp AEIC at p 27 para 39.

(5) Summary

437 In sum, under the But For Scenario, FSH would, discounting the Excluded Gloves, have made a profit of US$39,476,513.94 (US$194,299,796.64 less $152,602,729.40 less US$2,220,553.30). After adding this to FSH's losses in the Actual Scenario (*ie*, US$11,763,136.08), FSH would be entitled to damages of US$51,239,650.02 for SGI's breaches of Clause 1.2 and Clause 2.1.

The Storage Claim

438 FSH's next claim is that it incurred US$599,561.59 in storage costs on or around 19 May 2021 to 21 August 2022 because of SGI's delay in providing the EN455 certificates between 19 March 2021 and 1 June 2021,[361] which caused FSH to quarantine the affected gloves. Mr Watts states that he was "instructed to calculate the incremental costs associated with this quarantine, on the assumption that all of the pallets in storage from 19 May 2021 to 21 August 2022 relate to the quarantined products".[362] Further, Mr Watts explains that he was provided with invoices showing the number of pallets of 3mil gloves stored at a warehouse where the gloves were quarantined, and that these invoices show that the storage costs were US$2.75 per pallet per week.[363]

439 SGI objects to this claim on two grounds. First, it argues that the gloves were quarantined not because of any shelf-life issue caused by SGI's delay in

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361 DCS at para 384.

362 Watts' AEIC at p 35 para 4.14.

363 Watts' AEIC at p 35 para 4.14.

providing the certificates.[364] This is evidenced from the fact that there were movements in the gloves which were allegedly quarantined.[365] Mr Tang makes a similar observation.[366] Second, SGI argues that FSH should not be allowed to claim the costs of quarantine after 2 June 2021, since the EN455 certificates were provided by SGI on 1 June 2021.[367] SGI points out that the gloves remained in quarantine after 2 June 2021, which suggests that the gloves under quarantine was attributable to other reasons apart from the shelf-life issue.

440 While this does not appear to be raised in SGI's written submissions, I also note that SGI has pleaded that FSH failed to mitigate its losses by choosing to quarantine the entire shipment of gloves regardless of whether they were labelled as having a 3-year or 5-year shelf life, and/or failing to re-label the gloves as having a 3-year shelf life, and/or sell the gloves on the basis of a 3-year shelf life.[368]

441 On the other hand, FSH explains that the alleged mitigatory steps it could have taken are commercially impracticable and unreasonable.[369] It also explains that it continued to suffer losses from 3 June 2021 to 21 August 2022 due to limited demand (and quality issues), and the former issue arose because FSH was not able to sell off the gloves earlier.[370]

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364 PCS at para 648.

365 PCS at paras 649−651.

366 Tang's Supp AEIC at p 34 para 44.

367 PCS at para 652.

368 R&DC-A3 at para 52.

369 DCS at para 386.

370 DCS at paras 387−389.

442 I accept SGI's position that FSH has not proven its loss. The documentary evidence shows that between 17 May 2021 and 30 May 2021, the number of pallets in storage had in fact decreased.[371] This is plainly inconsistent with FSH's position. Neither Mr Watts nor Mr Mahli was able to explain this.[372] I thus reject FSH's claim on this head of loss.

The Indemnity Claim

443 FSH next asks for liberty to seek an indemnity for any claims from UMS, one of FSH's customers. According to FSH, due to SGI's failure to provide the EN455 certificates within reasonable time, on 19 May 2021, FSH had to cancel certain purchase orders UMS had issued to it.[373] UMS then issued a letter of demand to FSH on 25 May 2021, demanding damages over FSH's breach of the purchase orders. The limitation period for UMS' claim in England will not lapse until May 2027.[374]

444 On the other hand, SGI argues that FSH should not be granted any indemnity, citing, *inter alia*, the case of *Freight Connect*.[375]

445 I reject SGI's submission, which is based on a misreading of FSH's claim and of *Freight Connect*. FSH is not claiming for an indemnity *per se*. Rather, it is claiming for liberty to *apply* to seek an indemnity. I thus grant FSH

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371 Watts' AEIC at p 147.

372 110724 NE at p 98 line 18−p 100 line 19; Notes of Evidence for 9 July 2024 ("090724 NE") at p 100 line 1−p 101 line 12.

373 DCS at para 390.

374 DCS at para 391.

375 PCS at paras 654−656.

liberty to apply for directions when the real issues, *ie*, how UMS' potential claim against FSH would translate into damages which FSH can claim against SGI, can be determined and damages quantified (see [319] above).

Issue 7: whether the monies already paid to SGI by FSH are refundable

446 The next issue which arises for my consideration is whether the monies which FSH paid to SGI under the 1st PO, the 2nd PO and the 5mil PO, which parties agree amount to US$64,782,300 (see [56] above), are refundable. In gist, FSH argues that they are, because they are advance payments, by way of equitable relief against forfeiture, and/or because SGI would otherwise be unjustly enriched.[376] SGI also cannot rely on any defence of change of position.[377] SGI disagrees, arguing that the sum is a forfeitable deposit, that FSH cannot rely on the doctrines of equitable relief and unjust enrichment, and in any event that SGI can avail itself to the defence of change of position.[378] I turn to consider the parties' arguments.

Whether the monies already paid to SGI by FSH are forfeitable deposits

The applicable law

447 The parties do not dispute that the applicable framework for determining if a payment is a forfeitable deposit is that set out in *Li Jialin and another v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 ("*Li Jialin*") (at [73]):[379]

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376 DCS at paras 403–407.

377 DCS at paras 412–415.

378 PCS at para 497, 522, 524 and 526.

379 Plaintiff's Further Written Submissions ("PFWS") at para 2; Defendant's Further Written Submissions ("DFWS") at para 8.

(a) First, the court determines whether there is an express or implied contractual right to forfeit the sum alleged to be a deposit upon the payer's breach. Where there is an express forfeiture clause to this effect, this will be sufficiently clear. Where there is no such clause, the right of forfeiture may nonetheless be implied from the use of words such as "deposit". A reference to a sum described as a deposit being compensatory as liquidated damages could displace the inference that it is intended to be a deposit which is forfeitable upon breach. If there is no contractual right to forfeit, then there is no need to make any further inquiry as to the reasonableness of the sum. Its recoverability will be determined under the general law notwithstanding the payer's breach.

(b) Second, where there is a contractual right to forfeit, the court determines whether the sum is a true deposit. The test is whether the sum is reasonable as an earnest. The sum will be reasonable if it is customary or conventional. If it is higher than customary, it may nevertheless be reasonable if the vendor can show special circumstances to justify the deposit.

(c) Third, if the sum is reasonable as an earnest, it is a true deposit and can be forfeited. However, if the sum is not reasonable as an earnest, it is not a true deposit and cannot be forfeited. The right to forfeit, whether express or implied, is thus unenforceable and the claimant's right to recovery of the deposit will be left to be decided under the general law.

Parties' arguments

448 SGI argues that the US$64,782,300 which FSH has already paid SGI constitutes a forfeitable deposit on an application of the *Li Jialin* framework:

(a) In relation to the first stage, SGI argues that a proper interpretation of the Supply Agreement, the 1st PO and the 2nd PO suggests that SGI is expressly entitled to forfeit the sum, considering (i) the unprecedented demand for and low supply of gloves; (ii) the large commitment required from SGG; (iii) the absence of any prior commercial relationship between the parties (hence necessitating an assurance that FSH would honour its commitment, which assurance has been communicated to and acknowledged by FSH); and (iv) the common practice in the rubber glove industry for payment of substantial deposits.[380] Alternatively, SGI's right of forfeiture may be implied. Beyond the earlier-mentioned factors, the payments were contractually denoted as "deposits" or "down payment". The three-stage *Sembcorp Marine* test for implying terms in fact (see [155] above) is also satisfied.[381]

(b) In relation to the second stage, SGI argues that the sum was a true deposit as it was reasonable as an earnest since it was customary and conventional. Even if the 80% deposits were higher than customary, they are still reasonable given the special circumstances present, which include those just canvassed above under argument (a).[382]

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380 PFWS at paras 4–8.

381 PFWS at paras 9–13.

382 PFWS at paras 15–18.

449 FSH makes the converse arguments:

(a) In relation to the first stage, FSH argues that the relevant contracts do not state that the payments are forfeitable. The *Sembcorp Marine* test is also not satisfied due to the lack of any true gap in the parties' intentions. In any event, the evidence demonstrates that the parties did not consider the 80% payments to constitute forfeitable deposits.[383]

(b) While the second and third stages would therefore not apply, they would in any event not be satisfied − an 80% sum is simply unreasonable as an earnest because it is wholly disproportionate to the function of an earnest in terms of percentage and absolute amount. The recoverability of the sum will thus be determined under the general law.[384]

My decision

450 I agree with FSH that on application of the *Li Jialin* framework, the sum of US$64,782,300 which FSH paid SGI is not a forfeitable deposit.

(1) Stage 1

451 At the first stage, I agree with FSH that there is neither an express nor implied contractual right to forfeit this sum. By SGI's own concession, nothing

383 DFWS at paras 9–11.

384 DFWS at paras 13–17.

in the Supply Agreement, the 1st PO and the 2nd PO expressly states that the sum is forfeitable.[385]

452 Further, as FSH argues, there is no true gap in the parties' intentions in respect of whether the sum is forfeitable. Instead, the parties understood that such payments would merely constitute advance payments. As both parties point out,[386] when SGI raised the issue of how payments were to be made by FSH to SGI, it had asked FSH if it was "open to work on *advance payment*" [emphasis added].[387] While FSH responded to state that they were "open on the payment terms as [they] understand that there is a commitment needed from both parties",[388] I find that this does not amount to FSH saying that any advance payment would constitute an earnest and, in turn, a forfeitable deposit. This is so especially when SGI did not even raise the proposition that any advance payments would be forfeitable.

453 Indeed, FSH points to several pieces of evidence suggesting that SGI's contemporaneous understanding of the advance payments was that they were meant to facilitate its purchase of raw materials for the production of the gloves.[389] For example, on 23 October 2020, Mr Long sent an email to FSH clarifying a "miscommunication" in respect of the schedule of payment (wherein the requirement for FSH to pay 80% in advance is contained). In that email, he explained that "[t]he down payment schedule … was to assist in the

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385 PCS at para 501.

386 PCS at para 504(a); DFWS at para 11.

387 1AB 288.

388 PCS at para 504(b); 1AB 287–288.

389 DFWS at para 11 and note 22.

supply chain in totality … to ensure that [SGI] could purchase materials upfront without hitches".[390] This runs contrary to the purpose of forfeitable deposits, *ie*, that of deterring a breach on the part of the party who has paid the deposit: *Li Jialin* at [43] and [45]. This also satisfactorily explains why SGI would have required "advance payment [to be] done" before the contract is "[considered] in place".[391]

454 While I can accept that, given the factors identified by SGI (at [448(a)] above), a commercial party *might in theory* wish to seek an earnest before entering into a significant agreement with a counterparty, this does not change the fact that *in this case*, the evidence suggests that SGI did not in fact do so, let alone seek such a large amount. I also find that SGI did not prove that it is common practice in the rubber glove industry for payment of substantial deposits. Apart from the assertions by Mr Long and Mr Faizi,[392] SGI has not adduced objective evidence to show such practice. While SGI has exhibited its invoices to other customers,[393] which require 50 to 100% of upfront payments, these invoices do not specify whether such upfront payments constitute *forfeitable* deposits or *refundable* advance payments. Put another way, these invoices do not address the issue at stake here.

455 Relatedly, it does not assist SGI to argue that FSH itself required substantial deposits from its customers.[394] This says nothing about whether *SGI*

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390 13AB 695.

391 Agreed Bundle of Documents (Volume 2 of 52) 802; PCS at para 506.

392 PCS at paras 502 and 514; PFWS at paras 8 and 16.

393 See Faizi's 2nd Supp AEIC at para 17 and pp 55–180.

394 PCS at paras 507 and 514; PFWS at paras 8 and 16.

sought a deposit from FSH. It also says nothing about the practice among glove *manufacturers*, since FSH is a distributor. It also does not assist SGI to point to Mr Simpson's opinion that the payment terms of "80% with P.O. and 20% on shipping … is kind of the industry standard".[395] This is because Mr Simpson said nothing about whether the 80% to be made with the purchase order is, under the industry standard, a forfeitable deposit or a mere advance payment.

456 SGI also emphasises the use of the phrases "deposits" or "down payments" on various occasions by parties when referring to the 80% payments which FSH was to make in advance. However, as FSH observes,[396] these labels were not consistently used (see, *eg*, [452] and [453] above). In any event, it is well established that the court can (and will) go behind whatever labels that parties chose to put on their transactions, to ascertain their true nature and purport: *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 at [77].

457 Tellingly, I also observe that Clause 2.4 of the Supply Agreement gives SGI the right to, *inter alia*, "set-off any of the advance payment against any outstanding invoices" if FSH does not make prompt payment. This makes it inherently implausible that SGI could have intended for any payments made in advance to constitute forfeitable deposits. If the advance payments were forfeitable deposits, it would not have made commercial sense for SGI to set off the damages arising from FSH's late payments against amounts already paid, which would already have become forfeited independently. A similar observation was also made in *Li Jialin* (at [73(a)]; see [447(a)] above).

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395 PCS at paras 513; PFWS at para 16.

396 DFWS at para 11.

458 I hence find that there was no implied contractual right of forfeiture because there was no gap in the parties' intentions in relation to any right to forfeiture. In any event, the second and third stages of the *Sembcorp Marine* framework are also not satisfied:

(a) While it might have been a good to have for SGI, a forfeitable deposit is not commercially *necessary* to give the Supply Agreement and the subsequent purchase orders efficacy. These agreements could have functioned equally efficaciously if the 80% payments made by FSH were refundable advance payments.

(b) It is also commercially improbable that the 80% payments being forfeitable deposits is a term which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract.

459 Since there is no contractual right to forfeit, the recovery of the US$64,782,300 which FSH has already paid to SGI falls to be determined under the general law.

(2) Stage 2

460 Given my findings in Stage 1, there is technically no need to make any further inquiry as to the reasonableness of the sum of US$64,782,300 as an earnest to be paid by FSH to SGI. I nonetheless observe, for completeness, that the sum of 80% would not be reasonable as an earnest.

461 SGI's arguments on this sub-issue broadly overlap with its arguments in relation to Stage 1 of the *Li Jialin* framework (see [448(a)] and [448(b)]

above).[397] I have already addressed these arguments in the context of Stage 1 (see [454]–[455] above), and would repeat my finding that SGI has failed in proving that such a high sum is customary or conventional.

462 More fundamentally, I am also unconvinced that the circumstances under which the agreements were concluded would justify an 80% deposit amounting to US$145,204,552.[398] Such an amount is, both in terms of percentage of the total price and in absolute terms, simply so large that it cannot be objectively justified by reference to the functions which a true forfeitable deposit is supposed to serve: *Polyset Ltd v Panhandat Ltd* [2002] HKCU 145 at [165]. This is so even in the face of the factors raised by SGI.

463 Specifically, even if:[399]

(a) the transaction is large (and SGI had to forsake other orders);

(b) SGI shared no prior dealings with FSH (which I would also observe is only true in relation to the 1st PO, but which would no longer be true in relation to the 5mil PO and the 2nd PO);

(c) there was a great disparity between demand and supply of gloves; and

(d) SGI might have wanted to prevent FSH from reneging on its orders,

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397 PCS at paras 512–514; PFWS at paras 16–17.

398 See DFWS at note 31.

399 PFWS at para 17.

the quantum of the purported deposit would still be unreasonable. This is especially when considered with the fact, as FSH points out,[400] that the gloves were a product under SGI's own general brand, which can readily be on-sold to other customers (given the disparity between demand and supply) should FSH cancel any order. Indeed, by SGI's own case, it tried "to allocate some of the larger sized [3mil gloves] from other customers to FSH's orders". The converse would have been equally feasible should FSH renege on the purchase orders. And indeed, I have earlier found (at [363] above) that SGI had fully mitigated its losses in relation to its Cancelled Gloves Claim by re-allocating production lines to producing gloves for other customers. The sum of 80% therefore cannot be reasonable as an earnest, and FSH's right to recover the advance payments will be left to be decided under the general law.

Whether FSH can recover the advance payments made

464 Since the 80% advance payments made by FSH are not deposits, FSH's right to recover it will be left to be decided under the general law. In this regard, FSH argues that it is entitled to such payments under a claim in unjust enrichment.[401] Beyond denying such entitlement, SGI also relies on the defence of change of position.[402] I turn to address these arguments.

The applicable law

465 In *Esben Finance Ltd and others v Wong Hou-Liang Neil* [2022] 1 SLR 136 (at [125], citing *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole*

400 DFWS at para 16.

401 DCS at para 407.

402 PCS at para 526.

executrix of the estate of Ng Hock Seng, deceased) and another [2013] 3 SLR 801 at [98]), the Court of Appeal reiterated the well-settled elements of a claim in unjust enrichment: (a) that the defendant has benefitted or been enriched; (b) the enrichment was at the expense of the plaintiff; and (c) the enrichment was unjust. One situation where the enrichment would be unjust would be when there was a total failure of consideration, and the inquiry to this end has two parts: first, what was the basis for the transfer in respect of which restitution is sought; and second, did that basis fail: *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 ("*Benzline*") at [46]−[54].

466 On the other hand, for the defence of change of position to be made out, three elements need to be established:

(a) that the payee has changed his position;

(b) that the change is *bona fide*; and

(c) that it would be inequitable to require him to make restitution or to make restitution in full: *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 at [35].

Parties' arguments

467 FSH argues that the elements of unjust enrichment are satisfied because: (a) SGI has benefitted from the advance payments; (b) which were paid by FSH; even though (c) there was a total failure of consideration as regards the gloves which have not been delivered.[403]

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403 DCS at paras 408−411.

468 On the other hand, SGI repeats its argument that the amounts were paid "as an assurance of FSH's commitment to fulfil the purchase of all the gloves under its [purchase orders]", and highlights that there was in any event no total failure of consideration since a considerable number of gloves have been delivered (and FSH has in fact refused to take delivery of some of them).[404]

469 Further, SGI argues that the defence of change of position is made out, because in good faith, it utilised the advance payments to purchase and produce the gloves ordered by FSH under the purchase orders.[405] FSH, on the other hand, argues that SGI has not changed its position in reliance on the receipt of FSH's advance payments, and in fact applied the monies for SGI's own operations.[406] Any continued payments to the latex suppliers and to the SGG Manufacturers after FSH made clear on 20 April 2021 that no more gloves were to be shipped were also not made *bona fide*.[407]

My decision

470 I agree with FSH that the elements of unjust enrichment are made out. As FSH argues, it cannot be doubted that the first two elements are established: (a) SGI has been enriched by US$64,782,300; and (b) at the expense of FSH. The key inquiry therefore rests on whether (c) the enrichment was unjust due to a total failure of consideration. In this regard, it is well-established that where a contract is divisible such that it can be said that there has been a total failure of

404 PCS at paras 524−525.

405 PCS at paras 527−529.

406 DCS at paras 413−414.

407 DCS at para 415.

the consideration for a discrete part of that contract, a claim in unjust enrichment would be made out with respect to that discrete part of the contract: *Benzline* at [53], citing *Max Media FZ LLC v Nimbus Media Pte Ltd* [2010] 2 SLR 677 at [24].

471 Here, I am of the view that the 1st and 2nd POs, under which the sum of US$64,782,300 was paid by FSH to SGI as advance payments, were divisible. This can be seen by how, starting from the fourth month of each contract coming into operation, the 80% advance payments were to be paid (and were in fact paid) in tranches which correspond to each month of delivery (see [20], [28], [43] and [45] above). Further, it is evident from the way that SGI had regularly (and in fact, monthly) changed the number of orders to be delivered each month (see, *eg*, [113] above), that the parties understood each order to constitute divisible parts of the contracts under which deliveries could be adjusted (albeit within reasonable limits). Each individual order hence constituted a divisible part of the broader contract under the 1st and 2nd PO.

472 Given this, in relation to the US$64,782,300 paid by FSH to SGI for 208 unfulfilled orders and 75 unfulfilled orders under the 1st PO and the 2nd PO respectively, there has been a total failure of consideration. SGI would thus have to return these monies, which it had not earned: *Li Jialin* at [80]. For clarity, SGI would not be prejudiced because I have already awarded the appropriate remedies for any expenses it might already have incurred under its claims against FSH.

473 As for SGI's change of position defence, I am unable to accept this argument. It would simply not be inequitable to require SGI to make full restitution, in light of the remedies I have already granted it with respect to any

production costs it might already have incurred in relation to any undelivered gloves. There is therefore no reason for SGI to not return the US$64,782,300 to FSH.

Issue 8: whether pre-judgment interests should be awarded to FSH

474 Lastly, FSH seeks pre-judgment interests under s 12 of the Civil Law Act 1909 (the "CLA"), both on the losses it is entitled to (which I have assessed to be US$51,239,650.02 arising from SGI's breaches of the 1st PO and the 2nd PO), as well as for the advance payments totalling US$64,782,300 paid to SGI from 20 April 2021 – the date it purported to terminate the agreements.[408]

475 More specifically, FSH argues that the default rate of interest of 5.33% per annum used in relation to judgment debts should be adopted as an appropriate proxy of the value of money, and that pre-judgment interests should run from 20 April 2021 to the date of judgment.[409]

476 SGI does not appear to have made submissions on this issue.

477 In *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 ("*Grains*"), the Court of Appeal explained (at [137]−[138]) that the basis for awarding pre-judgment interests lies in the fact that the unsuccessful defendant had wrongfully kept the successful claimant out of moneys to which he has been shown to be entitled, during which time, the defendant instead had the use of it. It follows that as a general rule, damages should commence from the date of accrual of loss.

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408 DCS at paras 393−395.

409 DCS at para 395.

478 I am satisfied that FSH has, as a result of SGI's breaches, been kept out of the advance payments it has made of US$64,782,300. That said, I note that from the outset, FSH had intended to set-off US$5,127,384.80 owing to SGI under the Unpaid Payment Claim from the advance payments made. As I found at [302]–[303], SGI should have adopted this approach, and accordingly, I do not award contractual interests to SGI on the Unpaid Payment Claim. Given this position, for clarity, I state that from US$64,782,300 owing by SGI, the amount of US$5,127,384.80 may be deducted. Thus, I award FSH pre-judgment interests for only US$59,654,915.20 (*ie,* US$64,782,300 less US$5,127,384.80) at 5.33% per annum from 6 July 2021, being the date when FSH first acquired the right to have these monies returned following its valid termination of the contracts.

479 In relation to FSH's losses assessed at US$51,239,650.02, in my discretion, I decline to award pre-judgment interests from 6 July 2021 (when FSH validly terminated the agreements). There was much uncertainty surrounding the situation the parties found themselves in. As can be seen above, the assessment of damages was a complex endeavour, especially since FSH was also in breach by failing to take deliveries of the 3mil gloves from 20 April 2021 to 6 July 2021. Further, in assessing FSH's losses, I did not accept FSH's position in its entirety. For these reasons, I grant pre-judgment interests only from the date of writ.

Conclusion

480 To summarise, SGI has breached: (a) Clause 1.2 of the Supply Agreement to use all reasonable endeavours to ensure punctual deliveries of gloves in relation to the 1st PO and the 2nd PO; (b) Clause 2.1 of the Supply

Agreement for increasing the price of 3mil gloves between October 2020 and April 2021 in relation to the 1st PO; and (c) Clause 3.2 of the Supply Agreement for failing to produce the EN455 certificates in respect of gloves to be delivered under the 1st PO, the 2nd PO and the 5mil PO within a reasonable time upon FSH's request.

481 The first of these breaches constituted a Situation 3B repudiatory breach. FSH had not waived any of its consequent rights, and had validly terminated the agreements, *ie,* the Supply Agreement, the 1st PO and the 2nd PO on 6 July 2021. SGI has also been unjustly enriched by the payments comprising 80% of the purchase price of the undelivered and/or unproduced gloves paid to it in advance by FSH, which does not constitute a forfeitable deposit.

482 Given these, I award FSH the following amounts of damages:

(a) for SGI's breaches of the 1st PO and the 2nd PO, US$51,239,650.02, with interests at 5.33% per annum from the date of writ to the date of this judgment; and

(b) for SGI's unjust enrichment by US$64,782,300, the amount of US$59,654,915.20 (*ie,* US$64,782,300 less US$5,127,384.80 under the Unpaid Invoice Claim), with pre-judgment interests at 5.33% per annum for the period between 6 July 2021, being the date when FSH first acquired the right to have these monies returned following its valid termination of the contracts, and to the date of this judgment.

483 As for FSH, it has also committed a Situation 2 repudiatory breach of the 1st PO, the 2nd PO and the Supply Agreement between 20 April 2021 and

6 July 2021 (although SGI did not exercise its consequent right to terminate the agreements). For FSH's breach of the agreements, I award SGI US$282,560.60, with interests at 5.33% per annum from the date of writ to the date of this judgment. I also award SGI US$5,127,384.80, with no interests. That said, this amount is to be set-off from the advance payments of US$64,782,300 to be returned to FSH.

484 In addition, in relation to potential claims against the parties, I grant SGI liberty to apply for directions when any real issues, *ie*, how any claims by SGG Manufacturers against SGI would translate into damages which SGI can claim against FSH, can be determined and damages quantified (see [319] above). I grant the same remedy to FSH in relation to any potential claim by UMS against FSH (see [445] above).

485 The parties are to provide written costs submissions within four weeks of this judgment.

Hoo Sheau Peng
Judge of the High Court

Chan Kah Keen Melvin and Terence Yeo (TSMP Law Corporation) for the plaintiff;
Mak Sushan, Melissa (Mai Sushan), Wong Ling Yun, Jonathan Tan Ming En and Kwon Ha Jeong (Allen & Gledhill LLP) for the defendant.
