

**IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2026] SGHC(A) 19

Appellate Division / Civil Appeal No 101 of 2025

Between

Full Support Healthcare Limited

... Appellant

And

Smart Glove International Pte Ltd

... Respondent

Appellate Division / Civil Appeal No 102 of 2025

Between

Smart Glove International Pte Ltd

... Appellant

And

Full Support Healthcare Limited

... Respondent

In the matter of Suit 49 of 2022

Between

Smart Glove International Pte Ltd

... Plaintiff

And

Full Support Healthcare Limited

... *Defendant*

Counterclaim

Between

Full Support Healthcare Limited

... *Plaintiff*

And

Smart Glove International Pte Ltd

... *Defendant*

JUDGMENT

[Contract — Breach]

[Contract — Discharge — Repudiatory breach]

[Contract — Waiver]

[Damages — Assessment]

[Contract — Remedies — Deposits]

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

Full Support Healthcare Ltd
v
Smart Glove International Pte Ltd and another appeal

[2026] SGHC(A) 19

Appellate Division of the High Court — Civil Appeals Nos 101 of 2025 and 102 of 2025

Steven Chong JCA, Debbie Ong Siew Ling JAD and See Kee Oon JAD
12 March 2026

29 June 2026

Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 The business world is typically characterised by volatility, uncertainty, complexity and ambiguity – otherwise known as “VUCA”. The COVID-19 pandemic in the not-so-distant past exemplified this business reality.

2 A clear example of this could be seen in the healthcare industry, which had to cope with an unprecedented demand for healthcare services and products. This included an astronomical surge in the demand for personal protective equipment (“PPE”). This created business opportunities for those who could rise to the occasion to meet that demand. But those opportunities emerged in a challenging environment afflicted with global lockdowns and supply chain disruptions. Those who attempted to seize upon the opportunities had to navigate these challenges effectively to come out on top.

3 The genesis of the present dispute can be traced to the opportunities and challenges which confronted the parties during the pandemic. The appellant, Full Support Healthcare Ltd (“FSH”), is in the business of buying and selling PPE, including gloves. In June 2020, at the height of the pandemic, FSH engaged the respondent, Smart Glove International Pte Ltd (“SGI”), to produce gloves which FSH intended to on-sell. This resulted in the conclusion of four agreements:

- (a) the Memorandum of Agreement for the Supply of Medical Examination Gloves (“Supply Agreement”);
- (b) the 1st Purchase Order (“1st PO”);
- (c) the 5mil Purchase Order (“5mil PO”); and
- (d) the 2nd Purchase Order (“2nd PO”).

The Supply Agreement, the 1st PO, the 5mil PO and the 2nd PO will collectively be referred to as the “Agreements”; and the 1st PO and the 2nd PO will collectively be referred to as the “3mil POs”.

4 The effect of the Agreements was that SGI was to produce an enormous supply of some two billion gloves for FSH to be delivered by SGI in accordance with an agreed schedule. But, from the outset, the produced quantities and the timing of the deliveries of the gloves for each month did not adhere to the agreed delivery schedules. Each time a request was made by SGI for a revised delivery schedule, FSH acceded to it. At the same time, various price increases were requested by SGI during the contractual relationship, which FSH also accepted. Evidently, there was some measure of give and take between the parties. The overall picture was that the parties never insisted on strict adherence to the

Agreements because the market price of the gloves was rising due to what seemed to be an ever-increasing demand, which meant that FSH continued to make a healthy profit margin in spite of the price increases.

5 All that changed by March 2021, some nine months into the contractual relationship, because the market price of the gloves had dropped drastically and there was the emergence of new manufacturers who were able to supply gloves to FSH at prices significantly lower than the contractually revised price.

6 It was in this context that FSH informed SGI that, at the prevailing price that SGI was supplying the gloves to FSH, which had been revised multiple times, FSH would not be able to sell the gloves for a profit, and that unless the price was reduced, it would have “no option but to cancel all of [its] existing ... orders [under the 3mil POs]”. When negotiations between the parties failed to reach a resolution, FSH decided to cancel all open orders and ceased taking further deliveries.

7 In HC/S 49/2022, SGI alleged that FSH had wrongfully repudiated the contract by ceasing to take further deliveries. In response, FSH lodged a counterclaim, alleging that SGI had breached its obligations, which entitled FSH to terminate the contract. In the court below, a Judge of the High Court (“Judge”) held that FSH and SGI had both breached the Agreements. Both parties have appealed to this court.

8 As will be seen, the crux of the two cross-appeals before us ultimately turns on whether FSH was entitled to rely on grounds not stated in its notice of renunciation to justify the termination of the Agreements and if so, whether it had waived any such repudiatory breach by SGI.

Background facts

9 The facts are laid out in extensive detail in the Judge’s decision in *Smart Glove International Pte Ltd v Full Support Healthcare Ltd* [2025] SGHC 168 (“Judgment”). We adopt the background facts stated therein and only highlight the facts material to these appeals.

The Supply Agreement

10 In May 2020, FSH approached SGI to enquire about the supply of gloves. On 11 June 2020, SGI and FSH entered into the Supply Agreement for the tentative sale and purchase of 1.3 billion pieces of Gen-X 3mil nitrile powder-free blue gloves (“3mil gloves”).

11 The Supply Agreement was the first agreement concluded between the parties. In the court below, SGI argued that the Supply Agreement only applied to the 1st PO but not the 2nd PO and the 5mil PO. However, the Judge found that the 2nd PO and the 5mil PO were also governed by the Supply Agreement, unless overridden by the specific provisions in the 2nd PO and the 5mil PO (Judgment at [88]). As this finding has not been challenged on appeal, we will proceed on the basis that the Supply Agreement was the master agreement which governed the 1st PO, the 5mil PO and the 2nd PO.

12 The relevant clauses of the Supply Agreement are as follows:

1. SUPPLY OF PRODUCTS

- 1.1 [FSH] 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 [SGI] undertakes to use all reasonable endeavours to meet all orders for the Product required by [FSH] in accordance with the agreed terms of delivery. The tentative schedule of deliveries, subject to receipt of advanced payment by [SGI] 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.

...

2. PRICES AND PAYMENT

- 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 [SGI]'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 th June 2020	\$1,650,000	20% Balance of June Shipments
1 st July 2020	\$13,200,000	80% Deposit for September shipments
31 st July 2020	\$3,300,000	20% Balance for July Shipments
3 rd August 2020	\$13,200,000	80% Deposit for October shipments
31 st August 2020	\$3,300,000	20% Balance for August Shipments
1 st September 2020	\$13,200,000	80% Deposit for November shipments
30 th September 2020	\$3,300,000	20% Balance for September Shipments
1 st October 2020	\$13,200,000	80% Deposit for December shipments
31 st October 2020	\$3,300,000	20% Balance for October Shipments
30 th November 2020	\$3,300,000	20% Balance for November Shipments
31 st 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 [FSH] fails to make payment in accordance with the above schedule, [SGI] reserves the right to withhold shipment or set-off any of the advance payment against any outstanding invoices.

3. [SGI]'S WARRANTY

- 3.1 [SGI] hereby warrants that all gloves are manufactured by [Smart Glove Holdings Sdn Bhd]'s wholly owned subsidiaries in accordance with the prevailing quality standards as specified for each of the type of gloves. All gloves supplied by [SGI] shall undergo quality inspection to conform to the quality standards for the gloves including any applicable standards as required by [FSH].
- 3.2 [SGI] 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 [FSH], [SGI] shall provide copies of its affiliated factories' ISO certification, EN455 certification, EN374 PPE certification and MDR Certificate of Conformity.

4 OTHER TERMS & CONDITIONS

...

- 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 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

[emphasis in original]

The 1st PO

13 After the Supply Agreement was concluded, FSH issued the 1st PO on 12 June 2020. The terms of the 1st PO were then revised three times, and were finalised on or about 21 August 2020. The final version of the 1st PO also included a summary page (“1st PO Summary Page”) which specified, amongst other details, the delivery schedule. It is undisputed that SGI did not adhere to the delivery schedule set out in the 1st PO, but the parties are in dispute as to whether SGI was obligated to do so under cl 1.2 of the Supply Agreement.

14 Included in the 1st PO was also the payment schedule. It is reproduced here:

Payment Date	Payment Amount	Purpose of Payment
Upon issuance of PO	\$33,165,000	80% Deposit for first 3 months shipments
30 th June 2020	\$1,658,250	20% Balance of June Shipments
1 st July 2020	\$13,200,000	80% Deposit for September shipments
31 st July 2020	\$3,300,000	20% Balance for July Shipments
3 rd August 2020	\$13,266,000	80% Deposit for October shipments
31 st August 2020	\$3,316,500	20% Balance for August Shipments
1 st September 2020	\$13,266,500	80% Deposit for November shipments
30 th September 2020	\$3,316,500	20% Balance for September Shipments
1 st October 2020	\$13,266,500	80% Deposit for December shipments
31 st October 2020	\$3,316,500	20% Balance for October Shipments
30 th November 2020	\$3,316,500	20% Balance for November Shipments
31 st December 2020	\$3,316,500	20% Balance for December Shipments
Total Payment	\$107,786,250	

15 Under the Remarks/Special Instructions to the 1st PO, an explanation to the payment schedule was attached, which read as follows:

1. Delivery starting from June till December-2020.

2. Payment term is 80% down-payment upon [Proforma Invoice] 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 [Proforma Invoice] 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.

...

16 The transactions which took place pursuant to the 1st PO are summarised in the table below:

FSH Purchase Order Numbers	Delivery status	80% already paid by FSH	20% balance	Total amount paid by FSH to SGI
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
FSH16963 to FSH17171 (208 orders)	0 of 696,800,000 gloves delivered	Paid in full	Not paid	US\$45,988,800 paid

Although the parties agree with the contents of this table, they disagree on the characterisation of the 80% paid upfront by FSH for each tranche of the orders pursuant to the payment schedule. SGI contends that they are forfeitable

deposits which it is entitled to retain, while FSH argues that these are refundable advance payments which it is entitled to the return of upon cancellation.

The 5mil PO

17 On 4 August 2020, FSH issued the 5mil PO for SGI to supply FSH with a total of 346,590,000 pieces of “Gen-X 5mil Dark Smart Blue Regular Cuff & One order for Long Cuff gloves” (“5mil gloves”), which was revised on 6 August 2020. The 5mil PO also included a payment schedule, which followed a similar structure to that in the 1st PO (see [14] above). It is reproduced below:

Payment Date	Payment Amount	Purpose of Payment
Upon issuance of PO	\$10,911,680.00	80% Deposit for first 3 months shipments
31st August 2020	\$629,520.00	20% Balance of August'2020 Shipments
1st September 2020	\$1,678,720.00	80% Deposit for November'2020 shipments
30th September 2020	\$1,301,008.00	20% Balance for September'2020 Shipments
1st October 2020	\$1,678,720.00	80% Deposit for December'2020 shipments
31st October 2020	\$797,392.00	20% Balance for October'2020 Shipments
1st November 2020	\$1,846,592.00	80% Deposit for January'2020 shipments
30th November 2020	\$419,680.00	20% Balance for November'2020 Shipments
1st December 2020	\$1,678,720.00	80% Deposit for February'2020 shipments
21st December 2020	\$419,680.00	20% Balance for December'2020 Shipments
7th January 2021	\$1,678,720.00	80% Balance for March'2021 Shipments
31st January 2021	\$461,648.00	20% Balance for January'2021 Shipments
1st February 2021	\$2,182,336.00	80% Balance for April'2021 Shipments
28th February 2021	\$419,680.00	20% Balance for February'2021 Shipments
1st March 2021	\$2,014,464.00	80% Balance for May'2021 Shipments
31st March 2021	\$419,680.00	20% Balance for March'2021 Shipments
30th April 2021	\$545,584.00	20% Balance for April'2021 Shipments
31st May 2021	\$503,616.00	20% Balance for May'2021 Shipments
Total Payment	\$29,587,440.00	

18 A similar explanation to the payment schedule (see [15] above) was attached to the 5mil PO.

19 The transactions which occurred pursuant to the 5mil PO are summarised in the table below:

FSH Purchase Order Numbers	Delivery status	80% already paid by FSH	20% balance	Total amount paid by FSH to SGI
FSH17219 to FSH17348 (130 orders)	2,550,000 of 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

Again, the parties agree with the contents of this table but disagree on the characterisation of the 80% paid upfront by FSH for each tranche of the orders pursuant to the payment schedule.

The 2nd PO

20 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. Thereafter, on 19 November 2020, FSH issued the 2nd PO, which was for an additional 469,000,000 pieces of 3mil gloves. The 2nd PO also

included a summary page (“2nd PO Summary Page”) which specified a delivery schedule. As with the 1st PO, it is undisputed that SGI did not adhere to the delivery schedule in the 2nd PO, but the parties are in dispute as to whether SGI was obligated to do so. The 2nd PO also contained a payment schedule, which followed a similar structure to that in the 1st PO (see above at [14]). It is reproduced below:

Payment Date	Payment Amount	Purpose of Payment
Upon issuance of PO	\$15,034,800	80% Deposit for first 3 months shipments
31 st December 2020	\$1,252,900	20% Balance of December Shipments
07 th January 2021	\$5,011,600	80% Deposit for March shipments
29 th January 2021	\$1,252,900	20% Balance for January Shipments
1 st February 2021	\$5,011,600	80% Deposit for April shipments
26 th February 2021	\$1,252,900	20% Balance for February Shipments
1 st March 2020	\$5,011,600	80% Deposit for May shipments
31 st March 2020	\$1,252,900	20% Balance for March Shipments
1 st April 2020	\$5,011,600	80% Deposit for June shipments
30 th April 2020	\$1,252,900	20% Balance for April Shipments
31 st May 2020	\$1,252,900	20% Balance for May Shipments
30 th June 2020	\$1,252,900	20% Balance for June Shipments
Total Payment	\$43,851,500	

21 Like the 1st PO and the 5mil PO, a similar explanation to the payment schedule was also attached to the 2nd PO (see [15] above).

22 The transactions which took place under the 2nd PO are summarised in the table below:

FSH Purchase Order Numbers	Delivery status	80% already paid by FSH	20% balance	Total amount paid by FSH to SGI
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)	0 of 251,250,000 gloves delivered	Paid in full	Not paid	US\$18,793,500 paid

As with the 1st PO and 5mil PO, the parties agree with the contents of this table but disagree on the characterisation of the 80% paid upfront by FSH for each tranche of the orders pursuant to the payment schedule.

The events that occurred after the conclusion of the Agreements

23 After the conclusion of the Agreements, several key events occurred. We will expand on them briefly as they have a material bearing on the issues in the appeals.

The delays

24 As alluded to above at [13] and [20], SGI did not adhere to the delivery schedules set out in both the 1st PO and the 2nd PO. Based on a comparison of

the agreed number of deliveries per month in the delivery schedules against the actual number of deliveries per month, it is apparent that the delays began from the very outset of the Supply Agreement (*ie*, June 2020) (Judgment at [113]; see [110] below). However, on each occasion when SGI proposed a revised delivery schedule, FSH agreed to the same.

The price increases

25 From September 2020 to April 2021, SGI sought to revise the price of the 3mil gloves on multiple occasions, which FSH agreed to each time. Over the course of this period, the price of the 3mil gloves was revised six times.

The EN455 certificate request

26 On 19 March 2021, FSH wrote to SGI to ask about the shelf life of certain 3mil and 5mil gloves that had already been delivered, which was to be verified via the EN455 certification. Clause 3.2 of the Supply Agreement provided that SGI would, upon request by FSH, supply the EN455 certification. On the same day, SGI replied to FSH attaching a technical report dated 12 February 2019 on the shelf life of the 3mil gloves, but stated that it would “revert to [FSH] by next week” with more information.

27 After further correspondence on this matter, the required EN455 shelf-life certifications for the 3mil and 5mil gloves were eventually provided by SGI to FSH on 1 June 2021.

The 20 April 2021 E-mail

28 On 20 April 2021, FSH sent an e-mail to SGI, purporting to “cancel all of [FSH’s] existing 3mil orders” on the basis that at the current contractually

revised price, it “simply [could not] sell the gloves” (“20 April 2021 E-mail”).

The relevant content of the e-mail is reproduced below:

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. [FSH’s representative] 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 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.

29 Following the 20 April 2021 E-mail, FSH began declining to take delivery of the 3mil gloves. However, the parties continued corresponding to negotiate the price of the 3mil gloves. The parties disagree on whether these negotiations went towards the possibility of concluding a fresh agreement (which is FSH’s position), or whether the negotiations were made in the context of the existing Supply Agreement and the 3mil POs (which is SGI’s position).

The 6 July 2021 E-mail

30 On 6 July 2021, FSH sent SGI a further e-mail stating that FSH wished to “cancel all open POs” as the parties were unable to reach an agreement on the pricing of the 3mil gloves (“6 July 2021 E-mail”). The relevant content of the e-mail is reproduced below:

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?

31 Although the 6 July 2021 E-mail quantified the “deposit” (referring to the 80% purchase price which FSH had already paid SGI for the 3mil gloves) to be US\$59,654,915.20, the parties accept that this amount should in fact be US\$64,782,300, being the total amount paid for gloves that were eventually undelivered under the 1st PO (*ie*, US\$45,988,800) and the 2nd PO (*ie*, US\$18,793,500). To date, these sums remain with SGI, who claims that it is entitled to retain them on the basis that they are forfeitable deposits.

The commencement of the action

32 On 22 January 2022, SGI commenced HC/S 49/2022 against FSH. Apart from defending the claim, FSH lodged a counterclaim.

Summary of the parties’ cases below

SGI’s case

33 SGI’s primary case was that FSH had committed a breach and/or repudiatory breach of the Supply Agreement and the 3mil POs. SGI was always willing and able to fulfil its obligations under the Supply Agreement and the

3mil POs. However, after FSH sent the 20 April 2021 E-mail, SGI alleged that FSH breached the Supply Agreement and the 3mil POs by: (a) failing to arrange shipment or take delivery of some 92,559,000 pieces of 3mil gloves that SGI had already produced under the 3mil POs; (b) repeatedly demanding price reductions for both unshipped orders and retrospective price reductions for the gloves which had already been shipped whilst threatening cancellation of all open orders; and (c) sending the 6 July 2021 E-mail (Judgment at [59]).

34 Despite FSH’s repudiation, SGI did not accept the repudiation and continued performing by procuring the production of the remaining 855,491,000 pieces of the 3mil gloves under the 3mil POs. SGI sought specific performance for FSH to arrange shipment and/or to take delivery of the 855,491,000 pieces of gloves that SGI had produced and/or procured the production of. Alternatively, SGI claimed damages for FSH’s breaches of the Supply Agreement and the 3mil POs (Judgment at [60]–[61]). This was referred to as the “Cancelled Gloves Claim” by the Judge (Judgment at [339]).

35 Further, SGI claimed:

- (a) the amounts due under the unpaid invoices, as well as contractual interest at 1.5% per month, for all gloves it had already delivered (“Unpaid Invoices Claim”) (Judgment at [296(a)]); and
- (b) the price and storage costs of the 3mil gloves which it had already produced, but which had not been delivered (“Produced Gloves Claim”) (Judgment at [296(b)]).

FSH's defence and counterclaim

36 FSH denied committing any breach and argued that it had instead validly terminated the Supply Agreement and the 3mil POs *after accepting SGI's repudiatory breaches* of them through the 20 April 2021 E-mail. This termination was reiterated in the 6 July 2021 E-mail. FSH alleged that SGI committed three main repudiatory breaches of the Supply Agreement and the 3mil POs: (a) failing to use all reasonable endeavours to meet the agreed delivery schedules under the 3mil POs; (b) increasing the prices of the gloves; and (c) failing to supply the EN455 shelf-life certificate within a reasonable time after FSH had requested it (Judgment at [63]).

37 While FSH pleaded that SGI had breached the 5mil PO by failing to deliver the gloves, and its expert suggested that there was a potential increase in costs due to delays in delivery, FSH did not eventually submit that SGI had breached the 5mil PO as regards the delivery timing or pricing (Judgment at [64]).

38 As regards the price increases, FSH originally pleaded that both cost price increases and shipping cost increases constituted breaches. However, the Judge found that its actual case appeared to be that shipping cost increases were losses flowing from delivery delays rather than breaches in and of themselves (Judgment at [65]).

39 FSH argued that, in the light of its purported termination of the Supply Agreement and the 3mil POs on 20 April 2021, it was no longer obliged to accept deliveries or make further payments for the undelivered gloves. FSH denied that seeking price reductions from SGI constituted repudiatory breaches on its part as they were sought in response to SGI's price increases despite being

in breach (*ie*, delay) (Judgment at [66]–[67]). This resulted in FSH having to pay more for the gloves and selling them when the market price had fallen substantially between the date on which the orders should have been delivered and the date on which the orders were in fact delivered.

40 FSH acknowledged that it had not paid the balance US\$5,127,384.80 due for the delivered gloves under the 5mil PO and the 3mil POs but argued that this should be set off against the advance payments it had made for the undelivered gloves (US\$45,988,800 under the 1st PO and US\$18,793,500 under the 2nd PO), which it characterised as refundable advance payments, after which the balance should be returned to FSH. Alternatively, FSH sought restitution of the above sum on the basis that SGI had been unjustly enriched.

41 Apart from seeking the refund of the advance payments, FSH also claimed:

- (a) losses it had suffered due to SGI’s late deliveries under the 3mil POs, as well as the need to quarantine the gloves (“Late Delivery Claim”) (Judgment at [365(a)]);
- (b) storage costs it had incurred due to SGI’s failure to provide the EN455 certificates within a reasonable time (“Storage Claim”) (Judgment at [365(b)]);
- (c) liberty to seek an indemnity from SGI for claims made against FSH by United Medical Supply A/S (“UMS”), one of FSH’s customers (“Indemnity Claim”) (Judgment at [365(c)]); and
- (d) pre-judgment interest (Judgment at [365(d)]).

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

42 In its defence to FSH's counterclaim, SGI denied any breach of the Agreements. SGI also argued that FSH had in any event waived all rights arising out of any breach of the Agreements by SGI (in particular, FSH's right to terminate and its right to seek damages for any breach).

43 On the other hand, FSH denied *any* waiver on its part (Judgment at [70]).

The decision below

44 As mentioned above at [11], the Judge found that the terms of the Supply Agreement governed the 3mil POs and the 5mil PO (Judgment at [88]).

45 As regards the merits, the Judge found that SGI had committed the following breaches of the Agreements:

(a) Clause 1.2 of the Supply Agreement in relation to the 3mil POs, by failing to exercise all reasonable endeavours to meet the delivery schedules (Judgment at [129]). The Judge found that SGI had oversold its capacity in breach of its obligation to use all reasonable endeavours to deliver the gloves to FSH punctually (Judgment at [111]);

(b) Clause 2.1 of the Supply Agreement in relation to the 1st PO, by increasing the price of the 3mil gloves without the presence of extenuating circumstances beyond SGI's control (Judgment at [151]); and

(c) Clause 3.2 of the Supply Agreement, in relation to the 3mil POs and the 5mil PO, by failing to produce the EN455 certificates within a reasonable time (Judgment at [160]). As cl 3.2 of the Supply Agreement

did not provide a specific timeframe for SGI to produce the EN455 certification, FSH argued that the obligation to provide the EN455 certificate forthwith or within two days should be implied. However, the Judge rejected that argument, as she found that there was no “true gap” to imply the term. Instead, the Judge found that the proper remedy should be equitable rectification. Under the rectified cl 3.2, the Judge found that SGI’s obligation was to provide the EN455 certificates requested by FSH within a reasonable time (Judgment at [158]).

46 However, only the breach of cl 1.2 was found to be a repudiatory breach of the Supply Agreement and the 3mil POs under the Situation 3B classification in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 (“*RDC Concrete*”) (Judgment at [224]). The Judge found that FSH had lost the commercial benefit which the parties had envisioned from the “time-sensitive” Supply Agreement and the 3mil POs. Thus, the breach of cl 1.2, which resulted in the delays, had deprived FSH of substantially the whole benefit of the Supply Agreement and the 3mil POs and thus entitled FSH to terminate the Supply Agreement and the 3mil POs (Judgment at [214] and [231]). Notwithstanding that FSH did not at the material time rely on the breach of cl 1.2 to terminate the Supply Agreement and the 3mil POs, the Judge held that FSH was entitled to rely on the principle in *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 (“*Comfort Resources*”) to retrospectively justify its purported termination (Judgment at [265]).

47 Next, the Judge held that FSH had not waived its consequent right to terminate and its right to seek damages for loss that arose from SGI’s various breaches of the Supply Agreement. First, there could not be any waiver by

estoppel because FSH did not have full knowledge of SGI's breaches of cl 1.2 of the Supply Agreement (Judgment at [245]). Further, FSH's conduct did not suggest a waiver by estoppel of the right to terminate or the right to damages for SGI's breach of cl 1.2 of the Supply Agreement (Judgment at [246]–[261]). The Judge also found that FSH did not waive its right to damages for SGI's breaches of cl 2.1 and cl 3.2 of the Supply Agreement (Judgment at [276]–[278] and [280]).

48 As for when the termination of the Supply Agreement and the 3mil POs had occurred, the Judge found that FSH had only validly terminated the Supply Agreement and the 3mil POs on 6 July 2021 through the 6 July 2021 E-mail (Judgment at [290]), rejecting FSH's argument that it had earlier terminated through the 20 April 2021 E-mail (Judgment at [284]). In the Judge's view, FSH had continued to operate on the basis that the Supply Agreement and the 3mil POs were still alive even after the 20 April 2021 E-mail, and it was only on 6 July 2021 that FSH had unequivocally demonstrated by its conduct that it had elected to terminate the contracts.

49 In the light of the Judge's findings as to when FSH had terminated the contracts, FSH had committed an *RDC Concrete Situation 2* repudiatory breach of the Supply Agreement and the 3mil POs, between 20 April 2021 and 6 July 2021 by conveying to SGI that it would not accept delivery of the gloves through the 20 April 2021 E-mail (*ie*, by renouncing the Supply Agreement and the 3mil POs) (Judgment at [293]).

50 Having found breaches of contract by both FSH and SGI, the Judge made the following orders:

- (a) Remedies awarded to SGI arising from FSH's breach:

(i) “Unpaid Invoices Claim”: SGI was entitled to payment of the unpaid invoices totalling US\$5,127,384.80 (Judgment at [303]). However, the Judge denied SGI’s claim for pre-judgment interest on this sum (Judgment at [301]).

(ii) “Produced Gloves Claim”: This claim concerned the 92,559,000 gloves which had been produced by SGI and which FSH refused to take delivery of after it had purported to terminate the Supply Agreement and the 3mil POs on 20 April 2021 (“Produced Gloves”). The Judge rejected SGI’s claim for the *revenue* it would have earned from selling the Produced Gloves to FSH. This was because the Judge agreed with FSH that, due to the structure of the relationship between SGI and the SGG Manufacturers (comprising Smart Glove Corporation Sdn Bhd, GX Corporation Sdn Bhd, Platinum Glove Industries Sdn Bhd, and Sigma Glove Industries Sdn Bhd (“Sigma”)), SGI did not in fact incur any costs on the Produced Gloves. Rather, under the structure of the relationship, the SGG Manufacturers (which are separate legal entities) were the ones incurring the costs of the production of gloves (Judgment at [315]). Therefore, SGI was entitled only to damages amounting to its net profit that it would have earned on these gloves. This was taken to be 5% of SGI’s selling price to FSH less any “variable costs of sales” (Judgment at [315]–[316]). After considering the steps taken by SGI to mitigate its loss, this sum amounted to US\$282,560.60. The Judge granted SGI liberty to apply for directions should the issues of any potential claims from SGG Manufacturers

materialise which SGI could claim against FSH (Judgment at [319]).

(iii) “Cancelled Gloves Claim”: This claim concerned the balance unproduced gloves on outstanding orders which FSH had cancelled. SGI was not entitled to the remedy of specific performance (Judgment at [342]–[344]). Although SGI was entitled to damages for the period of the breach from 21 April 2021 to 6 July 2021 (Judgment at [345] and [352]), based on the evidence, SGI had mitigated its loss fully by re-allocating the production lines meant for FSH to producing gloves for other customers (Judgment at [357] and [359]). As SGI had not proven that it “earned lesser profits under the new orders as compared to the cancelled orders [with FSH], it ha[d] not proven that it suffered any loss” (Judgment at [363]).

(b) Remedies awarded to FSH arising from SGI’s breaches:

(i) “Late Delivery Claim”: The Judge accepted that the formula to calculate this loss was as follows:

(A) FSH’s actual profits (comprising FSH’s total *revenue* from the sale of the delivered 3mil gloves less the *amount paid* to SGI for all 3mil gloves and the associated *shipping costs*) (“Actual Scenario”), compared with 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) (“But For Scenario”).

(B) Applying the formula, FSH was awarded damages of US\$51,239,650.02 for SGI’s breaches of cl 1.2 and cl 2.1, this representing the difference between the Actual Scenario and the But For Scenario (Judgment at [437]).

(ii) “Storage Claim”: FSH had not proven its loss (Judgment at [442]).

(iii) “Indemnity Claim”: FSH was granted liberty to apply for directions when the issues of FSH’s customer’s potential claim against FSH would translate into damages which FSH can claim against SGI (Judgment at [445]).

(iv) Pre-judgment Interest: For the losses assessed for the Late Delivery Claim (*ie*, US\$51,239,650.02), pre-judgment interest of 5.33% per annum was awarded only from the date of writ to the date of judgment (Judgment at [479]).

(v) The monies totalling US\$64,782,300 paid to SGI by FSH, representing the total of the sums paid by FSH for gloves that had not been delivered, were found to be refundable advance payments and not forfeitable deposits that SGI was entitled to retain (Judgment at [463]). FSH was also found to be entitled to recover the refundable advance payments in unjust enrichment (Judgment at [470]). Pre-judgment interest of 5.33% per annum was awarded on US\$59,654,915.20 (*ie*, US\$64,782,300 less US\$5,127,384.80, which sum represented the “Unpaid Invoices Claim” which FSH accepted should be set off against the sum refundable to it) from 6 July 2021, being the date when FSH first

acquired the right to have these monies returned following its valid termination of the Supply Agreement and the 3mil POs (Judgment at [478]).

Outline of the parties’ respective submissions on appeal

AD/CA 101/2025

Appellant-FSH’s Case

51 In AD/CA 101/2025 (“AD 101”), FSH submits that the Judge erred in the following findings:

- (a) FSH did not validly terminate the Supply Agreement and the 3mil POs on 20 April 2021 (see [48] above);
- (b) FSH had instead committed a repudiatory breach by renouncing the Supply Agreement and the 3mil POs from 20 April 2021 to 6 July 2021 (see [49] above);
- (c) the quantification of SGI’s losses (see [50(a)(ii)] and 50(a)(iii) above);
- (d) FSH was not entitled to terminate the Supply Agreement and the 3mil POs on the basis of SGI’s renunciation with respect to cl 1.2 of the Supply Agreement, because SGI’s conduct was not a renunciation (Judgment at [176]);
- (e) a term could not be implied into cl 3.2 of the Supply Agreement that the EN455 certifications would be provided within a reasonable time (see [45(c)] above); and

- (f) the quantification of FSH’s damages in that it did not fully reflect the extent of FSH’s losses (see [50(b)] above).

Respondent-SGI’s Case

52 SGI resists these points of FSH’s appeal and has also filed an appeal in AD 102.

AD/CA 102/2025

Appellant-SGI’s Case

53 In AD/CA 102/2025 (“AD 102”), SGI submits that the Judge erred in the following findings:

- (a) SGI had breached the Supply Agreement (and in turn the 3mil POs) (see [45] above);
- (b) SGI’s breach was repudiatory in nature because FSH was deprived of substantially the whole benefit of the Supply Agreement and the 3mil POs (see [46] above);
- (c) FSH had validly accepted SGI’s repudiatory breach on 6 July 2021 (see [48] above);
- (d) the quantification of FSH’s damages (see [50(b)] above);
- (e) the appropriate remedies available to SGI from FSH’s breach, and also in her quantification of SGI’s damages (see [50(a)] above); and

- (f) the sum of US\$64,782,300 paid by FSH to SGI was refundable advance payments and not forfeitable deposits (see [50(b)(v)] above).

Respondent-FSH's Case

54 FSH resists these points of SGI's appeal.

The Issues

55 The following issues can be distilled from the parties' respective submissions:

- (a) Whether SGI was in breach of cl 1.2, 2.1 and 3.2 of the Supply Agreement.
- (b) Whether FSH's purported termination of the Supply Agreement and the 3mil POs on 20 April 2021 was valid.
- (c) Whether FSH had waived the right to terminate and/or the right to claim damages for SGI's breaches of the Supply Agreement and the 3mil POs.
- (d) Whether FSH was in breach of the Supply Agreement and the 3mil POs in cancelling the open orders.
- (e) Whether, and what, remedies are to be ordered.

SGI's alleged breaches of the Supply Agreement

SGI was in breach of cl 1.2 of the Supply Agreement

56 The Judge found that SGI had committed a Situation 3B repudiatory breach of cl 1.2 of the Supply Agreement in failing to exercise all reasonable

endeavours to meet the delivery schedules. As held by the Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [47], the obligation to use best endeavours “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 a reasonable time, would have taken” [emphasis in original]. Given the Judge’s finding, which we accept, that SGI had oversold its production capacity and diverted some of its production capacity to fulfil new orders from other customers (Judgment at [124]; see [45(a)]–[46] above), we agree that SGI had indeed committed a repudiatory breach of cl 1.2 of the Supply Agreement.

57 We note that FSH has also argued that the Judge erred in finding that SGI had not renounced the contract by their conduct (*ie*, SGI did not commit a Situation 2 breach). Having upheld the finding that SGI had committed the Situation 3B repudiatory breach, it is unnecessary to decide on this point.

The price increases were not in breach of cl 2.1 of the Supply Agreement

58 FSH accepts the Judge’s finding that SGI’s breach of cl 2.1 by increasing the price of the gloves was not a repudiatory breach. Instead, it relies on this breach in order to nullify the various price increases so as to adopt the original price in the Supply Agreement of US\$82.50 as the base price to quantify the damages payable on its Late Delivery Claim arising out of SGI’s repudiatory breach of cl 1.2. This is because, on the methodology adopted by the Judge, a lower deduction to account for the price payable to SGI would result in it being awarded a higher amount in terms of its net profit for the Late Delivery Claim. In the light of our finding below that FSH had waived its right to damages for loss resulting from the breach of cl 1.2 (*ie*, the Late Delivery Claim) (see [136]–[150] below), this issue, from FSH’s perspective, is rendered moot. However,

as we have some misgivings about the Judge’s interpretation of cl 2.1, we consider it useful to explain why we disagree with the Judge’s interpretation. Further, if there was no breach of cl 2.1, this would mean that the price increases were valid, which will in turn have a bearing on SGI’s claim for damages based on the relevant contractually revised price.

59 Clause 2.1 of the Supply Agreement provides as follows:

2. PRICES AND PAYMENT

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.

For present purposes, what is material is that cl 2.1 expressly provided for the possibility of the parties deviating from the original price of US\$82.50 per 1000 gloves, save that this would depend on whether “there [were] extenuating circumstances beyond [SGI’s] control that both parties agree[d] warrant[ed] a change”. The issue at hand as to whether SGI was in breach of cl 2.1 turns on whether the price increases during the parties’ contractual relationship satisfied the condition stipulated in cl 2.1.

60 Between October 2020 and April 2021, SGI sought to revise the price of 3mil gloves on six separate occasions, which FSH accepted at each relevant time. The price increases can be summarised as follows (Judgment at [49]):

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

61 On each occasion when SGI sought an increase in the price, there was an exchange of correspondence between the parties discussing the proposed price increase. Generally, SGI would inform FSH of its proposed price increase, as well as the reasons in terms of the extenuating circumstances necessitating the said increase. The principal extenuating circumstance cited by SGI to support the price increases was the increase in the cost of the raw materials. FSH would then have the option to accept the price increase or, if it was dissatisfied, protest the price increase by challenging, for example, the reason provided, or the applicability of the price increase to certain orders.

62 For example, on 24 March 2021, SGI informed FSH that the price of gloves shipped in April would be the same as that applicable to the gloves

shipped in March, that is, US\$106.42 per 1,000 pieces for the 3mil gloves. FSH objected and suggested that SGI review its pricing, noting that the prices from SGI's competitors were about 10 to 15% lower. After further discussion, the parties eventually settled on a price of US\$104.20 per 1,000 pieces for the 3mil gloves.

63 It is clear, therefore, that FSH did not have to agree to the price increases but nonetheless did so, even if it might have only done so with reluctance or was not entirely happy with the situation. In this respect, we observe from the evidence before us that FSH's practice was to perform some independent market checks to satisfy itself that the proposed price increases were justified. For example, following SGI's second proposed price increase on 17 November 2020, Mr Matthew Simpson of FSH circulated the following internal e-mail on 18 November 2020:

I spoke with one of the owners of Smart Glove this morning and he firstly stated he wished he could give us more but the raw material shortage right now means it is simply not possible so the extra 20 containers per month is looking like a bit of a bonus.

He also stated that they are left with no choice to lift their pricing to the levels listed below due to many factors - the shortage of raw material driving the price of raw material upwards being the main one.

...

I have done some benchmarking this morning and rang around a few people I know and **to be honest at \$93.50 for the 3mil glove we are still getting a reasonable price in comparison to the marketprice** [sic].

Supermax are at just shy of \$100, Intco the largest Nitrile glove company in China is at \$145, Innovative is at \$107 and the average seems to be working out at around \$110 - this is out of Malaysia, Thailand & China, Vietnam may be cheaper but the quality is woeful so I haven't checked their pricing.

[emphasis added]

This e-mail clearly demonstrated that FSH did not have any issue with the price increase, as in its own internal assessment, the increased price of \$93.50 was still “a reasonable price in comparison to the marketprice [*sic*]”. In fact, in the exchange of correspondence for the April 2021 revision, the price was revised *downwards* to \$104.20 after FSH objected to the price put forward by SGI (see above at [62]). The point is that the price revisions were not always upwards.

64 In the court below, FSH acknowledged that it had agreed to all the price increases. However, the Judge accepted FSH’s argument that there were two cumulative requirements for the price to be varied under cl 2.1: (a) first, there had to be extenuating circumstances beyond SGI’s control warranting an increase in price; and (b) second, FSH had to agree to the price increase. The Judge found at [151] of the Judgment that given her finding “that there were no extenuating circumstances which would have triggered the operation of cl 2.1, it [was] unnecessary for [her] to decide if FSH had agreed to any consequent price increases”.

65 With respect, the Judge was incorrect in her interpretation of cl 2.1 as providing for two cumulative requirements for a variation of the price. Instead, we find that there was only *one composite requirement*, ie, that “there [were] extenuating circumstances beyond [SGI’s] control that both parties agree[d] warrant[ed] a change”.

66 In this regard, as stated above at [61], on each occasion when SGI sought a price increase, it explained that the price increase was necessitated by the increase in the cost of the raw materials. As far as SGI was concerned, it had identified the “extenuating circumstances beyond [its] control” which it was relying on to request for the price increase.

67 FSH does not deny that it had agreed to the price increases. However, FSH argues that its agreement was not done in a vacuum. Instead, it pleaded that its acceptance of the price increases was done in the belief that there were extenuating circumstances. In our view, this is a distinction without a difference. The fact that FSH agreed to the price increases in the belief that there were extenuating circumstances means that there was a meeting of the minds between the parties that there were “extenuating circumstances beyond [SGI’s] control that ... warrant[ed] a change” in the price pursuant to cl 2.1.

68 FSH’s point appears to be that it was under a mistaken belief as to the truth of whether there were *objectively* “extenuating circumstances” supporting a price increase as SGI claimed. In other words, with the benefit of hindsight, FSH doubts the veracity of SGI’s claim of “extenuating circumstances”. However, that, in our view, misses the point. What cl 2.1 focuses on is not on the objective existence or otherwise of extenuating circumstances, but on whether the parties are of the view – and thus in agreement – as to whether such circumstances exist. By agreeing to the price increases requested by SGI, FSH must have accepted that the reasons or extenuating circumstances cited by SGI were valid. If it did not, it would not have assented to the price increases and SGI could not have revised the price unilaterally. Contrary to its submission, FSH’s agreement to the price increases is conclusive of the matter.

69 In our judgment, it is not open to FSH to revisit the price revisions retrospectively after having agreed to the price increases and after the parties have continued to perform the Supply Agreement on the footing of the price increases. The fact that FSH may now think better of whether there were extenuating circumstances at the material time does not mean that it did not think that such circumstances existed at the time it gave its agreement.

70 At [145]–[148] of the Judgment, the Judge undertook an objective assessment as to whether the increase in the cost of raw materials could constitute “extenuating circumstances beyond [SGI’s] control” and concluded at [151] that “there were no extenuating circumstances which would have triggered the operation of Clause 2.1”.

71 With respect, the Judge overlooked the fact that the price increases under cl 2.1 could only have occurred with the agreement of FSH. As mentioned, what mattered was not whether there objectively were “extenuating circumstances” but whether the parties were agreed that such circumstances existed. It was therefore not open to the Judge to override the parties’ own views on the matter by examining if there were or were not “extenuating circumstances” at the material time. SGI had specifically relied on the increase in the cost of the raw materials to trigger the price increases under cl 2.1 which FSH had agreed to. Given that FSH agreed to the price increase, it necessarily accepted the reason put forward by SGI to support the price increase. The price increases were accordingly effected in accordance with cl 2.1 and there could not have been any breach by SGI on this front.

Nothing turns on the alleged breach of cl 3.2 of the Supply Agreement

72 Clause 3.2 of the Supply Agreement provides as follows:

3.2 Supplier verifies that its affiliates practices 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 [FSH], [SGI] shall provide copies of its affiliated factories’ ISO certification, EN455 certification, EN374 PPE certification and MDR Certificate of Conformity.

73 This breach was alleged against SGI only for a specific delivery, *ie*, lots GT20J10 and GT20K02 in March 2021. The Judge rejected FSH's argument that a term should be implied into cl 3.2 for SGI to provide the EN455 certificates within a reasonable time. Instead, the Judge decided that the correct remedy should be an equitable rectification of the Supply Agreement to impose an obligation on SGI to furnish the certificates within a few days of FSH's request even though equitable rectification was not pleaded and the breach of cl 3.2 was not stated in the 20 April 2021 E-mail (Judgment at [160]). While it may have been open to the Judge to resort to equitable rectification, the question is whether it was necessary or even appropriate to do so in the light of the Judge's own findings.

74 The Judge found that the Supply Agreement was terminated by the 6 July 2021 E-mail. By that time, the certificates had already been provided on 1 June 2021. Furthermore, the Judge found at [442] of the Judgment that FSH had not proven its loss for any purported breach of cl 3.2. It appears to us that the discussion over the breach of cl 3.2 has no bearing on the validity of FSH's purported termination and/or its claim for damages.

75 Given the above findings by the Judge, it was unnecessary for the Judge to have resorted to equitable rectification.

FSH's Purported Termination

76 We had found above at [56] that the Judge was correct in finding that SGI had committed a repudiatory breach of cl 1.2 of the Supply Agreement. This would have entitled FSH to terminate the Supply Agreement and the 3mil POs.

77 In the light of the fact that it was FSH's pleaded case that the termination was effected on 20 April 2021, albeit a breach of cl 1.2 was not cited as a justification for termination in the 20 April 2021 E-mail, we think it is necessary to examine whether the Judge was correct in finding that FSH had validly terminated the Supply Agreement and the 3mil POs with respect to SGI's repudiatory breach of cl 1.2 via the 6 July 2021 E-mail, instead of 20 April 2021 as FSH submitted.

78 FSH pleaded that it had accepted SGI's repudiatory breach by way of the 20 April 2021 E-mail and cancelled all open orders. The purported acceptance of SGI's repudiation of the Supply Agreement and the 3mil POs was reiterated in the 6 July 2021 E-mail.

79 In its Defence and Counterclaim, FSH sought to justify the termination of the Supply Agreement and the 3mil POs on three grounds:

- (a) SGI failed to use all reasonable endeavours to meet the delivery schedules in breach of cl 1.2 of the Supply Agreement.
- (b) SGI increased the price of the gloves in breach of cl 2.1 of the Supply Agreement.
- (c) SGI failed to produce the EN455 certificates for certain orders within a reasonable time in breach of cl 3.2 of the Supply Agreement.

80 It is common ground that none of the three grounds were stated in the 20 April 2021 E-mail, the 6 July 2021 E-mail, or in any correspondence prior to the commencement of the action. In fact, the first time these three grounds appeared was in the Defence and Counterclaim.

81 Despite this, the Judge found that FSH was not precluded from relying on the breach of cl 1.2 as a ground for terminating the Supply Agreement and the 3mil POs (Judgment at [262]), relying on the Court of Appeal’s endorsement in *Comfort Resources* (at [63]) of the principle in *Taylor v Oakes, Roncoroni & Co* (1922) 127 LT 267 (“*Taylor*”) 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.

For ease of reference, we shall refer to this proposition as the “principle in *Comfort Resources*” in this judgment.

82 However, the Judge recognised that the principle in *Comfort Resources* is subject to two qualifications (Judgment at [264], citing *Comfort Resources* at [65] and [67]):

- (a) where the contracting party is precluded from relying on new grounds by reason of waiver by election and/or waiver by estoppel; and
- (b) where the breach could have been rectified had the ground been raised earlier.

83 The Judge found that, even if FSH had given a wrong reason to terminate the Supply Agreement and the 3mil POs, this did not deprive FSH of a justification which in fact existed, *ie*, SGI’s repudiatory breach of cl 1.2 of the Supply Agreement (Judgment at [265]). This was an application of the principle in *Comfort Resources*. That said, the Judge did not completely accept FSH’s case as she considered that a valid termination of the Supply Agreement and the

3mil POs was only effected by the later 6 July 2021 E-mail and not the initial 20 April 2021 E-mail.

84 With respect to the two qualifications, the Judge found that the only relevant qualification in issue was whether there was waiver by election and/or waiver by estoppel since the evidence did not suggest that SGI would or could have rectified the situation had it been afforded the opportunity to do so (Judgment at [265]). In that regard, the Judge found that there was no question of waiver by election or waiver by estoppel (Judgment at [265]). Thus, FSH was not precluded from relying on the principle in *Comfort Resources* to justify the termination.

85 Three significant points of the Judge’s application of the principle in *Comfort Resources* merit closer examination. First, whether FSH is precluded from relying on a breach not stated in its termination notice to justify its termination of the Supply Agreement and the 3mil POs based on the principle in *Comfort Resources*. Second, if the principle in *Comfort Resources* is applicable, when such termination would have taken effect given the Judge’s view that FSH only validly terminated the Supply Agreement and the 3mil POs on 6 July 2021 and not 20 April 2021 as FSH had claimed. Third, in any event, whether FSH is precluded from relying on the new grounds for termination by reason of waiver by election and/or waiver by estoppel, and/or other qualifications to the principle in *Comfort Resources*.

Application of the principle in Comfort Resources

86 We first address the Judge’s application of the principle in *Comfort Resources*. While we agree with the Judge’s finding that the principle would be applicable to permit FSH to rely on a breach not stated in its termination notice,

subject to the possible application of the qualifications to the principle which we address below, we find it necessary to elaborate further.

87 We begin with the genesis of the principle, which is best explained by an examination of the decision in *Comfort Resources*. That case concerned a sale and purchase agreement for sand. By the terms of the contract, the buyer was required to order a specified minimum amount of sand from the seller every month, and the buyer was to make payment within 60 days of delivery. During the course of the contract, the seller issued a termination notice which purported to terminate the contract on account of the buyer's breach in making late payments. However, the payment term was not a condition (such that any breach thereof was not a repudiatory breach), and therefore, the seller could not rely on it to terminate the contract. The question was whether the seller could rely on an additional ground which existed at the time of the purported termination to justify the termination (*ie*, the buyer's under-ordering in breach of the minimum contractual quantity obligation) even though the seller may not have been aware of its existence or relied on it at the material time. The Court of Appeal accepted based on the principle stated in *Taylor* (which we have set out at [81] above) that the seller could, in principle, rely on the additional ground, although the court ultimately found that it did not assist the seller as the additional ground itself did not constitute a repudiatory breach that entitled the seller to terminate and, in any event, one of the qualifications applied (*Comfort Resources* at [68]–[77]).

88 The court in *Comfort Resources* addressed a specific scenario concerning a contracting party who clearly intended to exercise a right to terminate a contract for a repudiatory breach of the counterparty but stated an incorrect or invalid reason. There was no ambiguity as to the intention to *accept*

a repudiation. The question was whether a contracting party could rely on a repudiatory breach which did exist at the time of the purported termination to justify what would otherwise have been a wrongful termination on account of the stated reason being non-existent or invalid. The Court of Appeal accepted that this was permissible.

89 However, the situation before us is quite different. Here, both the 20 April 2021 E-mail and the 6 July 2021 E-mail clearly stated that the reason for the cancellation was because SGI could not supply the gloves at the US\$80 to US\$85 mark and, after the price increase in April, FSH “simply [could not] sell the gloves at [that] price”. In short, FSH had sought, unsuccessfully, to renegotiate the price notwithstanding its earlier agreement to the price increase to US\$104.20. When that failed, FSH decided to cancel the open orders because the price was no longer competitive and at that price FSH “simply cannot sell the gloves”. Significantly, there was no mention of any repudiatory breach by SGI whatsoever. Instead, FSH’s declaration that it would not perform anymore would itself have constituted a renunciation, and therefore a repudiatory breach, on its part. Thus, the facts of the present case seemed, at first blush, to be a step removed from *Comfort Resources* to the extent that the intention that FSH had manifested was for it (FSH) to commit a repudiatory breach of the Supply Agreement and the 3mil POs as opposed to accepting a repudiatory breach by SGI. It was in this context that we asked counsel for FSH, Ms Melissa Mak (“Ms Mak”), at the hearing, whether the principle in *Comfort Resources* would apply in the situation presented by this case where there was a clear disconnect between FSH’s manifested intention – *ie*, to commit a repudiatory breach – and the intention that was sought to be retrospectively imputed to FSH – *ie*, to accept a repudiatory breach by SGI.

90 In this regard, Ms Mak helpfully referred us to the Court of Appeal’s decision of *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 (“*Phosagro*”) which cited, with approval, *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 59 L T 345; 39 Ch D 339 (“*Boston Deep Sea Fishing*”). Specifically, Ms Mak relied on *Phosagro* at [42], which is reproduced below:

The legal principle in embodied in *Boston Deep Sea Fishing* is well-established and was succinctly (and helpfully) summarised by the Judge as follows (see the Judgment at [164]–[165]):

164 *Boston Deep Sea Fishing* stands for the proposition that if an employer did not rely on his employee’s misconduct at the time of the dismissal because he did not know about it, he may subsequently invoke the said misconduct as a defence to a wrongful dismissal claim brought by the employee. *This ‘transforms’ what would have been a termination in breach of contract by the employer (hence giving rise to a claim for damages on the part of the employee), to a lawful termination pursuant to a repudiatory breach of the contract by the employee (removing any right on the employee’s part to claim for damages).*

...

[emphasis added]

91 We are satisfied that the principle in *Comfort Resources* remains applicable to the present case where, instead of accepting a (non-existent) repudiatory breach by the other party, the party seeking to terminate has itself committed a repudiatory breach for two reasons. First, this is in line with the Court of Appeal’s interpretation of *Boston Deep Sea Fishing* in *Phosagro*. It is material that the court in *Taylor*, when enumerating the principle that was adopted by the Court of Appeal in *Comfort Resources*, had likewise relied on *Boston Deep Sea Fishing* as its authority. Therefore, the Court of Appeal’s interpretation of *Boston Deep Sea Fishing* illuminates the basis of the principle itself. Second, from the above extract in *Phosagro*, it is clear that the Court of

Appeal accepted that it is possible to convert a renunciation, which is a breach of contract by one party, into a lawful termination pursuant to a repudiatory breach by the counterparty.

92 In our judgment, notwithstanding that the manifested intention is to renounce the contract rather than to accept the other party's repudiatory breach, the principle in *Comfort Resources* would apply because it is not focused on what the intention of the party seeking to terminate is, but whether he had a right of termination. If that is answered in the affirmative, the principle in *Comfort Resources* essentially deems him to have been exercising that right even if, as a matter of fact, his manifested intention was something else. Indeed, there is a further point to this, which is that, as a matter of law, the effect of one party seeking to terminate for a non-existent repudiatory breach by the other party and the former expressly renouncing the contract is the same: in both events, he would be himself committing a repudiatory breach. This is because, when a party purports to terminate the contract on a certain ground and that ground turns out to be invalid, such wrongful termination would amount to a renunciation of the contract on his part, constituting a Situation 2 repudiatory breach under *RDC Concrete*. A wrongful termination or an express renunciation are both, at base, renunciations of the contract albeit couched in different terms. There is thus no relevant distinction between them as a matter of law. Seen from this perspective, what the principle in *Comfort Resources* does, as mentioned above, is to effectively convert what would otherwise be a repudiatory breach of the contract by one party into the exercise of a right of termination, regardless of what his manifested intention may have been.

93 Accordingly, we find that the Judge was correct in finding that the principle in *Comfort Resources* can apply to the present case. Even though FSH

had effectively communicated the intention to renounce the Supply Agreement and the 3mil POs and made no reference to any repudiatory breaches by SGI or to any intention to accept such breaches by SGI, FSH would have been entitled to rely on any repudiatory breach of SGI that existed at the time to justify the termination. Thus, so long as at the time when FSH purported to terminate the contract (*ie*, 20 April 2021), there was an existing repudiatory breach by SGI, FSH could rely on the principle in *Comfort Resources* to terminate the contract.

94 As a corollary to the finding above, there is some doubt as to whether the Judge was correct in finding that FSH's termination took effect only on 6 July 2021 (via the 6 July 2021 E-mail) and not 20 April 2021 (via the 20 April 2021 E-mail). As explained above, the effect of the principle in *Comfort Resources* is that a breaching party cannot complain of the counterparty's renunciation of the contract, because it in effect converts one party's renunciation of the contract into an acceptance of the repudiatory breach of the counterparty. So long as SGI was in repudiatory breach of the Supply Agreement and the 3mil POs when FSH sought to terminate these contracts on 20 April 2021, the principle in *Comfort Resources* would deem FSH as exercising its right of termination for such repudiatory breach(es) by SGI on that date.

95 The foregoing analysis, however, is subject to the important qualifications to the principle in *Comfort Resources* (see [82] above). In our judgment, while the principle in *Comfort Resources* may have been applicable, it was ultimately not applicable on the facts of this case because FSH had waived SGI's repudiatory breach of cl 1.2, and therefore its right to terminate the Supply Agreement and the 3mil POs. We elaborate on the reasons for our finding of waiver below.

Qualifications to the principle in Comfort Resources

Whether FSH had waived the right to terminate the Supply Agreement and the 3mil POs

96 SGI’s case is that FSH had waived its right to terminate the 3mil POs and the Supply Agreement. This is because, between June 2020 and April 2021, FSH had accepted each revised delivery schedule following discussions between the parties, and did not once allege during this time that SGI had committed any breach of the delivery schedules in the Supply Agreement and the 3mil POs. On the other hand, FSH submits that it did not waive any of its rights. Alternatively, its conduct was, at best, a temporary waiver while it was assessing the consequences of SGI’s breach.

97 The Judge found that FSH could not have made any election to affirm the Agreements because FSH did not have knowledge of SGI’s failure to use all reasonable endeavours as required under cl 1.2 of the Supply Agreement, and that FSH had only discovered that SGI had failed to do so “by chance subsequently” in the course of the trial (Judgment at [238]).

98 In arriving at this finding, the Judge held that SGI, being the party with full knowledge that it had overcommitted itself, could not have detrimentally relied on any representation by FSH (which had no knowledge of the same) in relation to any of SGI’s breaches of cl 1.2 of the Supply Agreement (Judgment at [241]–[245], citing *Lim Ah Mee v Summerview Development Pte Ltd* [1998] SGHC 87 (“*Lim Ah Mee*”) at [92]–[94]).

99 While it appeared that FSH had accepted SGI’s revised schedules and was not insisting on strict adherence to the original delivery schedules, the Judge held that SGI’s obligation under cl 1.2 was not to ensure strict adherence to the

delivery schedules *per se* but to *exercise all reasonable endeavours* to ensure punctual delivery of the gloves. FSH's conduct in not insisting on strict adherence to the original delivery schedules therefore did not suggest that SGI was not required to exercise all reasonable endeavours in delivering the gloves in accordance with the original delivery schedules (Judgment at [247] and [260]). Even if FSH had waived any right(s) consequent to any breaches by SGI, the Judge found that any such waiver was made only for the time being for FSH to assess its position (Judgment at [270]).

100 In considering whether FSH had waived its right to terminate, it should be borne in mind that there are two distinct forms of waiver, *ie*, waiver by election and waiver by estoppel.

101 The 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 (*Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 (“*Audi Construction*”) at [54]).

102 Waiver by estoppel 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. This doctrine does not depend on any particular knowledge on the part of the representor. Instead, it is premised on inequity

(*Audi Construction* at [57]; *DJY v DJZ* [2025] 2 SLR 142 at [59]–[65]; *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 (“*Chai Cher Watt*”) at [33], citing *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The “Kanchenjunga”)* [1990] 1 Lloyd’s Rep 391 (“*The “Kanchenjunga”*”) at 399).

103 The requisite representation is different as between waiver by election and waiver by estoppel. A party making an election is communicating his choice whether or not to exercise a right *which has become available to him*. The party to an equitable estoppel, on the other hand, is representing that he will not *in future* enforce his legal rights (*Audi Construction* at [57]; see also *Chai Cher Watt* at [33]).

104 While mere silence or inaction will normally not amount to an unequivocal representation, in certain circumstances, particularly where there is a duty to speak, mere silence may amount to such a representation (*Audi Construction* at [58], citing *Fook Gee Finance Co Ltd v Liu Cho Chit* [1998] 1 SLR(R) 385 at [36]–[37]). The expression “duty to speak” does not refer to a legal duty, but to circumstances in which a failure to speak would lead a reasonable party to think that the other party has elected between two inconsistent rights or will forbear to enforce a particular right in the future, as the case may be. In other words, the duty necessary to found an estoppel by silence or acquiescence arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations (*The “Bunga Melati 5”* [2016] 2 SLR 1114 (“*The “Bunga Melati 5”*”) at [15], citing *Tradax Export SA v Dorada Compania Naviera SA (The “Lutetian”)* [1982] 2 Lloyd’s Rep 140

(“*The “Lutetian”*”) at 157). This is an objective assessment made by reference to how a reasonable person apprised of the relevant facts would view the silence in the circumstances (*Audi Construction* at [61]; *The “Bunga Melati 5”* at [16]).

105 Relevant to the present case, in the case of a repudiatory breach of contract, the innocent party has at least two rights arising from the breach: (a) the right to damages to make good any loss suffered as a result of the breach; and (b) the right to terminate the contract (*Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [120]). Each of those rights must be examined separately as it is possible for either, both or neither of these rights to be waived.

106 For the principle in *Comfort Resources* to apply, FSH must not have waived its right to *terminate* the Supply Agreement and the 3mil POs.

(1) Waiver by estoppel

107 We start by considering whether FSH is estopped from exercising its right to terminate.

108 In order to establish waiver by estoppel, SGI must establish the following two elements:

- (a) FSH must have unequivocally represented to SGI, by its words or conduct, that it would, in future, not insist upon its right to terminate the Supply Agreement and the 3mil POs on the basis of SGI’s breach of cl 1.2 of the Supply Agreement; and
- (b) SGI must have relied on this representation to its detriment such that it would be inequitable for FSH to resile on its representation.

(A) REPRESENTATION

(I) *FSH'S CONDUCT BETWEEN JUNE 2020 AND APRIL 2021*

109 In evaluating whether FSH had waived any breach of cl 1.2, it is imperative to bear in mind that the Judge held that the breach by SGI occurred from the outset of the Supply Agreement. This is borne out in her calculation of the damages in favour of FSH which commenced from June 2020. Based on FSH's own case, it had purported to terminate the Supply Agreement and the 3mil POs for SGI's alleged repudiatory breach only in April 2021. Therefore, FSH's conduct from June 2020 to April 2021 must be examined for the purpose of determining whether FSH had waived the alleged breach.

110 At [113] of the Judgment, the Judge helpfully set out a table comparing the original agreed number of deliveries to be made by SGI as set out in the 1st PO Summary Page and the 2nd PO Summary Page, against the actual number of deliveries made by SGI on each month, up until 20 April 2021, when FSH purported to terminate the Supply Agreement and the 3mil POs. This table is reproduced with slight modifications below:

Month	1st PO		2nd PO	
	Originally agreed number of deliveries in Summary Page (one container per delivery)	Actual number of deliveries (one container per delivery)	Originally agreed number of deliveries in Summary Page (one container per delivery)	Actual number of deliveries (one container per delivery)
June 2020	30	0		

July 2020	60	16		
August 2020	60	48		
September 2020	60	42		
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
Total	390	178	100	61

111 From the above table, it is evident that SGI had been late on its deliveries from the very beginning (*ie*, June 2020) up until FSH purported to terminate the Supply Agreement and the 3mil POs on 20 April 2021. Throughout that period from June 2020 to April 2021, SGI would frequently provide FSH with revised delivery schedules to inform FSH that deliveries would be delayed. Thereafter, SGI remained *persistently* late – it never *once* met its scheduled monthly delivery target, much less made any progress towards remedying the

accumulating shortfall from each passing month. While FSH would occasionally object to a revised delivery schedule, it would ultimately agree or at least acquiesce to SGI's requests, and it is undisputed that up until 20 April 2021, FSH accepted every delayed delivery without any reservation of rights. This can be illustrated from a sampling of the parties' conduct in relation to the delayed deliveries.

112 Pursuant to the original delivery schedule in the 1st PO Summary Page, SGI was to deliver the first 30 containers of gloves in June 2020. However, SGI in fact made no deliveries in June 2020. FSH did not raise any complaints regarding this initial delay; in fact, FSH had proactively assured SGI that it would be "OK" if the first batch of orders were delayed in an e-mail dated 21 June 2020 (three days after SGI had confirmed receipt of the advance payments for this order):

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]

113 Thereafter, on 1 July 2020, SGI sent FSH a new delivery schedule providing for the delivery of 390 containers between July and December 2020:

	No. of Containers				
Month	Week 1	Week 2	Week 3	week 4	Total
July	3	18	21	18	60
Aug	17	17	17	17	68
Sept	17	17	17	17	68
Oct	17	17	17	15	66
Nov	16	16	16	16	64
Dec	16	16	16	16	64
Total	86	101	104	99	390

114 However, matters did not improve in July. Pursuant to the original delivery schedule in the 1st PO Summary Page, SGI was to have delivered 90 containers by the end of July, while the revised delivery schedule provided for 60 containers by that date. But, as it turned out, SGI was only able to ship 16 containers on 15 July 2020, and a further 6 containers on 1 August 2020.

115 As a result, in an e-mail dated 3 August 2020, Mrs Sarah Jane Stoute (“Mrs Stoute”), the Chief Executive Officer of FSH, informed SGI that FSH was “having a problem with the glove delivery schedule as the dates keep slipping and the customers are becoming concerned” and asked if this was something that could be resolved. In another e-mail sent later that same day, another representative from FSH, Ms Shiah Yoong, stated:

As per our record, we are still waiting for confirmation of 39 containers due to be loaded last 2 weeks. This is causing a lot of problems to us as our customers cannot afford to run out of gloves during the pandemic.

My logistic department has been struggling with the on-going changes of collection dates and the number of containers can be collected.

Can you please look into this urgently and let me know by cop today?

We are hoping to place another big order with you but we need to resolve all the shipping problems and get assurance from you that our orders can be fulfilled in time as planned going forward.

116 It also appeared that FSH had expressed similar concerns in a call to SGI, as recorded in the following internal e-mail from SGI (also dated 3 August 2020):

Customer called me to inform me that they are very unhappy that our production is not following the schedule that we gave to them when they gave us the PO.

As per the instruction we have informed the customer we can commit to 20 containers weekly but up to date we only shipped out 33 containers as per list below.

Customer 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 [sic] fulfil we must inform them.

117 Notwithstanding these complaints, FSH continued to accept the late deliveries from SGI. Further, despite having just stated that it required assurance that its orders could be fulfilled before placing another order with SGI, FSH went on the very next day to issue the 5mil PO to SGI on 4 August 2020.

118 Another point of significance is that the subsequent delivery schedules provided by SGI (on 12 August and 17 August 2020) reduced the weekly deliveries under the 1st PO to 15 containers per week for the last two weeks of August, and 10 containers per week for the months of September to December. This meant that SGI would no longer be attempting to “catch up” with the present shortfall in deliveries, and the total of 390 containers under the 1st PO would no longer be delivered by December, as initially agreed by the parties. This was because, according to SGI, it could at best commit to delivering 15 containers (inclusive of deliveries under the 1st PO and the 5mil PO) each week. FSH did not object to this arrangement. In FSH’s response on 18 August 2020, it even proposed an “amended plan” for the number of deliveries per month under the 1st PO to be reduced in order to prioritise the deliveries under the 5mil PO, before it would “switch back” in later months. In the proceedings below, FSH’s Mrs Stoute conceded during cross-examination that FSH’s position meant that SGI was in “severe breach” and that the delays reflected in “the 17 August schedule” would have entitled FSH to terminate the Supply

Agreement and the 1st PO. Therefore, there is no question that FSH was fully aware of its rights but elected to affirm the Supply Agreement and 1st PO notwithstanding the alleged breaches by SGI.

119 After August 2020, SGI continued to face difficulties in making deliveries on time, even after lowering the previous expectation of 20 containers per week to 15 containers per week. For example, in a revised delivery schedule sent on 22 October 2020 (the third sent in the month of October alone), SGI informed FSH that it could only ship a total of four containers of gloves in the last week of October, and specifically, that it would only be delivering one container of gloves pursuant to the 1st PO despite having previously represented (in the prior two October revised schedules) that it could deliver four containers that week. In response, on that same day, FSH informed SGI that:

[W]e are disappointed [SGI] are only shipping 4 containers this week.

We expect 12 containers to ship next week to make up the difference[.]

Can you confirm[?]

120 SGI replied that “[t]he best plan that the production can do is [*sic*] for next few weeks is 8 containers due to the former issue”. FSH did not respond further. However, it continued to accept all deliveries from SGI notwithstanding that SGI was unable to meet the total of 12 deliveries that FSH had requested on 22 October 2020. We also note that in the proceedings below, FSH’s Mrs Stoute agreed under cross-examination that FSH’s position as of 22 October 2020 was that the delays were “entirely [SGI’s] fault” and while FSH could have terminated the Supply Agreement and 1st PO on this basis, FSH had made a “commercial decision” *to carry on with the Supply Agreement and 1st PO*.

121 Despite these persistent delays, on 19 November 2020, FSH issued the 2nd PO to SGI. Further, after the parties entered into the 2nd PO, deliveries for the 3mil POs continued to be delayed. In this regard, we note that deliveries under the 2nd PO were, as with the 1st PO, delayed from the outset. The original delivery schedule in the 2nd PO Summary Page provided that SGI would deliver 20 containers of gloves in the month of December. However, SGI only shipped six containers to FSH. As regards the orders under the 1st PO, compared to the 60 containers scheduled in the original delivery schedule, or even the eight containers scheduled in a revised schedule sent on 27 November 2020, SGI in fact delivered only six containers in December 2020.

122 On 4 January 2021, FSH and SGI met to discuss changes to the delivery schedule for 2021. At this meeting, it was agreed that SGI would return to delivering a total of 20 containers per week from February 2021. However, SGI's revised delivery schedule of 15 January 2021 departed from this agreement, providing for delivery of only approximately 10 containers per week up to end-March 2021. In its response on 18 January 2021, FSH noted that "[the parties'] plan for February [was] 20 containers but [SGI's] proposed production schedule only deliver[ed] 10" and that "[t]his was way below [FSH's] expectation[s]". Following this, FSH sent another e-mail on 19 January 2021 informing SGI that it had arranged for shipments of 15 containers per week, and requesting for SGI's revised delivery schedule.

123 On 25 January 2021, SGI informed FSH that the "best quantities that [it could] deliver is **10 containers/week**" [emphasis in original]. FSH responded with the following:

We are very disappointed to hear that you can only deliver 10 containers per week in February. I understand that Marisa and you are trying to push for 12 containers towards the end of

February. But, can you please change the mix of the 10 containers to the following?

124 For completeness, we note that despite these discussions, SGI was in any case unable to deliver the agreed 10 containers on time in February. Nor was SGI able to meet the revised 12 containers per week that FSH had sought for at any point in March. Nevertheless, FSH continued to accept each delayed delivery without any reservation of rights.

125 Finally, on 20 April 2021, FSH purported to “cancel all of [FSH’s] existing 3mil orders”, *not* on the basis of the delays, but rather due to a significant drop in the prices of the gloves that rendered the 3mil POs commercially unviable as explained above at [89]. Evidently, FSH did not consider the delays and potential breach of cl 1.2 of the Supply Agreement significant enough to cite it as a ground for termination when it purported to terminate on 20 April 2021, even though doing so would have provided it with a straightforward justification for the termination.

(II) FSH’S CONDUCT UNEQUIVOCALLY REPRESENTED THAT IT WOULD FORBEAR TO EXERCISE ITS RIGHT TO TERMINATE

126 In our view, it is clear from the entirety of the parties’ relationship that FSH had unequivocally represented that it would forbear to exercise its right to terminate the Supply Agreement and the 3mil POs arising from SGI’s breach of cl 1.2 of the Supply Agreement. Even though FSH did not make any express representation to this effect, there is little doubt in our minds that a representation can be implied from FSH’s conduct. Despite the persistent delays in delivery *from the outset*, FSH continued to treat the Agreements as alive from June 2020 to April 2021. FSH’s conduct clearly demonstrated that FSH saw an opportunity to profit from the pandemic and was prepared to tolerate the delayed

deliveries in order to maximise its profits during that period. And, as observed above at [120], FSH conceded that it had made a “commercial decision” to carry on with the Supply Agreement and 1st PO even in spite of SGI’s “severe breach” through the delayed deliveries that would have justified FSH’s termination. In these circumstances, a reasonable party in SGI’s position would have understood that FSH was content to keep the contractual relationship alive and prepared to accept the delayed deliveries. It is apparent that FSH’s predominant concern was to preserve the Agreements as a source of profit for as long as the pandemic-driven demand persisted.

127 The Judge also separately accepted (for completeness) that if there was any waiver by FSH, it would only be for the time being (Judgment at [266]). However, given FSH’s continued acceptance of the further deliveries notwithstanding the delays from June 2020 to April 2021, and its acceptance of the revised delivery schedules, we disagree with this finding. If the waiver for the time being was to allow FSH to “assess its position” and subsequently terminate the Supply Agreement and the 3mil POs as the Judge seemed to suggest (Judgment at [270]), it is significant that the purported termination by the 20 April 2021 E-mail or the 6 July 2021 E-mail did not refer to the delayed deliveries as a ground for termination in spite of the effluxion of time to enable FSH to “assess its position”. The fact that FSH did not cite a breach of cl 1.2 of the Supply Agreement due to the delay in deliveries when it came down to it makes clear that, even on the Judge’s view that FSH was seeking to “assess its position”, it had ultimately decided to waive its right to terminate on account of these breaches by SGI.

(B) RELIANCE

128 In our view, it is also clear that SGI had relied on the aforesaid representation from FSH to its detriment, by continuing to perform its obligations under the revised delivery schedules.

129 In the court below, the Judge found that FSH had only discovered SGI's breach of cl 1.2 by chance during the trial and that it therefore did not have knowledge of SGI's failure to exercise reasonable endeavours at the material time (Judgment at [238]–[239]). She then found that without such knowledge, there could have been no waiver by estoppel. In coming to this view, the Judge relied on the decision in *Lim Ah Mee*, which she considered to be authority for the proposition that where the defaulting party has full knowledge of its wrongdoing, and the innocent party does not, the defaulting party could not have detrimentally relied on any representations or conduct by the innocent party (Judgment at [241]–[242]).

130 In our view, *Lim Ah Mee* does not stand for any such general proposition and it thus does not assist FSH. In *Lim Ah Mee*, the plaintiffs executed an option to purchase a property and to develop it into a commercial-cum-residential complex in favour of the first defendant (“Summerview”). The terms of the option required that it be accepted within seven days upon Summerview's receipt of in-principle approval for the development. However, the option was not validly accepted by Summerview on time and significantly, the plaintiff was not aware of this. Summerview argued that the plaintiffs were nonetheless estopped from contending that the option had lapsed, as Summerview had made various payments pursuant to the option and the plaintiffs knew that those payments were made. The High Court rejected this argument. A reasonable person in Summerview's position could not have interpreted the plaintiffs'

conduct in allowing Summerview to incur expenses pursuant to the option as a clear and unequivocal representation that they would not insist on strict compliance with its terms. This was because Summerview was aware that the plaintiffs did not know that the option had not been validly accepted on time. Therefore, Summerview could not have interpreted the plaintiffs’ silence or acquiescence as a representation that they were prepared to waive the acceptance deadline, since Summerview knew that the plaintiffs were themselves unaware that there was anything to waive. Summerview could not have incurred the expenses in reliance on a non-existent representation.

131 It is clear to us that the High Court in *Lim Ah Mee* did not purport to lay down any general principle relating to reliance. The High Court’s decision was premised on its findings that on the facts before it, there was no clear and unequivocal representation by the plaintiffs, either by conduct or otherwise, for Summerview to have relied on. The expenses were instead incurred by Summerview “out of self-interest, not because it allegedly relied on some representation” (*Lim Ah Mee* at [92]). It appears that the High Court acknowledged that actual knowledge is unnecessary for a finding of waiver by estoppel (*Lim Ah Mee* at [92]).

132 In any event, we disagree that FSH did not have the requisite knowledge at the material time. It is clear to us that FSH was able to plead, *at the outset*, that SGI was in breach by its failure to exercise all reasonable endeavours to meet the orders and comply with the delivery schedule. During the appeal, Ms Mak accepted that FSH’s pleaded case on SGI’s failure to use “all reasonable endeavours” in breach of cl 1.2 was premised on the delayed deliveries. This was FSH’s case from inception and not something which emerged “by chance subsequently”.

133 Given that FSH does not need to have had actual knowledge of SGI's breach of cl 1.2 by failing to exercise all reasonable endeavours to meet the delivery schedules for an estoppel to arise, it suffices, in our view, that FSH's conduct represented to SGI that FSH *did not believe or was not claiming* that SGI had breached cl 1.2, or at any rate, that FSH considered any breach of cl 1.2 to be a repudiatory breach that FSH could rely on to terminate the Supply Agreement and the 3mil POs. The fact of the delayed deliveries was obviously known to FSH. It would have been in a position, based on those delays, to form a view on whether SGI was likely in breach of cl 1.2 or not. Based on the above evidence, it did not, throughout the entirety of the parties' relationship even until the 20 April 2021 E-mail, and indeed, even later on in the 6 July 2021 E-mail, form such a view. As seen above, FSH had repeatedly surfaced its dissatisfaction over SGI's delays in various e-mails. In the same way it had mounted its counterclaim in these proceedings, FSH could have alleged a breach of cl 1.2 against SGI each time the deliveries were delayed. The information which FSH had about the delayed deliveries when it pleaded its case against SGI for breach of cl 1.2 was no different from the information it was aware of at all material times after each occasion of delayed delivery. Its silence on this up until these proceedings, and more specifically, even when FSH actually sought to end the contractual relationship, speaks volumes.

134 On the contrary, the fact is that, as we have explained above (at [126]–[127]), FSH had clearly and unequivocally represented that it would forbear from enforcing its right to terminate for SGI's breach of cl 1.2 by way of its conduct from the outset and throughout the course of the contractual relationship. It is evident that SGI had relied on those representations to its detriment by performing its obligations under the revised delivery schedules. In the premises, we find that there was waiver by estoppel on the part of FSH.

(2) Waiver by election

135 Given our finding that FSH is estopped from terminating the Supply Agreement and the 3mil POs on the basis of SGI's breach of cl 1.2 of the Supply Agreement, it is unnecessary for us to go on to consider whether FSH had also waived this right by election.

Whether SGI had waived its right to claim damages for breach of the Supply Agreement

136 In addition to finding that FSH had waived its right to terminate (see [134] above), we find that FSH had also waived its right to damages arising from any breach by SGI of cl 1.2 of the Supply Agreement.

137 Preliminarily, we note that SGI cannot establish that FSH had *elected* to waive its right to damages. The doctrine of waiver by election concerns a situation where a party has a choice between two inconsistent rights. However, FSH was never faced with a situation to elect between retaining its right to seek damages and some other inconsistent right. At each instance of delayed delivery by SGI, FSH was faced with the choice to terminate the Agreements for a breach of cl 1.2, or to affirm them notwithstanding the breach. Regardless of which course FSH chose, it would retain its right to seek damages for the losses resulting from the breach. As noted by the Court of Appeal in *RDC Concrete*, even if an innocent party is entitled to terminate the contract and nevertheless chooses not to do so, it will always be entitled to claim damages as of right for loss resulting from the breach or breaches of contract. The innocent party is also entitled to claim damages as of right where it is entitled to terminate the contract and in fact terminates it (*RDC Concrete* at [40] and [114]). Accordingly, the

issue which remains is whether FSH is *estopped* from enforcing its right to seek damages.

138 As explained above (at [108]), in order to establish waiver by estoppel, SGI must demonstrate that:

- (a) FSH had unequivocally represented to SGI, by words or conduct, that it would, in future, not insist upon its right to seek damages for the breach of cl 1.2 against SGI; and
- (b) SGI had relied on this representation to its detriment such that it would be inequitable for FSH to resile on its representation.

Representation

139 In *The “Pacific Vigorous”* [2006] 3 SLR(R) 374 at [10], Belinda Ang Saw Ean J (as she then was) observed that “[the] abandonment of an accrued right to claim damages for breach of contract ... is not something to be facilely inferred” given that “[i]n the commercial context, and human nature being what it is, the probabilities are against the gratuitous or voluntary sacrifice of an accrued right to claim damages from the defendant’s breach of contract”. Although we accept that it would be a rare case for a party to be taken to have waived a right to claim damages, we are satisfied that the exceptional facts of this case do support such an inference.

140 In examining this issue, it is important to recall that the Judge assessed the damages payable to FSH from June 2020, *ie*, from the outset of the Supply Agreement, and hence calculated the damages in favour of FSH from June 2020. Despite the Judge’s finding that SGI was not obliged to strictly adhere to the original delivery schedules but was only required to exercise all reasonable

endeavours to do so (Judgment at [99]), her quantification of the damages was done on the basis that if not for SGI's breach, SGI would have delivered the gloves in accordance with the original delivery schedules, notwithstanding that FSH had agreed to the revised delivery schedules (Judgment at [398]). As such, the *effect* of the Judge's quantification of the damages was that SGI was found to be strictly bound to the *original* delivery schedules and that the revised delivery schedules had practically no legal effect despite FSH's agreement to the same.

141 Furthermore, it is imperative to note that FSH did not simply continue to treat the 1st PO as alive despite the persistent late deliveries – it went on to place new purchase orders, namely, the 5mil PO in August 2020 and the 2nd PO in November 2020. In our judgment, this conduct must be taken to constitute an unequivocal representation that FSH would not seek to enforce cl 1.2 of the Supply Agreement and/or claim damages for any breach of the same since FSH was at all material times fully aware of the persistent delays and had accepted the revised delivery schedules without any reservation of rights.

142 In this regard, we highlight that right before FSH issued the 5mil PO on 4 August 2020, FSH had complained to SGI about its delays in delivery and had even threatened that it would not be willing to place another order with SGI unless the issues relating to the existing delays could be resolved (see [115]–[117] above). Yet, before SGI even made any commitment in this regard, FSH nonetheless issued the 5mil PO. Moreover, even if FSH could claim to have still been under any misapprehension regarding SGI's ability to improve its performance after SGI accepted the 5mil PO – which, to be clear, we do not accept – it would have been abundantly clear to FSH by the time it issued the 2nd PO in November 2020 that SGI's difficulties with the delivery schedule

were unlikely to change. Nevertheless, FSH placed yet another fresh order (*ie*, the 2nd PO).

143 To our minds, this conduct of placing new orders, despite being fully aware that SGI would in all likelihood continue to struggle to meet the delivery schedule for the new orders, would have given a reasonable person in SGI's position the impression that FSH was sufficiently satisfied with SGI's efforts thus far and would be content with the same level of effort going forward, delays notwithstanding. There was no indication by FSH that, while it was placing new orders, which would likely, if not almost certainly, be afflicted with the same issue of delay, it would seek to claim damages from SGI for past and future orders.

144 Further, FSH's silence on this matter (*ie*, FSH's failure to make any reservation of its rights to claim for damages arising from the delays) when placing the fresh orders in itself constituted a representation that it would forbear from doing so in the future. As we have noted above (at [102]), the duty necessary to found an estoppel by silence or acquiescence arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations. In our view, SGI's decision to accept the new orders from FSH would have been largely influenced by FSH's conduct in accepting the revised delivery schedules and continuing to place new orders without any reservation of its rights in spite of SGI's persistent delays. This is because, by accepting new orders, SGI would in effect be exposing itself to further liability. It would make little commercial sense for SGI to take on additional orders from FSH if it believed that FSH was intending to pursue a claim for damages for delayed

deliveries against it in relation to the 1st PO. In these circumstances where FSH ought reasonably to have understood that SGI would not have entered into the 5mil PO and the 2nd PO had it known that FSH was intending to seek damages against it in relation to the 1st PO (and would also do so for future orders), a reasonable man would expect FSH, acting honestly and responsibly, to inform SGI that it would be reserving its right to do so. To be clear, we do not say that a party must, as a matter of law, invariably make an express reservation of rights. Whether the circumstances call for an express reservation, failing which a party may be taken to have waived its rights, is a fact-specific question.

145 The cases of *Tacplas Property Services Pte Ltd v Lee Peter Michael* [2000] 1 SLR(R) 159 (“*Tacplas*”) and *The “Lutetian”* are instructive in this regard.

146 The respondent in *Tacplas* was the co-administrator of an estate, who had allowed the appellants to continue incurring costs in maintaining a property belonging to the deceased on the faith of the validity of an agreement for the sale and purchase of the property between the appellants and the other co-administrator prior to the extraction of the grant of administration. The Court of Appeal held that in these circumstances, taking into account the fact that the respondent was at all material times represented by solicitors, he was under a duty to inform the appellants that he did not intend to ratify the agreement (at [65]–[68]).

147 In *The “Lutetian”*, the charterers of a vessel had, in good faith, paid the wrong amount of hire to the owners of the vessel. The owners then sought to rely on the charterers’ failure to pay the full sum of hire due under the charter

at the correct time as grounds for withdrawing the vessel. Bingham J (as he then was) observed (at 158) that:

The relationship of owner and charterer is not one of the utmost good faith. One must be careful not to impute unrealistically onerous obligations to those who may choose to conduct their relations in a tough and uncompromising way. There is nonetheless a duty not to conduct oneself in such a way as to mislead.

On the facts of the case, Bingham J “had no doubt that the owners knew that the charterers believed they had paid the right amount” and, therefore, had a duty acting honestly and responsibly to raise their view to the charterers. They did not, as they “were bent not on securing performance of the charter-party but on stage-managing a very profitable withdrawal”. The owners’ omission thus led the charterers to believe that no objection was taken to their calculation. Accordingly, Bingham J found that it would be unjust to allow the owners to rely on the charterers’ incorrect calculation of the sum of hire as grounds to withdraw the vessel (*The “Lutetian”* at 158).

148 These two cases illustrate that the doctrine of waiver by estoppel is ultimately premised on inequity. In *Tacplas*, it was inequitable for the respondent to assert that the agreement did not bind the estate when he had knowingly allowed the appellants to incur costs on the faith of the validity of the agreement. In *The “Lutetian”*, the court found that it would be inequitable to allow the owners of the vessel to engineer a profitable withdrawal. In the present case, if FSH retained its right to seek damages resulting from SGI’s delays, FSH stood only to gain by securing SGI’s acceptance of the 5mil PO and the 2nd PO. Even though SGI would certainly be unable to meet the delivery schedules (which would have been known to FSH given the past delays), not only could FSH profit from the on-selling of whatever gloves SGI managed to

deliver, it could also recover its loss of *prospective* profits by suing SGI for *all* the delays which it had previously accepted without any reservation. SGI, on the other hand, took on the risk of further liability by accepting the further orders in the belief that adherence to the agreed delivery schedule was never strictly required by FSH. In the premises, it was incumbent on FSH, acting honestly and responsibly, to inform SGI if it intended to take issue with SGI's delays. FSH's failure to do so, in our view, amounted to a clear and unequivocal representation that it would forbear from enforcing that right in the future which was reinforced repeatedly by its acceptance of each revised delivery schedule.

Reliance

149 In our view, SGI had clearly relied on FSH's representation to its detriment by, first, continuing to perform its delivery obligations with reference to the revised delivery schedules, and secondly, by entering into the 5mil PO and the 2nd PO, thereby exposing itself to more liability for its delays in fulfilling the orders under those POs.

150 In the circumstances, we find that FSH is estopped from seeking damages for SGI's breach of cl 1.2 of the Supply Agreement. The impact of this finding is addressed below at [160].

Whether cl 4.6 of the Supply Agreement bars a finding of waiver of both the right to terminate and the right to damages

151 In the court below, the Judge found that there was no waiver and hence did not address FSH's alternative argument relying on cl 4.6 of the Supply Agreement (Judgment at [271]). However, as we have found that there was a waiver of both the right to terminate and the right to damages, it is necessary to address cl 4.6.

152 Clause 4.6 of the Supply Agreement reads:

4 OTHER TERMS & CONDITIONS

...

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 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

FSH relies on cl 4.6 to make the argument that both parties understood that the “mere passivity or tolerance shall not be construed as a waiver”.

153 However, we find that the present case is not a situation which falls under cl 4.6. We agree with SGI that the waiver in the present case is not based on a “failure or delay” in FSH’s exercise of the right to terminate. Instead, the finding of waiver was premised on *positive intimations* by FSH that it was affirming the contract.

154 SGI relies on the New South Wales Court of Appeal decision of *Pittmore Pty Ltd v Chan* [2020] NSWCA 344 (“*Pittmore*”). *Pittmore* involved a clause that, much like cl 4.6, purported to prohibit a finding of waiver arising from the “failure, delay or omission by a party to exercise a power or right” (at [21]):

13. WAIVER

13.1 The failure, delay or omission by a party to exercise a power or right conferred on that party by this Deed will not operate as a waiver of that power or right, and any single exercise of a power or right will not preclude another exercise of that power, or the exercise of another power or right under this Deed.

155 The New South Wales Court of Appeal (Leeming JA, with whom Bell P and Brereton JA agreed) expressed the view, in *obiter*, that on a “natural” reading, the clause did not bar a finding that there were positive acts that amounted to a waiver of the right (at [130]):

Mr Insall maintained that cl 13 had no operation in relation to election or affirmation. He also adopted a construction to the effect that the clause applied to inaction by way of failure, delay or omission, *but not to positive acts amounting to affirmation. That, with respect, is a natural way to read the clause.* It is expressed to preclude inactivity by a party from amounting to a waiver of rights arising under the contract. *It is not expressed to apply to positive acts of the party which are sufficient to affirm the contract.* It is not necessary to express a concluded opinion on the operation of cl 13 ... but I favour the view that cl 13 would not prevent Pittmore’s positive acts constituting an election or affirmation.

[emphasis added]

156 As we explained above at [109]–[127] and [139]–[148], our finding that FSH had waived its right to terminate and its right to damages was not premised on FSH’s failure or a delay to exercise those rights. Instead, there were positive acts on the part of FSH that constituted an affirmation of the Supply Agreement and the 3mil POs and a waiver of the right to claim damages. Therefore, cl 4.6 is not an obstacle to our finding of waiver.

Whether FSH was in breach of the Supply Agreement

FSH’s cancellation of the open orders was a breach of the Supply Agreement

157 At the hearing, Ms Mak accepted that if FSH was not entitled to rely on the 20 April 2021 E-mail to accept any repudiatory breach to terminate the contract, it would follow that FSH’s cancellation of the open orders would in turn be a breach of the Supply Agreement.

158 This concession is correct. FSH had, by way of the 20 April 2021 E-mail, clearly conveyed to SGI that it would not perform its contractual obligations at all (namely, to accept delivery of the gloves). This constitutes an anticipatory breach falling squarely within Situation 2 of the *RDC Concrete* framework, as was indeed found to be the case by the Judge (*RDC Concrete* at [93]; Judgment at [293]). We also note that given our finding that FSH had waived SGI's repudiatory breach of cl 1.2 and that, therefore, there was no valid termination of the Supply Agreement and the 3mil POs by FSH on 6 July 2021 (see [134] above), it follows that FSH's breach was not limited to the period between 20 April 2021 to 6 July 2021.

The Remedies

159 In the light of the above findings, we consider the appropriate remedies to be ordered.

The award of US\$51,239,650 in damages to FSH for the Late Delivery Claim is set aside

160 Given our finding that FSH had waived its right to claim damages for SGI's breach of cl 1.2 of the Supply Agreement (see [150] above), this award of damages under the Late Delivery Claim cannot stand and must therefore be set aside.

The monies paid upfront by FSH to SGI are refundable advance payments

161 We agree with the Judge that the monies totalling US\$64,782,300 paid to SGI by FSH were refundable advance payments and not forfeitable deposits.

162 In *Li Jialin and another v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 (“*Li Jialin*”), the Court of Appeal set out the following framework for determining whether a payment is a forfeitable deposit (*Li Jialin* at [73]):

(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.

(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.

(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 therefore unenforceable and the claimant’s right to recovery of the deposit will be left to be decided under the general law.

163 Here, it is clear from the terms of the Supply Agreement that there is no express or implied right to forfeit the advance payments.

164 While SGI argues that it is expressly entitled to forfeit the sums “on a proper interpretation” of the Supply Agreement, it has failed to identify any specific term or provision that purportedly confers such a right.

165 On the contrary, cl 2.4 makes it clear that SGI has the right to set-off any of the advance payment against any outstanding invoices. As noted by the Judge

(Judgment at [457]), cl 2.4 of the Supply Agreement confers on SGI the right to, *inter alia*, “set-off any of the advance payment against any outstanding invoices”. If the advance payments could be forfeited as SGI claimed, it would not make sense to set-off the outstanding invoices against the forfeited sum which would contractually belong to SGI. SGI’s argument that cl 2.4 is merely “a mechanism for accounting between the parties” does not help its case – this only goes to show that the parties did in fact consider how the advance payments should be dealt with in the event of a breach. For this reason, there is also no “true gap” in the Supply Agreement that the court may imply a term to fill (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [101]).

166 Under the *Li Jialin* framework, having found that there is no express or implied right for forfeiture, it is strictly unnecessary to examine whether the sum was reasonable as an earnest. However, for completeness, we agree with the Judge that an 80% deposit would not be reasonable as an earnest.

167 A deposit’s primary purpose is to guarantee that the purchaser means business, and “guarantee that the contract shall be performed” (*Polyset Ltd v Panhandat Ltd* [2002] HKCU 145 at [36] and [63]). If an advance payment is too large, it will no longer be objectively justifiable by reference to the purpose and functions which a deposit properly serves.

168 Here, the advance payment of 80% of the contract price is, as rightly pointed out by the Judge, “both in terms of percentage of the total price and in absolute terms, simply so large that it cannot be objectively justified with reference to the functions which a true forfeitable deposit is supposed to serve” (Judgment at [462]). Even when considering the supposedly special circumstances, such as the large size of the transaction, the lack of prior dealings

between parties, and the disparity in the supply and demand of gloves, there is no justifiable reason for the deposit to have been 80% of the total price. As the Judge observed, the gloves were in SGI's own generic brand, which could be readily on-sold to other customers (given the high demand exceeding supply), should FSH renege on the agreement, and this is what SGI eventually did in mitigating its loss.

169 When the above points were put to counsel for SGI, Mr Ushan Saminda Premaratne ("Mr Premaratne"), during the appeal, Mr Premaratne readily acknowledged the force of these arguments, and did not seriously pursue this point any further.

170 As such, we turn next to consider FSH's entitlement to the sums paid upfront to SGI under the general law. In the court below, the Judge found that the sums paid in advance by FSH to SGI were divisible, with each individual order constituting a divisible part of the broader contract under the 3mil POs. In relation to the sums paid by FSH to SGI for the unfulfilled orders under the 1st PO and the 2nd PO save for the 92,559,000 gloves which had been produced but which FSH failed and/or refused to take delivery of, there had been a total failure of consideration. SGI had thus been unjustly enriched and would have to return those monies, which it had not earned (Judgment at [471]–[472]). We see no reason to disturb the Judge's findings in this regard save that the refundable advance payments are reduced by the sum of US\$7,644,233.30 for the Produced Gloves Claim awarded to SGI (see [179]–[191] below).

171 For the above reasons, save for the adjustment in the sum to be refunded, this point of appeal is dismissed.

The award of pre-judgment interest on the refundable advance part payments is set aside

172 The Judge awarded pre-judgment interest on the refundable advance payments of US\$59,654,915.20. The Judge decided that the pre-judgment interest should begin 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” (Judgment at [478]).

173 However, by reason of our finding that FSH had waived its right to terminate the Supply Agreement and the 3mil POs (see above at [134]), this finding cannot stand. In our view, no pre-judgment interest should be awarded. As noted by the Court of Appeal in *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 (“*Grains and Industrial Products*”) at [137], the basis for an award of pre-judgment interest lies in the fact that the unsuccessful party had wrongfully kept the successful party out of monies to which he has been shown to be entitled, during which time, the unsuccessful party instead had the use of it.

174 In this case, the basis for the return of the sums is in unjust enrichment for a total failure of consideration (above at [170]). However, as FSH had waived its right to terminate, *SGI* was vested with the choice to terminate the Supply Agreement and the 3mil POs for FSH’s subsequent breach in refusing to take delivery of the gloves. *SGI* had, in fact, elected to affirm the Supply Agreement and the 3mil POs and would have continued to fulfil its obligations under those agreements if not for FSH’s refusal to take delivery. It should also not be overlooked that part of the refundable advance payments was for the 92,559,000 gloves which had been produced but which FSH refused and/or failed to take delivery of. In these circumstances, it could not be said that there

had been a total failure of consideration in respect of the remaining orders until the contract was brought to an end.

175 As such, SGI was under no obligation to return the refundable advance payments to FSH until FSH’s entitlement to them was finally determined by the court. The Judge’s award of pre-judgment interest on the US\$59,654,915.20 is hereby set aside.

SGI is not entitled to pre-judgment interest for the Unpaid Invoices Claim

176 The claim for the Unpaid Invoices is not disputed by FSH. The only dispute is whether interest ought to be awarded for this sum. Since the monies were advance payments which SGI could have set-off against the outstanding invoices, we agree with the Judge that no interest should be ordered as it was within SGI’s control to obtain payment by way of the set-off.

177 As earlier noted at [173], the basis for an award of pre-judgment interest lies in the fact that the unsuccessful party had wrongfully kept the successful party out of monies to which he has been shown to be entitled, during which time, the unsuccessful party instead had the use of it. The fact that the set-off was not automatic is irrelevant – the Judge declined to award contractual interest on the basis that SGI had essentially chosen to remain “kept out of monies” by refusing to effect the set-off, even though the quantum of advance payments made by FSH (US\$64,782,300) far exceeded the undisputed outstanding sum of US\$5,127,384.80 due to SGI under the invoices for the delivered gloves (Judgment at [302]).

178 SGI’s argument that “for the outstanding under the 5mil PO, there [were] no deposits or advance payments to utilise for any offset” is

misconceived. Clause 2.4 of the Supply Agreement entitles SGI to “set-off *any* of the advance payment against *any* outstanding invoices” [emphasis added]. The advance payments made in respect of the 1st PO and the 2nd PO may also be applied to set off the outstanding invoices due under the 5mil PO.

The award of US\$282,560.60 in damages to SGI under the Produced Gloves Claim is increased to US\$7,644,233.30

179 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.

180 The Judge found that the 92,559,000 gloves were in fact produced for FSH (Judgment at [307]). However, instead of awarding the contractual price for the 92,559,000 gloves, the Judge only awarded SGI its lost profits, which were calculated to be 5% of the applicable price (*ie*, US\$282,560.60). She reasoned that but for FSH’s breach, SGI would only have earned a net profit of 5% of the selling price less any variable costs of sales because she found that SGI did not incur any costs in purchasing the gloves from the SGG Manufacturers (Judgment at [315]).

181 We respectfully disagree. Even accepting that there is no evidence that SGI had paid any costs to the SGG Manufacturers, the proper award of damages should be the contractual price. If FSH had taken delivery, it would have been obliged to pay the full contractual price irrespective of whether SGI had paid any costs to the SGG Manufacturers. Therefore, but for FSH’s breach, SGI’s loss would have been the full contractual price of the 92,559,000 gloves produced but not shipped, at US\$104.20 per 1,000 gloves, subject to its efforts to mitigate its losses.

182 When this formulation of the damages was presented to counsel for FSH, Mr Jonathan Tan, he could not provide a satisfactory response other than to emphasise that there is no evidence that SGI had paid costs to the SGG Manufacturers. The payment arrangement between SGI and the SGG Manufacturers for the production of the gloves is an internal accounting matter. However, in order for a vendor to claim for damages against a buyer for failure to take delivery, it is not necessary for the vendor to satisfy the court that it had fully paid-up whatever costs may be due to the other parties in the chain. It is commercially unworkable to require this before awarding the contractual price for a breach of contract claim. Indeed, it is an established principle of law that an unpaid liability is capable of constituting recoverable loss (see *Royal & Sun Alliance Insurance Ltd v Tughans (a firm) (No 2)* [2024] 2 All ER 747 (at [60]); *Motor Insurers' Bureau of Singapore v AM General Insurance Bhd* [2018] 4 SLR 882 at [123]–[125]; *Inter-Pacific Petroleum Pte Ltd v Goh Jin Hian* [2024] SGHC 178 at [314]–[322]). Given this, in so far as Mr Tan may be suggesting that SGI had not established that such a *liability* existed, we disagree. The question of *payment* between SGI and the SGG Manufacturers is a separate issue altogether, but it does not change the fact that SGI is strictly liable to pay the SGG Manufacturers for the gloves they had produced for SGI.

183 In this respect, we note that the Judge had relied on the case of *Freight Connect (S) Pte Ltd v Paragon Shipping Pte Ltd* [2015] 5 SLR 178 (“*Freight Connect*”) to support her finding that the award of damages should not include the costs owed to the SGG Manufacturers and that SGI should instead be granted liberty to apply for directions when the real issues of the claims from the SGG Manufacturers should materialise into damages (Judgment at [317]–[319]).

184 In our view, *Freight Connect* is not applicable to the present case. *Freight Connect* concerned a claimant sub-charterer seeking an indemnity for potential claims from a third-party head charterer arising out of the defendant's failure to ship cargo. The Court of Appeal found that where a claimant faces a potential claim from 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 (such as differences in the contracts between the claimant and the defendant as compared with those made between the claimant and the third party and the obligation of the third party to mitigate damages) can be determined and damages quantified (*Freight Connect* at [53]–[54]). Thus, the Court of Appeal declined to grant the claimant sub-charterer the indemnity sought.

185 However, the present case does not involve any potential third-party claims for damages arising from FSH's breach of contract. Rather, SGI's liability to the SGG Manufacturers has already materialised – it stems from SGI's contractual obligation to pay costs for the gloves that the SGG Manufacturers had produced for it. There are no “real issues to be determined” or damages to be quantified. The principle in *Freight Connect*, which is intended to prevent premature awards for potential claims for resulting damage, has no application to crystallised contractual liabilities incurred before the breach.

186 Given our finding (above at [71]) that the price increases by SGI were not in breach of cl 2.1, it follows that the contractual price of the gloves which should be used to calculate SGI's losses would be US\$104.20 per 1,000 gloves, the latest price agreed between the parties (see [60] above).

187 Regarding SGI's claim for storage costs, the Judge disallowed SGI's claim on the ground that the storage costs were not incurred by SGI, but by Sigma, which remains a separate legal entity from SGI (Judgment at [331]).

188 We agree. We note that on SGI's own case, SGI had not, in fact, incurred any costs for storing the produced but undelivered gloves. Instead, SGI's case is that as SGI had to store the gloves in its warehouses in Malaysia, the *SGG Manufacturers* had to store *other materials* in nearby warehouses and thereby incurred additional costs. SGI alleges that it is liable to the SGG Manufacturers for *those additional costs*. However, SGI has not established that it is liable to the SGG Manufacturers for the cost of leasing those storage spaces, and therefore, has not proven their loss.

189 Finally, the Judge found 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 gloves to other third-party customers between March 2022 and April 2023 in mitigation of SGI's losses (Judgment at [336]). In this regard, she found that SGI had not acted unreasonably in only starting to sell the gloves in March 2022.

190 We agree. As the Judge rightly observed, there was no obligation on SGI to have started mitigation between 20 April 2021 and 6 July 2021, as the parties were still in negotiations and there was a reasonable possibility that FSH would eventually perform its contractual obligations (Judgment at [333]).

191 In the circumstances, we quantify SGI's loss under the Produced Gloves Claim to be the sum of US\$7,644,233.30 (being the total contractual price of the 92,559,000 produced gloves at a price of US\$104.20 per 1,000 gloves, less

US\$2,000,414.50) which is to be set-off against the refundable advance payments – see [197(b)(iv)] below.

SGI had fully mitigated its loss and have not proven any additional loss under the Cancelled Gloves Claim

192 In the court below, SGI had primarily sought specific performance of the open orders under the 3mil POs. However, at the hearing before us, Mr Premaratne confirmed that SGI was no longer seeking specific performance. Given this, the issue is whether SGI should be awarded damages in lieu of specific performance, comprising:

- (a) SGI’s loss of profits due to the cancellation of the open 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 3mil POs 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 in purchasing latex to produce the remaining gloves.

193 The Judge declined to grant SGI any of the heads of loss claimed under the Cancelled Gloves Claim, as she found that SGI had fully mitigated its loss by re-allocating its production capacity to fulfilling new orders (Judgment at [357]).

194 We agree that SGI should not be entitled to any damages for the Cancelled Gloves Claim. The Judge’s finding of fact that SGI had fully

reallocated its production capacity to fulfilling new orders only extended to the losses arising from cancelled orders in the period between 20 April 2021 and 6 July 2021. Nevertheless, on SGI's own case, all "855,491,000 pieces of gloves" under the cancelled orders would have been delivered by May 2021 (Judgment at [347]). The Judge's finding would therefore still apply, given that SGI would not have incurred any losses from cancelled orders after May 2021 on its own case.

195 The Judge's other finding of fact, *ie*, that SGI had not proven that it earned lesser profits under the new orders as compared to the cancelled orders, effectively meant that SGI had fully mitigated its loss by reallocating its production capacity. On appeal, SGI argues that the Judge erred in finding that it had fully mitigated its loss by reallocating its production capacity because it *may* have lost the opportunity to make additional sales to other customers at higher prices or *may* have incurred additional costs. However, that is a matter for SGI to prove, which it failed to do. It is plainly insufficient for SGI to simply allege that this *may* be the case. In the circumstances, we affirm the Judge's finding that SGI had failed to prove any loss for the Cancelled Gloves Claim.

Conclusion

196 To conclude, we dismiss FSH's appeal and allow SGI's appeal in part. Below is a summary of our findings on liability:

- (a) SGI committed a repudiatory breach of cl 1.2 of the Supply Agreement. However, SGI did not breach cl 2.1 of the Supply Agreement in raising the prices for the gloves as FSH had agreed to the price changes: at [56] and [71].

(b) Although SGI's repudiatory breach of cl 1.2 of the Supply Agreement would in principle have entitled FSH to terminate the Supply Agreement and the 3mil POs on 20 April 2021 or 6 July 2021, FSH had waived these rights by its conduct. Accordingly, FSH did not terminate the Supply Agreement and the 3mil POs and is also not entitled to claim damages for SGI's breach of cl 1.2: at [134] and [150].

(c) We affirm the Judge's finding that FSH had committed a repudiatory breach of the Supply Agreement and the 3mil POs by renunciation through the 20 April 2021 E-mail: at [158].

197 As regards the remedies, a summary of our orders is set out below:

(a) Remedies awarded to FSH

(i) The Judge's award of the damages for the Late Delivery Claim arising from the breach of cl 1.2 of the Supply Agreement in the sum of US\$51,239,650 is set aside in light of our finding that FSH had waived its right to claim damages for SGI's breach: [160].

(ii) The Judge's finding that FSH is entitled to a refund of refundable advance payments paid to SGI is upheld less the sum of US\$7,644,233.30. The sum of US\$5,127,384.80 due from FSH to SGI under the Unpaid Invoices Claim should be set-off against the refundable advance payments. However, the Judge's finding on pre-judgment interest on this sum is set aside: at [161]–[175].

(b) Remedies awarded to SGI

(i) FSH had accepted that it is liable to SGI for the Unpaid Invoices Claim in the sum of US\$5,127,384.80 leaving only the question of pre-judgment interest. We agree with the Judge in rejecting SGI's claim for pre-judgment interest as it was always open to SGI to set-off the Unpaid Invoices Claim against the refundable advance payments: at [176]–[177].

(ii) In relation to the Produced Gloves Claim, the damages are increased to the sum of US\$7,644,233.30: at [191].

(iii) We affirm the Judge's finding that SGI had fully mitigated its losses under the Cancelled Gloves Claim and that SGI had not proven any additional losses it may have suffered: [194]–[195].

(iv) After taking into account the sums due to SGI for the Unpaid Invoices Claim and the Produced Gloves Claim of US\$5,127,384.80 and US\$7,644,233.30 respectively, the net sum payable to FSH for the refundable advance payments is US\$52,010,681.90 (US\$64,782,300 less US\$5,127,384.80 and US\$7,644,233.30).

Costs

198 As for the costs of the appeals and in the light of the parties' respective costs schedules for the appeals, we order FSH to bear SGI's costs for both appeals, which we fix in the sum of \$41,000 (all-in) and \$70,000 (all-in) for AD 101 and AD 102 respectively. This quantum takes into account the fact that FSH's appeal in AD 101 was dismissed, while SGI's appeal in AD 102 was only allowed in part. We also award SGI costs of \$165,000 (all-in) for the

proceedings below, taking into account the fact that SGI failed on some of the issues in the court below.

Steven Chong
Justice of the Court of Appeal

Debbie Ong Siew Ling
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

Mak Sushan, Melissa, Wong Ling Yun, Jonathan Tan Ming En and
Kwon Ha Jeong (Allen & Gledhill LLP) for the appellant in
AD/CA 101/2025 and respondent in AD/CA 102/2025;
Hewage Ushan Saminda Premaratne and Tan Liqi, Joseph (USP Law
LLC) for the respondent in AD/CA 101/2025 and appellant in
AD/CA 102/2025.
