

Swissco Offshore Pte Ltd v Seabed Offshore Pte Ltd
[2009] SGHC 30

Case Number : Suit 777/2007
Decision Date : 06 February 2009
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Bernard Yee Weng Wai and Adrian Aw Hon Wei (Gurbani & Co) for the plaintiffs;
Sharmini Yogarajah and Subashini Narayanasamy (Haridass Ho & Partners) for
the defendants
Parties : Swissco Offshore Pte Ltd — Seabed Offshore Pte Ltd
Contract

6 February 2009

Tay Yong Kwang J:

1 The plaintiff, the owner of a vessel named "Swissco Surf" ("the vessel"), agreed to sell the vessel to the defendant at the price of US\$2.25m. This was evidenced by a memorandum of agreement ("MOA") (on the Norwegian Sale Form 1993) dated 27 August 2007.

2 The MOA is in the following terms:

SWISSCO OFFSHORE (PTE) LTD

hereinafter called the Sellers, have agreed to sell, and

SEABED OFFSHORE PTE LTD or their nominee

hereinafter called the Buyers, have agreed to buy

Name: **M.T. SWISSCO SURF**

Classification Society/Class: **Germanischer Lloyd**

Built: **2007** By: **Berjaya Dockyard, Miri, Malaysia**

Flag: **Singapore** Place of Registration: **Singapore**

Call Sign: **9V7052** Grt/Nrt : **224/68 tons**

Register Number: **392696**

hereinafter called the Vessel, on the following terms and conditions:

Definitions

"Banking days" are days on which banks are open both in the country of the currency stipulated for the Purchase Price in Clause 1 and in the place of closing stipulated in Clause 8.

"In writing" or "written" means a letter handed over from the Sellers to the Buyers or vice versa, a registered letter, telex, telefax or other modern form of written communication.

"Classification Society" or "Class" means the Society referred to in line 4.

1. Purchase Price *US\$2,250,000.00 (United States Dollars Two Million and Two Hundred and Fifty Thousand Only)*

2. Deposit

As security for the correct fulfilment of this Agreement the Buyers shall pay a deposit of 10% (ten per cent) of the Purchase Price within *five (5)* banking days from the date of this Agreement. This deposit shall be placed with *R.S. Platou (Asia) Pte Ltd's account - Hongkong & Shanghai Banking Corporation Ltd, 21 Collyer Quay, #08-01 HSBC Building, Singapore 049320 USD A/C No. 260-XXXXXX-XXX, Swift Code No. hsbc sgsg*

and held by *R.S. Platou (Asia) Pte Ltd* in an escrow account for the Sellers and the Buyers, to be released *at time of delivery of the vessel* in accordance with joint written instructions of the Sellers and the Buyers. Interest, if any, to be credited to the Buyers.

3. Payment

The *balance 90% of the* said Purchase Price shall be paid in full free of bank charges to *Sellers' account : Swissco Offshore (Pte) Ltd c/o United Overseas Bank Ltd, Block 450 Clementi Avenue 3, #01-287/289, Singapore 120450, USD Account No. 130-XXX-XXX-X* on delivery of the Vessel, but not later than 3 banking days after the Vessel is in every respect physically ready for delivery in accordance with the terms and conditions of this Agreement and Notice of Readiness has been given in accordance with Clause 5.

4. Inspections

a)* The Buyers have inspected and accepted the Vessel's classification records. The Buyers have also inspected the Vessel at/in *Singapore* on 31st July and 21st August 2007 and have accepted the Vessel following this inspection and the sale is outright and definite, subject only to the terms and conditions of this Agreement.

* 4a) and 4b) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative 4a) to apply.

5. Notices, time and place of delivery

a) The Sellers shall keep the Buyers well informed of the Vessel's itinerary and shall provide the Buyers with *10, 7, and 3* days notice of the estimated time of arrival at the intended place of drydocking/underwater inspection/delivery. When the Vessel is at the place of delivery and in every respect physically ready for delivery in accordance with this Agreement, the Sellers shall give the Buyers a written Notice of Readiness for delivery.

b) The Vessel shall be delivered and taken over safely afloat at a safe and accessible berth or anchorage at *Seller's yard in Singapore* in the Seller's option.

Expected time of delivery: On and about 3rd week September 2007.

Date of cancelling (see Clauses 5c), 6b) (iii) and 14): *8th October 2007*

c) If the Sellers anticipate that, notwithstanding the exercise of due diligence by them, the Vessel will not be ready for delivery by the cancelling date they may notify the Buyers in writing stating the date when they anticipate that the Vessel will be ready for delivery and propose a new cancelling date. Upon receipt of such notification the Buyers shall have the option of either cancelling this Agreement in accordance with Clause 14 within 7 running days of receipt of the notice or of accepting the new date as the new cancelling date. If the Buyers have not declared their option within 7 running days of receipt of the Sellers' notification or if the Buyers accepted the new date, the date proposed in the Sellers' notification shall be deemed to be the new cancelling date and shall be substituted for the cancelling date stipulated in line 61.

If this Agreement is maintained with the new cancelling date all other terms and conditions hereof including those contained in Clauses 5a) and 5c) shall remain unaltered and in full force and effect. Cancellation or failure to cancel shall be entirely without prejudice to any claim for damages the Buyers may have under Clause 14 for the Vessel and not being ready by the original cancelling date.

d) Should the Vessel become an actual, constructive or compromised total loss before delivery the deposit together with interest earned shall be released immediately to the Buyers whereafter this Agreement shall be null and void.

6. Docking

b)** (i) The Vessel is to be delivered without drydocking. However, the Buyers shall have the right at their expense to arrange for an underwater inspection by a diver approved by the Classification Society prior to the delivery of the Vessel. The Sellers shall at their cost make the Vessel available for such inspection. The extent of the inspection and the conditions under which it is performed shall be to the satisfaction of the Classification Society. If the conditions at the port of delivery are unsuitable for such inspection, the Sellers shall make the Vessel available at a suitable alternative place near to the delivery port.

(ii) If the rudder, propeller, bottom or other underwater parts below the deepest load line are found broken, damaged or defective so as to affect the Vessel's class, then unless repairs can be carried out afloat to the satisfaction of the Classification Society, the Sellers shall arrange for the Vessel to be drydocked at their expense for inspection by the Classification Society of the Vessel's underwater parts below the deepest load line, the extent of the inspection being in accordance with the Classification Society's rules. If the rudder, propeller, bottom or other underwater parts below the deepest load line are found broken, damaged or defective so as to affect the Vessel's class, such defects shall be made good by the Sellers at their expense to the satisfaction of the Classification Society without condition/recommendation*. In such event the Sellers are to pay also for the cost of the underwater inspection and the Classification Society's attendance.

7. Spares/bunkers, etc.

The Sellers shall deliver the Vessel to the Buyers with everything belonging to her on board and on shore. All spare parts and spare equipment including spare tail end shaft(s) and/or spare propeller(s)/propeller blade(s), if any, belonging to the Vessel at the time of inspection used or unused, whether on board or not shall become the Buyers' property, but spares on order are to be excluded. Forwarding charges, if any, shall be for the Buyers' account. The Sellers are not required to replace spare parts including spare tail-end shaft(s) and spare propeller(s)/propeller blade(s) which are taken out of spare and used as replacement prior to delivery, but the replaced

items shall be the property of the Buyers. The radio installation and navigational equipment shall be included in the sale without extra payment if they are the property of the Sellers. Unused stores and provisions shall be included in the sale and be taken over by the Buyers without extra payment.

The Sellers have the right to take ashore crockery, plates, cutlery, linen and other articles bearing the Sellers' flag or name, provided they replace same with similar unmarked items. Library, forms, etc, exclusively for use in the Sellers' vessel(s), shall be excluded without compensation. Captain's, Officers' and Crew's personal belongings including the slop chest are to be excluded from the sale, as well as the following additional items (including items on hire):

The Buyers shall take over the remaining bunkers and unused lubricating oils in storage tanks and sealed drums and pay the current net market price (excluding barging expenses) at the port and date of delivery of the Vessel.

Payment under this Clause shall be made at the same time and place and in the same currency as the Purchase Price.

8. Documentation

The place of closing: *Singapore*.

In exchange for payment of the Purchase Price the Sellers shall furnish the Buyers with delivery documents, namely:

- a) Legal Bill of Sale in a form recordable in *Singapore* (the country in which the Buyers are to register the Vessel), warranting that the Vessel is free from all encumbrances, mortgages and maritime liens or any other debts or claims whatsoever, duly notarially attested and legalized by the consul of such country or other competent authority.
- b) Current Certificate of Ownership issued by the competent authorities of the flag state of the Vessel. *Original to be returned to Registry in exchange for Deletion Certificate.*
- c) Confirmation of Class issued within 72 hours prior to delivery.
- d) Current Certificate issued by the competent authorities stating that the Vessel is free from registered encumbrances. *Proof of this is incorporated in the Bill of Sale.*
- e) Certificate of Deletion of the Vessel from the Vessel's registry or other official evidence of deletion appropriate to the Vessel's registry at the time of delivery, or, in the event that the registry does not as a matter of practice issue such documentation immediately, a written undertaking by the Sellers to effect deletion from the Vessel's registry forthwith and furnish a Certificate or other official evidence of deletion to the Buyers promptly and latest within 4 (four) weeks after the Purchase Price has been paid and the Vessel has been delivered. *This is also subject to the return of original Registry back to Sellers for deletion.*
- f) Any such additional documents as may reasonably be required by the competent authorities for the purpose of registering the Vessel, provided the Buyers notify the Sellers of any such documents as soon as possible after the date of this Agreement.
- g) *The outstanding notation on the Cargo Ship Safety certificate is final approved safety plan*

which is with Class awaiting stamp of approval and will be forwarded to Buyers once Sellers receive the approved drawings.

h) Intact stability booklet awaiting final Class approval and Sellers will forward to Buyers once Class returns.

i) Copy of load test certificate by manufacturer confirmed by Class to be provided as soon as possible, the original to be provided at closing.

j) Certification of Sellers' naval architects on the stern roller in respect of calculation on capacity of the stern roller.

At the time of delivery the Buyers and Sellers shall sign and delivery to each other a Protocol of Delivery and Acceptance confirming the date and time of delivery of the Vessel from the Sellers to the Buyers.

At the time of delivery the Sellers shall hand to the Buyers the classification certificate(s) as well as all plans etc, which are on board the Vessel. Other certificates which are on board the Vessel shall also be handed over to the Buyers unless the Sellers are required to retain same, in which case the Buyers to have the right to take copies. Other technical documentation which may be in the Sellers' possession shall be promptly forwarded to the Buyers at their expense, if they so request. The Sellers may keep the Vessel's log books but the Buyers have the right to take copies of same.

9. Encumbrances

The Sellers warrant that the Vessel, at the time of delivery, is free from all charters, encumbrances, mortgages and maritime liens or any other debts whatsoever. The Sellers hereby undertake to indemnify the Buyers against all consequences of claims made against the Vessel which have been incurred prior to the time of delivery.

10. Taxes, etc.

Any taxes, fees and expenses in connection with the purchase and registration under the Buyers' flag shall be for the Buyers' account, whereas similar charges in connection with the closing of the Sellers' register shall be for the Sellers' account.

11. Condition on delivery

The Vessel with everything belonging to her shall be at the Sellers' risk and expense until she is delivered to the Buyers, but subject to the terms and conditions of this Agreement she shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted. However, the Vessel shall be delivered with her class maintained without condition/recommendation*, free of average damage affecting the Vessel's class, and with her classification certificates and national certificates, as well as all other certificates the Vessel had at the time of inspection, valid and unextended without condition/recommendation* by Class or the relevant authorities at the time of delivery.

"Inspection" in this Clause 11, shall mean the Buyers' inspection according to Clause 4a) or 4b), if applicable, or the Buyers' inspection prior to the signing of this Agreement. If the Vessel is taken over without inspection, the date of this Agreement shall be the relevant date.

* Notes, if any, in the surveyor's report which are accepted by the Classification Society without condition/recommendation are not to be taken into account.

12. Name/markings

Upon delivery the Buyers undertake to change the name of the Vessel and alter funnel markings.

13. Buyers' default

Should the deposit not be paid in accordance with Clause 2, the Sellers have the right to cancel this Agreement, and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest.

Should the Purchase Price not be paid in accordance with Clause 3, the Sellers have the right to cancel the Agreement, in which case the deposit together with interest earned shall be released to the Sellers. If the deposit does not cover their loss, the Sellers shall be entitled to claim further compensation for their losses and for all expenses incurred together with interest.

14. Sellers' default.

Should the Sellers fail to give Notice of Readiness in accordance with Clause 5a) or fail to be ready to validly complete a legal transfer by the date stipulated in line 61 the Buyers shall have the option of cancelling this Agreement provided always that the Sellers shall be granted a maximum of 3 banking days after Notice of Readiness has been given to make arrangements for the documentation set out in Clause 8. If after Notice of Readiness has been given but before the Buyers have taken delivery, the Vessel ceases to be physically ready for delivery and is not made physically ready again in every respect by the date stipulated in line 61 and new Notice of Readiness given, the Buyers shall retain their option to cancel. In the event that the Buyers elect to cancel this Agreement the deposit together with interest earned shall be released to them immediately.

Should the Sellers fail to give Notice of Readiness by the date stipulated in line 61 or fail to be ready to validly complete a legal transfer as aforesaid they shall make due compensation to the Buyers for their loss and for all expenses together with interest if their failure is due to proven negligence and whether or not the Buyers cancel this Agreement.

15. Buyers' representatives

After this Agreement has been signed by both parties and the deposit has been lodged, the Buyers have the right to place two representatives on board the Vessel at their sole risk and expense at *Sellers' yard in Singapore* on or about

These representatives are on board for the purpose of familiarisation and in the capacity of observers only, and they shall not interfere in any respect with the operation of the Vessel. The Buyers' representatives shall sign the Sellers' letter of indemnity prior to their embarkation.

16. Arbitration

c)* Any dispute arising out of this Agreement shall be referred to *and*, subject to the procedures applicable of *Singapore law*. The laws of *Singapore* shall govern this Agreement.

* 16a), 16b) and 16c) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative 16a) to apply.

Signed for and on behalf of Sellers

Signed for and on behalf of Buyers

SWISSCO OFFSHORE (PTE) LTD

SEABED OFFSHORE PTE LTD

(signature and stamp)

(signature and stamp)

Italics are in the original.

3 Pursuant to clause 2 of the MOA, the defendant paid US\$225,000 (10% of the purchase price) ("the deposit") to the brokers, R S Platou (Asia) Pte Ltd ("Platou"). The plaintiff averred that the defendant was in repudiatory breach of the MOA by failing to complete the sale of the vessel and to pay the balance of the purchase price. On 12 October 2007, it accepted the defendant's alleged repudiatory breach and cancelled the agreement pursuant to clause 13 of the MOA. Accordingly, the plaintiff claimed that it was entitled to forfeit the deposit paid by the defendant, together with any interest earned thereon.

The plaintiff's case

4 Alex Yeo, the managing director of the plaintiff, testified that the vessel, built in 2007, is a 26m long, twin-screw Anchor Handling Tug/Supply vessel ("AHTS"). The plaintiff took delivery of the vessel around end June 2007.

5 Sometime in the middle of July 2007, Jimmie Wee, a broker from Platou, enquired whether the plaintiff had any AHTS for sale or for charter. The plaintiff proposed the vessel for charter at S\$75,000 a month. The prospective charterer asked to inspect the vessel before making any commitment and was permitted to do so by the plaintiff. The inspection took place on 31 July 2007 at the plaintiff's yard.

6 The prospective charterer enquired whether certain modifications could be made to the vessel. In particular, it wanted an "A-frame" for anchor-handling to be installed. As a result of this request, the plaintiff became less keen to charter the vessel to the prospective charterer as it was not a known entity to the plaintiff. The plaintiff wanted some sort of security first.

7 Around this time, the plaintiff found out that the prospective charterer was Pacmar Offshore Pte Ltd ("Pacmar"). Platou also informed the plaintiff that Pacmar was prepared to purchase rather than charter the vessel. The plaintiff proposed the price at US\$2m on an "as is where is" basis.

8 The next day, the plaintiff received a draft MOA from Platou in which the sale price was stated to be US\$2.25m and the defendant was named as the buyer. Alex Yeo was naturally pleased with the price and he started to negotiate on the other terms of the MOA through Platou.

9 The defendant wanted clause 4(a) deleted as it was of the view that the inspection on 31 July

2007 was for the purpose of charter only and not of sale. The plaintiff disagreed as there was no difference in an inspection for one or the other purpose. Nevertheless, the plaintiff agreed to a second inspection for the defendant to satisfy itself that the vessel was suitable for its purpose and that the vessel's documents were in order.

10 A second inspection took place on 21 August 2007. The defendant found that some of the vessel's documents were either not acceptable or not available. As the plaintiff was sure that the documentation would be resolved in due time, it proposed that this issue be dealt with in the MOA. The three documents that were in issue were the Cargo Ship Safety Equipment Certificate, the vessel's stability booklet and the Load Test Certificate for the towing winch.

11 The Cargo Ship Safety Equipment Certificate that was available during the inspection was an interim certificate issued by Germanischer Lloyd, the vessel's classification society, on 17 August 2007. It contained the notation "Approved Fire Control & Safety Plan to be provided onboard". The defendant wanted the plaintiff to comply with this. At that time, the said safety plan had been submitted already to the classification society and the plaintiff was awaiting its approval. As the plaintiff was unable to say when approval would be given, it proposed that the MOA provide that the Cargo Ship Safety Equipment Certificate be handed over to the defendant when the safety plan was approved.

12 Similarly, the stability booklet was also awaiting approval at that time. The same proposal was made by the plaintiff regarding this document.

13 The defendant wanted the load test certificate for the towing winch, which was not available during the inspection, to be provided on board the vessel. The plaintiff informed Platou that this certificate issued by the manufacturer of the towing winch would be in the operation manual and that would be provided to the defendant at the time of delivery of the vessel. The defendant insisted on a copy of the certificate to be provided as soon as possible. The plaintiff agreed to do so.

14 Earlier in the proceedings, the plaintiff took the position that the document referred to in clause 8(i) of the MOA referred to the certificate for the crane. After having considered the documents and correspondence in greater detail, it now believed that the document in clause 8(i) was the load test certificate for the towing winch.

15 At about 5.18pm on 27 August 2007, Alex Yeo received an email attaching a draft MOA from Platou's Frances Claire, with clause 8(g) to 8(j) included. He accepted these 4 clauses and proposed two further amendments. Platou reverted to the plaintiff with a further draft incorporating the said two further amendments but Alex Yeo did not read that email in the office that evening. At about 7.30pm that evening, Platou sent a copy of the MOA signed and stamped by Pacmar on behalf of the defendant. Alex Yeo recalled that he did not sign the MOA immediately.

16 At about 9.44am on 28 August 2007, the plaintiff emailed a copy of the winch manufacturer's test certificate to Platou. At about 10am, the plaintiff received an email from Frances Claire of Platou stating that the defendant wanted the manufacturer's test certificate to be approved by the classification society (referred to as "Class"). The plaintiff was puzzled as such certificate for the towing winch was never endorsed nor approved by Class in practice. That email from Frances Claire also stated that her colleague Jimmie Wee had apparently informed the defendant that the manufacturer's test certificate would be endorsed by Class. Alex Yeo did not tell Jimmie at any time that the manufacturer's test certificate would be endorsed by Class. All that he told Jimmie was that the equipment used to test the winch was approved by Class. Accordingly, Alex Yeo emailed Frances Claire to state the correct position and that he would send her the relevant documents from the

towing winch manufacturer.

17 Alex Yeo had still not looked at the MOA sent by Frances Claire the night before. He was therefore unaware that clause 8(i) of the MOA had been amended to read "load test certificate by manufacturer confirmed by Class". Later that afternoon, he sent to Platou the documents showing that the equipment used to test the winch was endorsed by Class. He also informed Platou that he would sign the MOA after the defendant confirmed that the documents sent were sufficient for its purposes. The email of 17 September 2007 from Frances Claire to Pacmar stated:

With respect to items: -

(i) Copy of load test certificate by manufacturer – This has been forwarded to you on 28th August and has been accepted as per the telecon between our Jimmie Wee and your Capt Kok on/about the same day.

(j) ...

18 Alex Yeo signed the MOA either in the evening of 28 August 2007 or the next morning. After that, he returned the signed MOA to Platou. He believed that he must have received Jimmie Wee's confirmation that the towing winch documents were in order because he would not have signed the MOA otherwise. When he was signing the MOA, he also noticed that the MOA was signed by Pacmar on the defendant's behalf. He therefore assumed that Pacmar was the defendant's representative or nominee and added in his handwriting the words "PACMAR SHIPPING PTE LTD" in brackets after the words "or their nominee" in the preamble of the MOA.

19 Still feeling uneasy that the MOA was signed by Pacmar instead of the defendant, Alex Yeo asked Platou to prepare a fresh MOA for the defendant to sign. That was done and Alex Yeo signed that MOA (still dated 27 August 2007) on 30 August 2007.

20 On 5 September 2007, Platou received the deposit from the defendant. On 10 September 2007, the plaintiff informed Platou and the defendant that the vessel would be delivered on 19 September 2007, giving the 10-day notice stipulated in the MOA. This was followed by the 7-day notice on 13 September 2007 and the 3-day notice on 15 September 2007. In the meantime, the plaintiff's staff was told to prepare for the completion of the sale of the vessel, including getting ready all the vessels' documents except those which were still with Class. On 17 September 2007, the plaintiff notified Platou and the defendant that the vessel would be handed over at noon on 19 September 2007. Because of the handing over that day, Alex Yeo postponed his overseas business trip.

21 On 19 September 2007, the defendant's Capt Sitki Kok went to the plaintiff's premises together with Platou's Jimmie Wee and Frances Claire. Capt Sitki Kok informed Alex Yeo that completion could not take place that day as the defendant's person-in-charge was not available and requested that it be postponed to the next day. Alex Yeo was surprised by this request as there was no earlier indication that there would be delay. Disappointed though he was, he acceded to the defendant's request. He then proceeded on his business trip.

22 While he was overseas, he was told by his staff that the defendant had refused to complete the sale on 20 September 2007. The defendant had brought along an engineer and a surveyor who proceeded to inspect the entire vessel again and then drew up a list of alleged deficiencies which the defendant wanted the plaintiff to undertake to rectify. As the plaintiff did not give the undertaking sought, the defendant refused to complete the sale.

23 Jimmie Wee forwarded the defendant's list of alleged deficiencies to Alex Yeo. After perusing the list, Alex Yeo thought the allegations were baseless and sent an email on 24 September 2007 to rebut them. The next day, the defendant responded, still insisting that the alleged deficiencies had to be rectified. Alex Yeo then gave the defendant an ultimatum to complete the sale the next day. The defendant suggested that an independent surveyor be appointed to determine whether the deficiencies were made out and whether the vessel was ready for hand-over. The plaintiff refused as the defendant had inspected the vessel twice before signing the MOA and agreeing to purchase "as is where is". The plaintiff decided to call off the deal as a result of the defendant's breach in refusing to complete the sale.

24 On 5 October 2007, Platou informed the plaintiff that the defendant wanted a refund of the deposit. The plaintiff refused the refund and instructed its solicitors to write to the defendant and to Pacmar to offer a final opportunity to complete the sale by 6pm on 8 October 2007. That deadline passed without any positive outcome.

25 On 12 October 2007, the plaintiff's solicitors demanded that the deposit be released to the plaintiff. Platou refused to release the deposit to either party unless joint instructions were given. On 17 October 2007, the defendant's solicitors in turn demanded the release of the deposit to the defendant. On 13 December 2007, the plaintiff commenced this suit.

26 The plaintiff denied that it had failed to give notice of readiness for delivery of the vessel. It also denied that the Cargo Ship Safety Equipment Certificate and the stability booklet were to be delivered in exchange for the balance of the purchase price, relying on clauses 8(g) and (h) of the MOA. The plaintiff reiterated that it did not agree to provide a manufacturer's certificate for the towing winch which was confirmed by Class nor did it represent that the towing winch would be approved by Class. Although the Class Maintenance Certificate was dated 20 September 2007 (and hence not available on 19 September 2007), it was not a document "on board the vessel" that had to be handed over to the defendant upon delivery of the vessel. The relevant document was the Interim Certificate of Class dated 26 June 2007 which was ready on 19 September 2007. In any event, the defendant ought to know that the Class Maintenance Certificate would not be issued until all the recommendations made by Class have been complied with and it followed that this certificate would only be issued after the Cargo Ship Safety Equipment Certificate and the stability booklet were ready. Because of the defendant's request that the completion be postponed one day, the plaintiff "chased Class to have the two outstanding documents ready and to also issue the Class Maintenance Certificate by 20 September 2007, which they did". That was done out of good faith. The date of the Class Maintenance Certificate was irrelevant at any rate since the defendant was not ready to take delivery either on 19 or on 20 September 2007.

27 As far as Alex Yeo was concerned, Jimmie Wee was the defendant's broker to facilitate the sale of the vessel as the plaintiff did not appoint him as its broker. Alex Yeo assumed that Jimmie Wee was acting for the defendant because the offer came through him. The plaintiff only found out later that there was another broker (Pacmar) in the transaction.

28 There was a commission agreement between the plaintiff and Platou. Platou asked the plaintiff to indicate a price higher than the asking price of US\$2m so that the excess would be paid to Platou as commission for the sale. The plaintiff accepted that when Platou wrote to Pacmar on 12 July 2007 stating that it was doing so "on behalf of our direct clients, Swissco Offshore", the plaintiff had employed Platou although he disagreed that Platou was the plaintiff's broker and agent. The plaintiff did not know whether there was an agreement on agency between Pacmar and the defendant.

29 Jimmie Wee gave oral testimony. He joined Platou as a broker in February 2006. It was Pacmar

which approached Platou while looking for a vessel to charter for the defendant's operations in India. Platou then recommended the vessel here. When the negotiations turned from charter to sale, Pacmar requested payment of 1% of the price (amounting to US\$22,500) upon the completion of the sale of the vessel. Platou agreed as it would be making a commission of US\$250,000 if the deal went through. Jimmie Wee could see from the start that this deal was not going to be straightforward and hence obtained a commission higher than that usual in the market from the plaintiff.

30 On 16 July 2007, Platou sent an email to the plaintiff stating that it was acting "on behalf of our direct clients, Pacmar" in looking for a bare-boat charter because Pacmar had approached Platou. The buyer agreed to place the deposit with Platou as it was a neutral party representing both the seller and the buyer. Platou would be paid a commission by the plaintiff only. Jimmie Wee regarded both Pacmar and the plaintiff as "direct clients" and believed that the defendant was Pacmar's subsidiary. He did not know that Pacmar was a broker. He regarded Pacmar as the buyer of the vessel.

31 When Jimmie Wee spoke to the defendant's Capt Sitki Kok in August 2007, the latter insisted that he wanted the Bollard Pull Certificate (which Jimmie Wee equated with the manufacturer's load test certificate) to be confirmed by Class although Jimmie Wee was trying to persuade him to accept the vessel "as is where is". Capt Sitki Kok said the defendant would sign the MOA if the words "confirmed by Class" were inserted. Jimmie Wee conveyed the request to Alex Yeo who told him to go ahead with the insertion of the words.

32 After the defendant signed the MOA on 27 August 2007, Jimmie Wee informed Alex Yeo it was alright to sign the MOA. Alex Yeo took a couple of days before signing it but not before adding Pacmar's name to the MOA.

33 Tommy Yeo, the operations general manager of the plaintiff, was not involved in the negotiations leading up to the sale of the vessel. His duty was to attend the completion of the sale on 20 September 2007 as Alex Yeo would be abroad that day.

34 After the defendant inspected the vessel that day, it produced a list of alleged deficiencies which it wanted Tommy Yeo to acknowledge by signing on it and to confirm that they would be rectified before the defendant signed the protocol of delivery. One of the alleged deficiencies was that the plaintiff would have to modify the engine room. The defendant also wanted additional radar and other navigational equipment installed. Tommy Yeo refused to sign on the list as he had to check with his management first. The completion therefore did not take place that day.

35 William Tan, a shipping executive of the plaintiff, testified that he was ready with the necessary documents on 19 and 20 September 2007. He left it to Tommy Yeo to deal with the defendant's representatives as his duty was merely to release the documents to the defendant.

The defendant's case

36 Capt Sitki Kok, a director of the defendant and managing director of Pacmar, testified that the defendant's business contact in India required a suitable tug for a project in India. Roslinda, Pacmar's chartering executive, told him that Platou had informed her that the plaintiff had a new tug for bare-boat charter. After some negotiations, Platou informed the defendant that the plaintiff would rather sell the vessel. The negotiations for the sale of the vessel were handled by Roslinda.

37 The defendant denied that Platou was acting for both the plaintiff and the defendant. At all material times, Platou was acting as broker for the plaintiff. After all, for the sale, the plaintiff had agreed to pay a commission of more than 10% to Platou, an amount considerably more than the

market practice of 1%.

38 The defendant made it known to the plaintiff that it was buying the vessel solely for the 40 ton towing winch. When Capt Sitki Kok spoke with Jimmie Wee in the evening of 27 August 2007, the former insisted that the manufacturer's load test certificate be confirmed by Class. From his many years of experience in the shipping industry, Capt Sitki Kok knew that any equipment used on board a tug had to be approved by Class. That was also the practice in India. When the defendant studied the manufacturer's load test certificate, the vessel's particulars were stated as "rated pull 5 ton ..." and "brake holding 15 ton ...", contrary to the defendant's knowledge that the particulars should read "single drum hydraulic 40 tons ..." and "brake holding 80 tons ...". The certificate had no meaning unless it clearly stated that the towing winch was confirmed or approved by Class. He therefore insisted that amendments be made to clause 8(i) of the MOA before he signed.

39 In the evening of 27 August 2007, Platou sent page 5 of the MOA incorporating the amendment to clause 8(i). The defendant then signed the MOA. The next day, Jimmie Wee called to say that he was sending over the manufacturer's certificate which had been approved by Class. However, when the defendant got the certificate, there was no indication therein that it had been approved by Class. Jimmie Wee telephoned Capt Sitki Kok to try to persuade him to accept the certificate but the latter insisted on Class approval. Later, Roslinda also showed Capt Sitki Kok two documents sent to her by Platou. They were an Attestation of Marine Equipments Pte Ltd Hydraulic Cylinders issued by Bureau Veritas dated 7 January 2005 (a document issued before the vessel was built) and a Certificate of Calibration issued by Det Norske Veritas Pte Ltd dated 29 June 2007. According to Platou, the equipment referred to in these two documents was the manufacturer's test equipment used to test the winch and the said equipment was Class approved. However, the documents made no reference to the towing winch. The defendant was concerned that the manufacturer's certificate and the two documents did not confirm that the load test done on the towing winch was confirmed by Class as required under clause 8(i) of the MOA. Jimmie Wee called to ask Capt Sitki Kok to accept the documents but Capt Sitki Kok did not because accepting them would mean that the defendant would have to incur time and costs to do the load test to get the towing winch confirmed by Class.

40 As the defendant's technical personnel were not available on 19 September 2007, the defendant requested that the completion date be pushed back one day. On 20 September 2007, the defendant arranged for an independent surveyor to inspect the vessel together with the defendant's technical personnel. Several items were found not to be in order. The plaintiff said that it could rectify them provided the defendant signed the protocol of delivery. Capt Sitki Kok was prepared to sign the said protocol provided the defendant was able to make remarks on the protocol to the effect that the plaintiff would attend to the deficiencies. As the plaintiff insisted on having a clean protocol, the defendant drafted and typed a list of the deficiencies for the plaintiff to sign and to rectify by 10 October 2007. The plaintiff refused to do so and the defendant's representatives then left the plaintiff's premises.

41 Out of goodwill, on 26 September 2007, the defendant proposed the appointment of a surveyor to check the readiness of the vessel for delivery. The plaintiff did not accept the proposal. The plaintiff was in breach by failing to hand over to the defendant the requisite documents stipulated in clause 8(g), (h) and/or (i) of the MOA.

42 Karci Cem, the general manager of Pacmar, the defendant's agent, was Pacmar's technical manager at the material time. He joined Pacmar in August 2003 and his duties involved the taking and handing over of vessels and commercial and technical management for vessels. He was not involved in the negotiations between the plaintiff and the defendant concerning the sale of the vessel but took part in the technical matters just before and after the completion date.

43 On 17 September 2007, after receiving the notice that the plaintiff was ready to deliver the vessel on 19 September 2007, he liaised with Jimmie Wee via email regarding the documentation for the vessel. The next day, he received some of the requested documents from Jimmie Wee. Roslinda then contacted Platou about the omitted documents, including a copy of the manufacturer's load test certificate confirmed by Class. The copy of this certificate for the towing winch received in August 2007 was not confirmed by Class. Because of this, Roslinda informed Platou that the completion might not be able to take place as scheduled on 19 September 2007, enquiring also whether the plaintiff would still like to meet at 2pm on 19 September 2007.

44 On 19 September 2007, Capt Sitki Kok and Roslinda went to the plaintiff's premises to show that the defendant was serious about buying the vessel. On 20 September 2007, Capt Sitki Kok, Karci Cem and Roslinda brought along an independent surveyor to inspect the vessel. The plaintiff was represented by Tommy Yeo, William Tan and two others. Jimmie Wee and Frances Claire of Platou were also present. The surveyor found that several items were not in order as some of the drawings and documents were not present on board. The plaintiff's representatives said that they would be able to get the documents from their office.

45 A few hours later, in the plaintiff's conference room, the defendant was asked to sign the protocol of delivery. As some of the documents presented were not in accordance with the terms of the MOA, Karci Cem annotated some remarks on the list. One missing document was a copy of the load test certificate which had to be confirmed by Class pursuant to clause 8(i) of the MOA. The documents stipulated in clause 8(g) and (h) were not presented on 20 September 2007. The plaintiff offered a letter of undertaking to hand over these two missing documents once they were approved by Class. Karci Cem asked for evidence that these two documents were with Class pending approval and enquired about the stage of the application. The plaintiff was not able to produce the evidence requested. Accordingly, the defendant took the position that the plaintiff's undertaking was insufficient as the plaintiff was required under clause 8 to present these documents at the completion in exchange for the balance of the purchase price of the vessel.

46 Capt Sitki Kok said that he would sign the protocol of delivery if he were allowed to make a remark therein stating the items that were not presented. Alternatively, the plaintiff could sign on the defendant's list of missing documents, confirming that the items therein were not in order and would be rectified not later than 10 October 2007. After consulting Alex Yeo via telephone, the plaintiff's representatives did not sign the defendant's list of missing documents. The defendant then left the plaintiff's premises.

47 On 21 September 2007, Karci Cem emailed Platou about the failed delivery of the vessel, setting out the items found not to be in order, among which were the documents mentioned in clause 8(g), (h) and (i). The email ended by saying that the defendant was awaiting the plaintiff's revised readiness date.

48 Later that day, Jimmie Wee sent Pacmar a copy of the plaintiff's letter to the defendant alleging that the defendant was in breach of the MOA and that the plaintiff intended to forfeit the deposit. On 24 September 2007, Pacmar replied to reiterate its position that it was the plaintiff which was in breach, setting out in detail the missing documents and stating that the defendant was waiting for the revised delivery date. An exchange of email between the plaintiff and Pacmar followed

49 On 26 September 2007, the defendant proposed the mutual appointment of a surveyor to check the readiness of the vessel for delivery. The plaintiff did not accept the proposal.

50 On 5 October 2007, Pacmar wrote to Platou to ask for the return of the deposit but Platou

replied to say that as the broker, it would only release the deposit upon joint instructions from both parties. The same day, Pacmar received the plaintiff's solicitors' letter regarding the documents in clause 8(g), (h) and (i) of the MOA. Karci Cem was surprised by the assertion that the load test certificate in clause 8(i) related to the crane and not the towing winch on the vessel. This could not be correct. The plaintiff's solicitors' letter also provided for "a final opportunity to complete the sale of the vessel by 6pm on Monday, 8 October 2007", failing which the plaintiff would cancel the MOA and forfeit the deposit. The defendant did not attend on 8 October 2007 as it was of the view that the plaintiff was still not ready to complete the sale.

51 Further correspondence ensued between the parties' respective solicitors, with the plaintiff's solicitors maintaining that the load test certificate in clause 8(i) of the MOA referred to the crane and not the towing winch. The plaintiff has now conceded that its stand on this was erroneous (see [14] above).

52 The following was also mentioned in the defendant's list of items for rectification:

Additional bunk for two (2) extra crews. Total ten (10) crews.

Karci Cem explained that the vessel was built to accommodate 10 crew members but, after modification, it had only 8 bunks for the crew. He did not know when the modification was done. Under Singapore regulations, he said, the defendant required 10 crew in order to trade in international waters. The other alleged deficiencies in the list were items covered in the MOA. For the last item in that list, the Bollard Pull Test Report, he explained that it was not the same as the manufacturer's load test certificate. In any event, that item was deleted by mutual agreement between the parties subsequently. He disagreed with the plaintiff's suggestion that the defendant conducted another inspection on 20 September 2007 for the sole reason of finding some way to get out of the sale of the vessel.

53 Roslinda testified that her duties in Pacmar included sourcing for dredging equipment and vessels for purchase or for charter for offshore projects. She had some 15 years of experience in chartering or ship brokering before joining Pacmar in 2007.

54 The first inspection in July 2007 was with a view to the defendant chartering the vessel from the plaintiff. It was to ascertain whether the vessel was suitable for the project in question. There were discussions on Pacmar's request for an A-frame to be installed on the vessel. Such a frame would "provide movability and height for the anchor when lifted out of the water". After some negotiations on the charter party, the parties decided to proceed on the basis of a purchase of the vessel. In August 2007, Platou informed Pacmar that the plaintiff would prefer an outright sale to avoid complications. The plaintiff's asking price on an "as is where is" basis was US\$2.5m. Pacmar asked for the price to be lowered to US\$2m and informed Platou that a load test would have to be done for all the equipment on board before the sale was finalized. Platou replied that the plaintiff wanted to sell "as is where is" and would try to obtain the A-frame. Pacmar then counter-offered the price of US\$2.25m which was accepted by the plaintiff.

55 A draft MOA was sent by Platou to Pacmar and negotiations took place regarding its terms. An inspection of the vessel was permitted and that was done on 21 August 2007. Further negotiations took place regarding the documentation of the vessel. One of the documents required by Pacmar was the load test certificate for the towing winch, not the crane. On 27 August 2007, Pacmar emailed to Platou stating:

...

Copy of Load test certificate by manufacturer to be provided as soon as possible (within 48 hours) – comments: The only reason why we are buying this tug is the guarantee that the tug has a 40 tons towing winch – without this certification, the tug will not be suitable for our requirement anymore).

Platou responded by email, stating:

Not an issue, we will forward manufacturer's certificate shortly.

56 A couple of hours later, Platou emailed to ask whether the defendant could sign the MOA first as Alex Yeo was not around to sign on behalf of the plaintiff. It was either after this email or the one just before that Capt Sitki Kok spoke with Jimmie Wee regarding the towing winch. Frances Claire had earlier asked Roslinda to tell Capt Sitki Kok to call Jimmie Wee's mobile telephone number. After that, Capt Sitki Kok informed Roslinda that he would sign the MOA only if the load test certificate for the towing winch was confirmed by Class.

57 Accordingly, clause 8(i) of the MOA was amended to include the words "confirmed by Class" and "the original to be provided at closing". Upon receipt of the amended MOA, Capt Sitki Kok signed it. Pacmar then faxed the agreement signed by the defendant to Platou.

58 On 28 August 2007, Roslinda received a copy of the manufacturer's test certificate for the towing winch from Platou. She sent it to the surveyor who noted that it had revisions made to it when compared with the certificate exhibited in his survey report. The surveyor suggested that a test be carried out to confirm the tow winch capacity.

59 That day, Platou wrote to inform Pacmar that the plaintiff said that the manufacturer's test equipment used to test the towing winch was Class-approved and that it was waiting for the manufacturer to furnish evidence of that. Pacmar was never told by Platou that the load test certificate was not Class-approved. Roslinda responded by saying that the certificate looked okay but wanted to see that the certificate was endorsed by Class prior to delivery of the vessel.

60 Platou then purported to email the Class-approved certificate to Pacmar. However, the two documents sent merely showed that the equipment used for load testing of equipment was Class-approved. No reference was made to the towing winch in those documents. At all material times, Roslinda spoke with Frances Claire while Capt Sitki Kok spoke with Jimmie Wee. Capt Sitki Kok never told Roslinda that the documents tendered thus far were acceptable to him.

61 On 29 August 2007, Platou sent the MOA signed by the plaintiff for the defendant to sign again because Pacmar was reflected as the nominee on the first page. The next day, Platou told Pacmar to discard the previous signed MOA. On 3 September 2007, the deposit was remitted to Platou.

62 After receiving the various notices of readiness, on 18 September 2007, Pacmar reminded Platou that the load test certificate confirmed by Class was still outstanding. The rest of the events was as narrated by the defendant's other two witnesses.

63 The plaintiff was in breach of clause 8(g), (h) and (i) of the MOA. Accordingly, the defendant asked that the plaintiff's claim be dismissed and the deposit be released to the defendant pursuant to its counterclaim.

The decision of the court

64 The defendant's defence and counterclaim was premised on five matters not having been fulfilled validly by the plaintiff pursuant to the MOA. They were:

- (a) the Cargo Ship Safety Equipment Certificate under clause 8(g);
- (b) the stability booklet under clause 8(h);
- (c) the manufacturer's load test certificate under clause 8(i);
- (d) the Class Maintenance Certificate; and
- (e) the notice of readiness.

65 The Class Maintenance Certificate dated 20 September 2007 was obviously not available on the original completion date of 19 September 2007 but became available only on the postponed completion date the next day. To that extent, the plaintiff was not ready for completion on 19 September 2007. The notice of readiness given on 17 September 2007 for completion on 19 September 2007 would be defective if the other documentation to be provided at completion was not in order. Further, such notice of readiness had to be furnished on 19 September 2007 too and none was given that day.

66 The evidence and the relevant clauses of the MOA regarding the Cargo Ship Safety Equipment Certificate and the stability booklet were quite clear. They were not necessarily going to be ready because the plaintiff could not be sure when Class would return the documents in question. That event was not within the plaintiff's control and it certainly did not undertake to ensure that these two documents would be available at completion. This was made clear during the discussions and by the words "which is with Class awaiting stamp of approval and will be forwarded to Buyers once Sellers receive the approved drawings" in clause 8(g) and by "Intact stability booklet awaiting final Class approval and Sellers will forward to Buyers once Class returns" in clause 8(h). The MOA therefore envisaged that the handing over of these two documents could take place even after completion and not, as the defendant contended, that it must take place by completion at the very latest.

67 Karci Cem's assertion that the abovementioned two documents had to be furnished at completion would also appear inconsistent with his request that the plaintiff provide evidence as to the status of the documents with Class although he said he was merely trying to look for solutions. The defence must therefore fail on the first two grounds.

68 The plaintiff's position at trial was that Platou was the defendant's broker and not the plaintiff's. The plaintiff relied on the fact that the defendant instructed Pacmar to locate a suitable vessel and Pacmar in turn asked Platou to do the same. The plaintiff also placed emphasis on the email of 16 July 2007 which Jimmie Wee sent to Alex Yeo wherein he stated that Platou was looking for a bare-boat charter of the vessel "on behalf of our direct clients, Pacmar". Roslinda also said that the buyer would usually not pay the deposit to the seller's broker. The plaintiff therefore argued that the fact that the deposit in this case was paid to Platou would therefore indicate that Platou was, at the least, acting for the defendant.

69 The plaintiff submitted that this question of whether Platou was the plaintiff's or the defendant's agent was crucial when analysing how clause 8(i) of the MOA was signed in its final form with the words "confirmed by Class". Roslinda agreed that this requirement regarding the towing winch did not appear in her email of 20, 24 and 27 August 2007. The first time that Capt Sitki Kok informed Platou of this requirement was in his telephone conversation with Jimmie Wee on 27 August

2007. Jimmie Wee said that he conveyed Capt Sitki Kok's requirement to Alex Yeo who told him that only the equipment used to test the towing winch would be Class-approved. Jimmie Wee reverted to Capt Sitki Kok about this but the latter insisted on the towing winch being certified or confirmed by Class before he would sign the MOA. As a result, Jimmie Wee inserted the words "confirmed by Class" into clause 8(i). The plaintiff denied Jimmie Wee's contention that he had obtained Alex Yeo's consent to the insertion of the said words. Jimmie Wee also told Alex Yeo that it was alright for him to sign the MOA.

70 The plaintiff argued, on the basis of the events set out in [69] above, that this could only mean that as far as the plaintiff was concerned, the defendant had accepted the towing winch testing equipment certificates such that there was no longer any issue with the terms of the MOA and that Jimmie Wee's evidence was consistent with Alex Yeo's assertion that Jimmie Wee had told him that the said certificates had been accepted by the defendant. The plaintiff contended that Jimmie Wee/Platou was acting as the defendant's agent when he added the words in issue in clause 8(i). The plaintiff also averred that Jimmie Wee did not bring to the attention of Alex Yeo the addition of those words, that he did not obtain permission to include them in the MOA and, as the defendant's agent, assured Alex Yeo that he could proceed to sign the MOA. In the circumstances, the plaintiff argued, the defendant was estopped from asserting that the plaintiff had failed to comply with clause 8(i).

71 The plaintiff also contended that Roslinda's evidence corroborated its conclusion because she had stated in her email of 28 August 2007 that the manufacturer's certificate "looks ok". However, I would say immediately that the plaintiff's arguments on this point ignored the other words following which emphasized that the certificate must be endorsed by Class prior to delivery of the vessel.

72 The defendant accepted that a broker could act for both the seller and the buyer so long as he remained neutral in the transaction. While the email of 16 July 2007 pointed to Platou acting as the agent of Pacmar/the defendant, there were other documents which indicated clearly that Platou was in fact acting for the plaintiff, the email of 12 July 2007 from Frances Claire being one of them. It was also apparent from Pacmar's email of 20 July 2007 that Pacmar was in fact acting on behalf of a "client" during the negotiations on the bare-boat charter. In my view, if there was any doubt about the status of Platou, the commission agreement between the plaintiff and Platou removed all traces of it. The commission was a hefty one, amounting to more than 10% of the sale price. The fact that it was the plaintiff which was paying the commission to Platou said it all. On the other hand, the arrangement between Platou and Pacmar was not that Pacmar would pay Platou a commission but that Platou would pay Pacmar a commission of 1% of the sale price. This showed that the relationship between Platou and Pacmar was more akin to one of co-brokers, with Platou taking the lion's share of the commission. There was no evidence of any commission agreement between Platou and the defendant. Clearly, Platou was the plaintiff's agent by the time of the sale transaction.

73 It followed that any representations made by Jimmie Wee (which he denied making anyway) to Alex Yeo concerning Capt Sitki Kok's alleged acceptance of the documents regarding the towing winch could not bind the defendant. In any event, it was difficult to believe that Alex Yeo would allow himself to be led by someone like Jimmie Wee into signing something that he was doubtful about simply because Jimmie Wee told him it was alright for him to sign the MOA and urged him to do so. It appeared from Alex Yeo's own testimony that he was a careful businessman. He wrote Pacmar's name on the first page of the MOA as a precautionary measure when he noticed that the original MOA was signed and stamped by Pacmar only. He then asked that a fresh MOA be prepared and asked that it be signed by the defendant. It was hard to accept that he did not notice the words "confirmed by Class" in clause 8(i) when he signed the MOA when that was a non-standard clause in the sale form and over which there was so much discussion. He did not appear to be someone who would rely on mere verbal assurances over such an important matter.

74 The plaintiff's credibility on the issue of clause 8(i) was even more doubtful when viewed in the light of its initial insistence that the clause related to the crane and not the towing winch when the email showed that its assertion could not be right.

75 As the plaintiff was not able to fulfil clause 8(i) on 19 September 2007, it was in no position to give notice of readiness to complete the sale. The Class Maintenance Certificate was also not available on the original completion date of 19 September 2007 although it was issued the next day. On the totality of the evidence, I therefore found for the plaintiff in respect of grounds (a) and (b) set out at [64] above and for the defendant in respect of grounds (c), (d) and (e). In the result, the plaintiff failed in its action and the defendant succeeded in its counterclaim.

76 I made the following orders:

- (a) the plaintiff's claim is dismissed;
- (b) there be judgment for the defendant on its counterclaim for US\$225,000 together with all interest accrued thereon in the interest-bearing account held by Platou;
- (c) Platou is directed to pay the amounts stated in (b) above to the defendant; and
- (d) the defendant is to have one set of costs for the claim and the defence and counterclaim and is entitled to only 80% of the total costs.

The plaintiff submitted that each party should bear its own costs because the defendant was not relying on ground (d) (in [64]) anymore and therefore the parties won or lost on two grounds each. I could not agree because the defendant succeeded in the main issue in the trial and that was the issue pertaining to clause 8(i). However, I deducted 20% of the costs awarded to the defendant to account for the relatively minor matters which it failed in.