

CW Continental Corp v Patec Pte Ltd
[2016] SGHC 224

Case Number : Suit No 205 of 2015
Decision Date : 02 September 2016
Tribunal/Court : High Court
Coram : Andrew Ang SJ
Counsel Name(s) : Loong Tse Chuan and Chan Tuan San, Jonathan (Allen & Gledhill LLP) for the plaintiff; Balasubramaniam Ernest Yogarajah and Bernadette Chen (Unilegal LLC) for the defendant.
Parties : CW Continental Corp — Patec Pte Ltd

Contract – Contractual Terms – Implied Terms

Contract – Discharge – Breach

Contract – Remedies – Damages

2 September 2016

Judgment reserved

Andrew Ang SJ:

1 This is my oral judgment setting out briefly my grounds of decision. Should there be an appeal I may elaborate on the grounds.

Facts

2 This action was brought by the Plaintiff, CW Continental Corp, against the Defendant, Patec Pte Ltd, seeking damages and other relief for the Defendant's failure to deliver certain customised machinery and equipment ("Patec Turnkey System") which, to the knowledge of the Defendant, was intended for delivery to Honeywell with whom the Plaintiff had entered into a contract ("Honeywell Contract") for the sale of the said machinery and equipment.

3 Apart from a first tranche, the balance of the Patec Turnkey System was never delivered to the Plaintiff. Instead, the Defendant sold it directly to Honeywell and obtained a higher price than it would have received from the Plaintiff.

4 The Plaintiff's case is that the Defendant was behind schedule and had not completed the Patec Turnkey System by 3 November 2014, the deadline set by Honeywell. As a result, Honeywell terminated the Honeywell Contract with the Plaintiff on 11 November 2014. Thereafter, the Plaintiff continued to seek confirmation that the Patec Turnkey System was completed but received what it considered to be unsatisfactory answers.

5 The Defendant, on the other hand, contended that the delivery date agreed was 30 November 2014 and that before that date, it had called upon the Plaintiff to make payment as the Defendant considered that the Patec Turnkey System was complete (by its interpretation of its obligations under the contract between the Plaintiff and the Defendant). When the Plaintiff did not make payment, the Defendant claimed to have accepted the alleged repudiatory breach of the Plaintiff and sold the Patec

Turnkey System directly to Honeywell.

6 Apart from the dispute about the date for delivery, there was a dispute over what the Defendant's obligations were in regard to Honeywell's requirements and specifications. Whereas the Plaintiff's case was that the Defendant was obligated to meet them, the Defendant contended that they were not included as terms of the contract between the Plaintiff and the Defendant.

7 Accordingly, the following are the issues in this case :

- (a) What were the terms of the contract between the Plaintiff and the Defendant?
- (b) What was the date by which the Patec Turnkey System was to be delivered?
- (c) Did the Defendant breach its obligations under the Purchase Order 4502007163 (the "P.O.") when it failed to deliver the Patec Turnkey System to the Plaintiff?
- (d) If so, what measure of damages is to apply?

Issue 1

What were the express terms of the contract between the Plaintiff and the Defendant?

8 For a start, the terms of the contract were set out in the P.O. issued by the Plaintiff on 3 December 2013 and accepted by the Defendant on 6 December 2013 when the Defendant invoiced the Plaintiff with reference to the same P.O.

9 In the P.O., the terms of payment were stated to be "As per PATEC Quote PPL/1041/13R". Also, the delivery schedule was stated in the P.O. to be "As per "Intel 7 parts **qualifying** strategy" and "Plan for **HIS** Turnkey Solution". Despite the typographical errors ("qualifying" instead of "qualification" and "HIS" instead of "IHS" there is no doubt what these two documents were).

10 In the Defendant's closing submissions, at paragraphs 22 to 24, the Defendant contends that the "Intel 7 parts qualifying strategy" and "Plan for HIS Turnkey Solution" did not form part of the contract between the parties. This contention is plainly at odds with Defendant's pleadings (see paragraphs 12, 15A, 18, 19, and 20) and cannot stand.

11 In addition to those two documents, the Plaintiff contends that it was an implied term of the contract between the parties that the Patec Turnkey System must be fit for the purpose for which it was purchased *viz* for delivery to Honeywell pursuant to the Honeywell Contract.

12 In support of this contention the Plaintiff cited *Francis v Cockrell* (1870) LR 5 QB 501, where Kelly CB said at p 503:

"I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied." [emphasis added]

13 Section 14(3) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) is to the same effect.

14 The evidence showed that during the negotiations between the Plaintiff and Honeywell from

May 2012 to November 2013, the Defendant's General Manager, Mr Hiroyuki Hidaka ("Hiro") was fully involved in the marketing efforts and technical discussions with Honeywell. The Defendant was fully aware that the Patec Turnkey System was intended for resale to Honeywell. It stands to reason that the Patec Turnkey System had to meet the requirements of Honeywell.

15 Those requirements were set out in:

(a) Attachment A to the Honeywell Contract; and

(b) A document entitled "Specifications for Progressive Stamping Turn-Key Package" dated 30 April 2013 described below.

16 As earlier stated, Francis Wong, the director and sole shareholder of the Plaintiff, testified that the Defendant's Hiro was fully involved in marketing efforts and technical discussions with the Plaintiff and Honeywell.

17 In April 2013, one Nagu of Honeywell invited Hiro and Francis Wong to Honeywell's office to present the Plaintiff's and the Defendant's capabilities to the members of the Honeywell technical and commercial teams.

18 At the meeting, Nagu provided Francis Wong a document entitled "Specifications for Progressive Stamping Turn-Key Package" dated 30 April 2013, which contained the specifications of the machines needed by Honeywell. Hiro and Francis Wong went to the Plaintiff's office to jointly review the specifications in the document aforesaid. Hiro then confirmed to Francis Wong that the Defendant had the capability to meet Honeywell's requirements.

19 At all material times the Defendant had copies of the Honeywell Contract and the Specifications for Progressive Stamping Turn-Key Package. The Defendant was therefore fully aware of the specifications.

20 Further on 4 August 2014, Honeywell circulated to the Plaintiff and the Defendant a buyout checklist based on discussions between Honeywell and Defendant on 1 August 2014.

21 The Plaintiff submits that in assessing whether the remaining items of the Patec Turnkey System had been completed, there has to be taken into account Honeywell's requirements set out in the buy-off checklist, Attachment A to the Honeywell Contract, and the document entitled "Specifications for Progressive Stamping Turn-Key Package".

22 The Defendant contends that there should not be any terms implied into the contract between the Plaintiff and the Defendant. It argues that there is no gap in the contract between the parties and therefore no room for implication.

23 Michael Wee, the Managing Director of the Defendant, disputes the Plaintiff's contention and asserts in his Affidavit of Evidence-in-Chief ("AEIC") that at a meeting in the Defendant's office on 23 December 2013, he had refused to sign a Custom Equipment Purchase Agreement between the Plaintiff and the Defendant which was on similar terms as the Honeywell Contract. The Defendant argues that by such refusal, Michael Wee signified that the Defendant did not wish to be bound by Honeywell's requirements.

24 Francis Wong, recounts, however, that Michael Wee's objection was to clause 10.1 of the draft Custom Equipment Purchase Agreement, which required Defendant to indemnify Honeywell for any

losses arising from Defendant's negligence or misconduct. Francis Wong further stated that Michael Wee nevertheless confirmed that the Defendant would meet Honeywell's technical specifications and timelines.

25 On a balance of probabilities, I would tend to believe Francis Wong's account of what transpired at the 23 December 2013 meeting.

26 Francis Wong's uncontroverted evidence was that:

(a) Throughout the course of the project, there were regular communications and meetings between the Plaintiff, the Defendant, and Honeywell.

(b) From January 2014, there were weekly conference calls between the Plaintiff, the Defendant, and Honeywell to monitor the progress of the project.

(c) From December 2013 to November 2014, Francis Wong was in regular communication with Defendant's Hiro and Senior Project Manager, Sajesh Babu ("Sajesh") conveying instructions from Honeywell and liaising between Honeywell and the Defendant.

(d) Representatives from Intel and Honeywell also regularly visited the Defendant's factories in Singapore and Indonesia to observe the progress.

27 During cross examination, Michael Wee admitted that from December 2013 until November 2014, the Defendant's employees assisted the Plaintiff towards meeting Honeywell's requirements and specifications. The Plaintiff relies upon that as lending support to the Plaintiff's contention that Honeywell's requirements and specifications were implied obligations. I do not accept Michael Wee's contention that it was purely out of goodwill that such assistance was provided. Indeed it defies commercial sense that the Plaintiff would contract with Defendant for the Patec Turnkey System without being sure that the Defendant would meet Honeywell's requirements and specifications.

28 In an endeavour to find support for his contention that Honeywell's requirements and specifications did not form part of the contract between the Plaintiff and the Defendant, Michael Wee referred to a Whatsapp conversation on 27 November 2013 between Hiro and Francis Wong. Allegedly, in that conversation, Hiro informed Francis Wong that the Defendant was unable to sign the Custom Equipment Purchase Agreement between the Plaintiff and Honeywell.

29 I accept the Plaintiff's submission that the Court should disregard the Defendant's allegation based on the Whatsapp conversation on 27 November 2013 between Hiro and Francis Wong for 2 reasons:

30 First, the Defendant never pleaded this Whatsapp conversation. The relevant pleading in paragraph 5 of the Defence makes no mention of it. When the Plaintiff asked for Further and Better Particulars of the Defendant's contention in paragraph 5 of the Defence that "the Defendant made it clear to the Plaintiff that it would only take instructions from the Plaintiff and these discussions which included Honeywell's input would not alter the terms of the contract", the Defendant replied referring only to the 23 December 2013 meeting between Francis Wong and Michael Wee. No mention was made of the Whatsapp conversation in the Further and Better Particulars.

31 Secondly, Michael Wee's evidence in regard to the Whatsapp conversation is inadmissible hearsay. Hiro was not called and the Defendant has not given explanation satisfactory to the Court for its failure to call Hiro as a witness.

32 Even if the Court were minded to consider the Defendant's evidence in respect of the Whatsapp conversation, Francis Wong says that the conversation would not support the Defendant's contention that the Defendant never agreed to comply with Honeywell's requirements and specifications.

33 This is because, according to him, the document referred to in the Whatsapp conversation was a draft of the Honeywell Contract and not the Custom Equipment Purchase Agreement which Michael Wee refused to sign on 23 December 2013.

34 The Plaintiff highlighted that in the Whatsapp conversation, Hiro explained that the Defendant was happy to be named as "manufacturer" in the Honeywell contract but did not wish to sign the same as it did not want to be contractually liable to Honeywell.

35 The Whatsapp conversation therefore does not support Defendant's contention that it did not agree to comply with Honeywell's requirements and specifications.

Issue 2

What was the date by which the Patec Turnkey System was to be delivered?

36 The Plaintiff's case is that it was agreed that the Patec Turnkey System would be completed and delivered by 3 November 2014. As earlier stated, under P.O. 4502007163, the delivery schedule was stated to be in accordance with the "Intel 7 parts qualifying strategy" and "Plan for HIS Turnkey Solution."

37 The "Intel 7 parts qualifying strategy" was first discussed on or about 9 October 2013 at the Defendant's factory in Indonesia. The parties and Honeywell agreed that the stamping week for all specified copper heat sinks had to be completed by week 40 of 2014 (*ie*, the week commencing 13 October 2014). This schedule was eventually converted into an Excel spreadsheet entitled "Intel 7 parts qualification strategy" by Honeywell and the Plaintiff forwarded a copy to the Defendant on 14 October 2013.

38 Separately, Honeywell had also prepared another spreadsheet entitled "Plan for IHS Turnkey Solution with Transfer Die" which set out the timeline for the production and testing of the different designs of copper heat sinks. According to this timeline, the stamping week for all specified copper heat sinks had to be completed by week 37 of 2014 (*ie*, the week commencing 8 September 2014). This spreadsheet was forwarded by the Plaintiff to the Defendant on 5 November 2013.

39 At the time that P.O. 4502007163 was concluded, the stamping week for all specified copper heat sinks had to be completed by week 40 of 2014 under the "Intel 7 parts qualification strategy" and by week 37 of 2014 under the "Plan for IHS Turnkey Solution". The two spreadsheets were subsequently revised and circulated amongst Honeywell, Plaintiff, and Defendant. In the revision, the stamping week for the first three priority part numbers were postponed and the stamping week for the remaining four were left open.

40 On 23 August 2014, Honeywell circulated a schedule for the project based on discussions between Honeywell and Defendant which targeted completion by the week commencing 27 October 2014. The Defendant confirmed to the Plaintiff by email dated 24 August 2014 that it would adhere to the schedule proposed.

41 Because of delays by the Defendant, on 1 October 2014, Honeywell requested early delivery of two 300 ton presses and one die set for part number G 18831-007/97369 even though the said die

set had not yet undergone a qualification build. The Plaintiff discussed with both Honeywell and the Defendant and agreed to Honeywell's request. Delivery of this first tranche ("First Tranche Equipment") to Honeywell was duly made.

42 By a letter dated 17 October 2014, Honeywell gave notice to the Plaintiff that the Honeywell Contract would be terminated if the Patec Turnkey System was not completed and delivered by 3 November 2014.

43 As at that date, except for the First Tranche Equipment which was in transit to Honeywell, the Patec Turnkey System was not ready.

44 The Plaintiff conveyed the 3 November 2014 deadline to the Defendant immediately by email.

45 The Plaintiff submits that it would have been clear to the Defendant's Hiro and Sajesh that Honeywell required the Patec Turnkey System completed and delivered at the latest by 3 November 2014. This has not been contradicted by the Defendant which has chosen not to call Hiro or Sajesh to give evidence.

46 On this basis, the Plaintiff submits that the date 3 November 2014 replaced the original deadlines in the 2 spreadsheets and that the new deadline formed part of the Defendant's express obligations under the P.O.

47 The alternative basis upon which the Plaintiff submits that the new deadline can be held to be binding on the Defendant is that there is an obligation on the part of the Defendant to deliver within reasonable time.

48 The Plaintiff contends that it was reasonable to expect the Defendant to comply with the 3 November 2014 deadline imposed by Honeywell and communicated by the Plaintiff to the Defendant on or around 18 October 2014.

49 The Plaintiff submits that when one considers that under its Quotation No. PPL/1041/13R, the Defendant was contemplating completion by 27 June 2014, it could not be unreasonable to expect the Defendant to complete by 3 November 2014.

50 Again, considering that the Defendant had, through Sajesh, confirmed by email on 24 August 2014 that it would complete by the week commencing 27 October 2014, completion by 3 November 2014 could not be unreasonable.

51 The Defendant contends that there was no deadline for delivery under the P.O. because it had been set at large. Even so, it cannot be that the Defendant could take as long as it wished.

52 Alternatively, the Defendant contends that the contracted date of delivery had been varied to 30 November 2014 by the course of dealings between the parties.

53 However, the Defendant has not shown how the deadline of 30 November 2014 was agreed. What the Defendant averred was that the Defendant called upon the Plaintiff to make payment of the purchase price by 30 November 2014. That in itself could not constitute an agreement on the date. At best it was an attempt by the Defendant to extend the deadline. There is no evidence of any agreement on that date.

54 Another argument that the Defendant makes is that changes had been made to the scope of

work under the P.O. by reason of which the deadline had to be extended.

55 The Plaintiff's Counsel rightly points out that the Defendant's allegation was never pleaded and the Defendant's Counsel had confirmed to the Court on 19 May 2016 that the Defendant stood by its pleadings and did not intend to make any amendment.

56 It was in Michael Wee's AEIC that reference was made to alleged changes to the scope of work. However, apart from exhibiting some correspondence variously between the Plaintiff's Francis Wong, representatives of Honeywell, and the Defendant's Hiro and Sajesh, the Defendant did not call Hiro or Sajesh to give evidence on the documents, Michael Wee not being in a position to do so as he was not party to any of the correspondence.

57 Moreover, some of the correspondence appears to relate to a proposed part number H44241 which was not one of the Intel part numbers under the P.O. but was independent of the Patec Turnkey System.

58 Kelvin Wee alleged during cross examination that Honeywell's Jeff Fairchild requested revisions and changes to the Patec Turnkey System at a meeting that took place on or around 27 October 2014. But this was something Kelvin Wee brought up for the first time. He said that when any revisions or changes were requested the Defendant would "go through the technical drawings or specifications" with Honeywell, after which the Plaintiff and the Defendant "would present a quotation or a technical feasibility study to that effect". However, he could not satisfactorily explain why the Defendant had not disclosed any of these documents. His explanation that the Defendant did not think it was material was unconvincing.

59 In paragraph 9 of Defendant's closing submissions, the Defendant contends that "but for the constant changes requested for by the Plaintiff's customer, even up to October 2014, the Defendant had fulfilled its obligations to Plaintiff from as early as 26 June 2014".

60 If this was intended to suggest that the Defendant's scope of work under the P.O. had been varied, this was never pleaded as I observed earlier.

61 Paragraph 9 of the Defendant's closing submissions referred to documents set out at Annex A thereto. But the Defendant did not call any witness to explain the documents and none of the documents were put to the Plaintiff's witness in cross examination.

62 Taking all the circumstances into account, I find that 3 November 2014 was the agreed date by which the remainder of the Patec Turnkey System was to be delivered.

Issue 3

Did the Defendant breach its obligations under the P.O. when it failed to deliver the Patec Turnkey System to the Plaintiff?

63 The Plaintiff contends that the Defendant breached its obligations under the express and implied terms of the P.O. by:

- (a) Failing to complete and deliver the remaining items of the Patec Turnkey System by 3 November 2014;
- (b) Its continuing failure thereafter to complete and deliver the same; and

(c) Selling the remaining items of the Patec Turnkey System to Honeywell on or around 15 December 2014

64 I agree with the Plaintiff that the Defendant had breached the terms of the P.O. in the aforementioned ways. It had failed to complete and deliver the remaining items of the Patec Turnkey System by 3 November 2014, and thereafter continued in its failure to complete and deliver the same. By selling the remaining items of the Patec Turnkey System directly to Honeywell, the Defendant placed it beyond its ability to perform its obligations towards the Plaintiff under the P.O. These can be seen from the events that took place after the Defendant failed to complete and deliver the remaining items of the Patec Turnkey System on 3 November 2014.

65 By letter dated 11 November 2014 and an email dated 12 November 2014, Honeywell notified the Plaintiff of the termination of the Honeywell Contract because of the Plaintiff's failure to deliver the completed Patec Turnkey System.

66 The evidence of Francis Wong is that as at that date, the Patec Turnkey System was not complete. The evidence includes the following:

(a) On 27 and 28 October 2014, when Honeywell's Jeff Fairchild visited the Defendant's factory, Francis Wong, Sajesh, and Kelvin Wee met with him. They explained to him that the Defendant was unlikely to complete by 3 November 2014 and asked for additional time. Sajesh said that the Defendant anticipated completing by January 2015 and promised to send a more detailed schedule.

(b) This he did on 29 October 2014 by email to Jeff Fairchild. The attached schedule to his email anticipated that the qualification builds for the remaining items were expected to be in mid-January 2015.

(c) The Defendant completed the qualification build for part no. G83156-001/100180 only on 6 November 2014 as evidenced by an email from Honeywell's Rao (Senior New Project Introduction Engineer of Honeywell) to the Defendant's Hiro and Sajesh, and copied to the Plaintiff.

(d) As at 12 November 2014, the Defendant had yet to complete the qualification builds for any of the other part numbers. This was evidenced by an email dated that day from Rao (who was then at the Defendant's Singapore factory) to Kelvin Wee, Hiro, Sajesh, and Francis Wong.

67 Francis Wong's evidence on this issue as summarised above was not challenged in cross-examination. Michael Wee and Kelvin Wee did not address any of the documentary evidence described above in their AEICs. Moreover, Hiro and Sajesh, who were most intimately involved in the project and were copied on all the correspondence described above, were not called to give evidence.

68 Under cross-examination, Kelvin Wee said that the email of 29 October 2014 from Sajesh to Jeff Fairchild was prepared on the basis of a revised scope of work allegedly requested by Jeff Fairchild at a meeting on 27 October 2014. However, no document was produced to evidence such a request. Kelvin Wee's AEIC also made no mention of this alleged request.

69 From the above, I am satisfied that as at 3 November 2014, the Defendant had not yet completed the qualification builds for the die sets in respect of any of the part numbers other than G83156-001/100180.

70 Francis Wong also gave evidence that he visited the Defendant's factory in Singapore on 20

November 2014 and observed that many components of the Patec Turnkey System had yet to be completed. According to him, Rao from Honeywell who was visiting the Defendant's factory also told him particulars of the incomplete state of the Patec Turnkey System.

71 Francis Wong took photographs of the various components of the Patec Turnkey System at the Defendant's factory and exhibited them in his AEIC.

72 No factual evidence was adduced by the Defendant to contradict Francis Wong's evidence. None of the Defendant's employees who were at the factory on that day (*ie*, 20 November 2014) was called to controvert Francis Wong's evidence.

73 Instead, the Defendant called an expert witness, Lim Tai Pong, to comment on the photographs taken by Francis Wong on 20 November 2014.

74 On its part, the Plaintiff also called an expert, Mark Ellison Williams, to testify. Without going into the parties' detailed arguments, it is fair to say that the conclusion to be drawn from the experts' evidence is that it is not possible to say from the photos alone whether the Patec Turnkey System was ready and whether it met Honeywell's specifications.

75 The Defendant claims that the Patec Turnkey System was in fact complete by 12 November 2014 and that the Plaintiff repudiated the contract by failing to make payment by 30 November 2014 and refusing to take delivery.

76 The Defendant further contends that it accepted the Plaintiff's repudiation and was therefore entitled to sell the Patec Turnkey System to mitigate its loss.

77 The Plaintiff disputes that the Patec Turnkey System was ready on 12 November 2014 for reasons which I have already mentioned.

78 In particular, as earlier mentioned, according to an email of that same day sent by Honeywell's Rao to Kelvin Wee, Hiro, Sajesh, and Francis Wong, save for partnumber G83156-001/100180, none of the qualification builds for the other part numbers had been completed.

79 I therefore do not accept the Defendant's contention that the Patec Turnkey System was ready on 12 November 2014. The Plaintiff was therefore not in repudiatory breach of its payment obligation.

80 It is significant that on 12 November 2014, after Honeywell had notified the Plaintiff of the termination of the Honeywell Contract, the Defendant's Sajesh sent an email to the Plaintiff which stated, *inter alia*, that the Defendant would be "stopping all work" on the project with "immediate effect" while at the same time requiring the Plaintiff to make payment of the balance of the purchase price.

81 The same email also said that the Defendant was "assessing [its] options to mitigate [its] losses" and that all future communications between the parties "will be ceased" (*sic*) although in the same breath it directed that communications should be with Kelvin Wee.

82 Clearly under the P.O. the balance of the purchase price was due only after buy-off had been completed. As the Plaintiff pointed out, Sajesh did not provide any confirmation that the system was completed nor state how the Plaintiff could verify the same.

83 To Francis Wong, it seemed that the Defendant was extremely keen to terminate their contract.

84 On 13 November 2014, Francis Wong replied to Sajesh's email and confirmed that the Plaintiff would make payment once it had verified that the remaining items of the Patec Turnkey System satisfied Honeywell's buy-off requirements.

85 On 14 November 2014, Sajesh sent an email attaching the Defendant's formal letter stating for the first time, that the project had been completed according to the P.O. and requesting full payment by 30 November 2014.

86 Francis Wong gave evidence that he was sceptical of the Defendant's claim that the project had been completed because of the earlier projection (that it would be completed only in mid-January 2015) given by the Defendant to Honeywell by the email of 29 October 2014 and also Rao's email of 12 November 2014 earlier referred to. Moreover, in its email of 12 November 2014, the Defendant had said it would be stopping all work on the project.

87 The Plaintiff therefore sent emails on 17 and 20 November 2014 seeking confirmation that various specific aspects of the Patec Turnkey System had been completed.

88 By an email dated 18 November 2014, the Defendant again claimed that the project had been completed but failed to confirm that the specific items identified by the Plaintiff had been completed.

89 As noted earlier, this led to Francis Wong's visit to the Defendant's factory on 20 November 2014 where, according to him, he observed that many components had not been completed.

90 On 23 November 2014, the Plaintiff wrote to the Defendant stating its observations on what appeared to be outstanding works.

91 Many reminders were sent by the Plaintiff in the weeks that followed seeking updates on the progress. The Defendant maintained "radio silence".

92 On or around 15 December 2014, the Defendant sold the remaining items of the Patec Turnkey System to Honeywell for \$2,200,000. This was higher than the sum of \$1,681,884 which the Defendant would have received from the Plaintiff under the P.O.

93 The Plaintiff contends that the Defendant had unscrupulously taken advantage of the situation to benefit itself. It pointed to the curious email of 12 November 2014 from Sajesh to Francis Wong which showed the Defendant to be strangely keen to terminate their agreement.

94 According to the Plaintiff, from 12 November 2014 onwards, while ignoring the Plaintiff's requests for updates on the progress of the project, the Defendant was readily entertaining various requests from Honeywell behind the Plaintiff's back.

95 The Defendant contends that the reminders were "nothing more than a tactical ruse, as [they] lacked any real sense of urgency". Further, they did not reveal any genuine effort by the Plaintiff to acquire the remainder of the Patec Turnkey System. The Defendant argues that in those circumstances, its "radio silence" cannot be said to be evidence of the Defendant shutting out the Plaintiff while it worked with Honeywell behind the Plaintiff's back.

96 I am inclined to agree with the Plaintiff that the Defendant was stonewalling the Plaintiff while,

at the same time, it was anxious to please Honeywell.

97 An example of what the Plaintiff characterises as the Defendant's "duplicitous conduct" is set out below:

98 As noted earlier, Sajesh wrote on 12 November 2014 at 4.25pm stating that the Defendant would stop all work with immediate effect. (Kelvin Wee admitted in cross-examination that he had instructed Sajesh to send that email). Remarkably, only a few minutes later, at 4.39pm, Kelvin Wee sent an email to Sajesh and Hiro, asking them to continue working on the Patec Turnkey System. His email said *inter alia*, "I propose we finish this week in adherence to *our own timeline commitment, especially since Rao is here* until Friday, and we reconvene next week to decide". [Emphasis added]

99 The evidence also shows that the Defendant entertained Honeywell's employees' presence at the Defendant's factory in late November 2014 and early December 2014 despite telling the Plaintiff it would stop work on the project.

100 In his AEIC, Kelvin Wee admitted that he was in discussions with Honeywell from 15 November 2014 to sell the remaining items of the Patec Turnkey System to Honeywell. However, he said that the Defendant and Honeywell only began negotiating the price in early December 2014 and concluded their agreement in mid-December 2014.

101 The Plaintiff suggests that Kelvin Wee's version of events is implausible in view of the services provided by the Defendant to Honeywell and the requests from Honeywell that the Defendant accommodated even from 12 November 2014.

102 The Defendant contends that it sold to Honeywell only after the Plaintiff repudiated the contract and the Defendant had accepted such repudiation. However, this is untenable since the Plaintiff was clearly not in repudiatory breach. Moreover, the Defendant was already in negotiations to sell to Honeywell well before Plaintiff's alleged repudiation.

103 One other incident deserves mention:

104 On 21 January 2015, the Defendant's solicitors wrote to the Plaintiff's solicitors and offered to give the Plaintiff "a final opportunity to pay up the balance due... and to give shipping instructions within 7 days of this letter".

105 Francis Wong gave evidence that the Plaintiff did not accept the Defendant's "offer" because the Plaintiff did not have an opportunity to verify that the Patec Turnkey System was ready. Besides, in the light of the circumstances in January 2015, the Plaintiff was not sure whether Honeywell was still prepared to buy the Patec Turnkey System (Of course, unbeknown to him, Honeywell and the Defendant had agreed on the sale and purchase).

106 As it turned out, the Defendant's offer was not genuine because, by that time, the Defendant had already entered into a contract to sell the remaining parts of the Patec Turnkey System to Honeywell for \$2,200,000. Moreover, the Defendant had already made arrangements to ship different components of the Patec Turnkey System according to Honeywell's instructions. Here was another instance of dishonest conduct by the Defendant. By his own admission under cross-examination, Kelvin Wee agreed that if the Plaintiff had accepted the Defendant's "offer" of 21 January 2015, the Defendant would not have been able to deliver the Patec Turnkey System to Plaintiff.

107 For these reasons, I find that the Defendant was in breach of its obligations under the P.O.

when it failed to deliver the Patec Turnkey System to the Plaintiff.

Issue 4

What measure of damages is to apply?

108 By reason of the Defendant's breach of contract in that it failed to deliver the remaining items of the Patec Turnkey System to the Plaintiff, the Plaintiff suffered loss of \$1,181,916 which was the profit it would have earned from selling the same to Honeywell.

109 The Plaintiff relies on *Benjamin's Sale of Goods* (M Bridge gen ed) (Sweet & Maxwell, 9th Ed, 2014) at para 17 – 035 which reads as follows :

“..... if the goods were to be specially manufactured for the buyer, and the seller knew that they were to be resold by him, the buyer's loss of profit is the measure of damages when the seller fails to deliver: the seller is taken to know that similar goods cannot be bought in the market.”

110 In *Kwei Tek Chao and others v British Traders and Shipper Ld* [1954] 2 WLR 365, Devlin J held at 384 :

“If a man sells goods of special manufacture and it is known that they are to be re-sold, it must also be known that they cannot be bought in the market, being specially manufactured by the seller. In such a case the loss of profit becomes the appropriate measure of damage.”

111 Section 51 of the Sale of Goods Act which the Plaintiff also relies on, is to similar effect.

112 The Defendant contends that the Plaintiff failed to act reasonably to mitigate its loss. It argues that the Plaintiff should have agreed to Honeywell's demand for a 25% discount and that its “complete inaction in mitigating its loss” was the cause of its loss. Accordingly it asserts that the Plaintiff could not recover such loss from the Defendant.

113 However, none of this was pleaded by the Defendant. Such an assertion had to be pleaded and proved by the Defendant. (See *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 at [71]; *The "Rainbow Star"* [2011] 3 SLR 1 at [56]; and *Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2012] 1 SLR 131 at [23]).

114 In my view, if the Plaintiff had agreed to give Honeywell a 25% discount, it is not inconceivable that the Defendant might in that situation have argued that the Plaintiff should not have granted the discount but rather should have called Honeywell's bluff, Honeywell being contractually bound to manufacture and supply copper heat sinks to Intel Corporation with the use of the Patec Turnkey System. That argument would have been persuasive.

115 (Indeed one wonders if Honeywell would have terminated its contract with the Plaintiff if it had no confidence that it could buy the Patec Turnkey System directly from the Defendant.)

116 All things considered, the Plaintiff in my view did not act unreasonably in refusing to give Honeywell the 25% discount which Honeywell sought.

117 Assuming for arguments' sake, that accepting a 25% discounted price was a reasonable option which the Plaintiff should have taken, such discount would represent a loss of profit which the Plaintiff would have been able to recover from the Defendant anyway.

118 In conclusion, I therefore find the Defendant liable for breach of its obligations to the Plaintiff to complete and deliver the balance of the Patec Turnkey System. Accordingly, I award the Plaintiff damages for loss of profit in the sum of \$1,181,916 together with interest pursuant to s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed), which I set at 2% per annum from the date of issue of the Writ until judgment.

119 I will hear the parties on costs.

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