Gimpex Ltd *v* Unity Holdings Business Ltd and others and another appeal
[2015] SGCA 8

Case Number : Civil Appeal Nos 160 of 2013 and 161 of 2013

Decision Date : 09 February 2015

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; Chao Hick Tin JA; Quentin Loh J

Counsel Name(s) : Philip Tay and Yip Li Ming (Rajah & Tann LLP) for the appellant in Civil Appeal No 160 of 2013 and the respondent in Civil Appeal No 161 of 2013; Bazul Ashhab and Mabel Tan (Oon & Bazul LLP) for the respondents in Civil Appeal No 160 of 2013 and the appellants in Civil Appeal No 161 of 2013.

Parties : Gimpex Ltd — Unity Holdings Business Ltd and others

Contract – Breach

Damages – Rules in awarding – Proof of actual damage

Evidence – Admissibility of evidence – Hearsay

Evidence – Documentary evidence – Reports

9 February 2015 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 These two appeals before us arose from the decision of *Gimpex Limited v Unity Holding Business Limited and others* [2013] SGHC 224 ("the Judgment") in Suit No 390 of 2010 ("the Suit"). The Suit concerned a dispute surrounding a contract for the sale of 41,510MT of coal by Unity Holdings Business Limited ("Unity") to Gimpex Limited ("Gimpex"). The coal was to be shipped from Kalimantan, Indonesia, and delivered to Karachi, Pakistan. When the coal was discharged at Karachi, Gimpex had the coal tested by surveyors and discovered that it did not meet the contractual specifications. Also, a request by Gimpex for a joint survey was turned down by Unity. As a result, Gimpex brought a number of claims against Unity and two other parties, including for breach of contract and unlawful means conspiracy based on fraud. The action thus concerned the quality of the coal which was delivered at Karachi and it also raised difficult issues concerning, *inter alia*, admissibility of documentary hearsay evidence.

The facts

The parties to the dispute

2 The plaintiff in the Suit was Gimpex, a Chennai-based trading company which has been trading in commodities and raw materials since the 1950s. The representatives of Gimpex that were of particular importance to the present proceedings, were one Samir Goenka ("Samir") who was the joint managing director, and one Avinash Kulkarni ("Kulkarni") who was the executive director of a Singapore-incorporated subsidiary of Gimpex, SPG Mining Pte Ltd.

3 The first defendant, Unity, is a company incorporated in the British Virgin Islands ("BVI"). Unity is owned by a number of shareholders, *ie*, Sainik Mining (International) Ltd ("SMIL"), Classic Ventures Assets Incorporated ("Classic") and the second defendant to the Suit, Param Energy Pte Ltd ("Param Energy"). SMIL owns 51% of the shares in Unity, and is in turn wholly owned by Sainik Mining and Allied Services Limited ("SMASL"). Classic owns 24% of the shares in Unity. Param Energy, a Singapore-incorporated company, owned the remaining 25% shares.

4 The third defendant, Vinay Parmanad Hariani ("Vinay"), is the sole shareholder and director of Param Energy, and is also one of five directors of Unity. Vinay's evidence was that he was not very involved in dealings with Gimpex, and that he left it to three of his employees, namely, Lalit Balchandani ("Lalit"), Kishore Chuharmal Mahtani ('Kishore") and Prem Sangtani ("Prem"). All these three employees were directly involved in carrying out the sale of the coal, and testified in the present proceedings. Another director of Unity, Dev Sindhu ("Dev"), also gave evidence on behalf of the defendants.

Background to the dispute

The Contract

5 In 2009, Samir and Kulkarni were interested in the coal business and were introduced to Vinay through a contact. Some discussions ensued, and this led to Gimpex deciding to purchase coal from the defendants. On 18 February 2010, Lalit sent a draft contract to Gimpex. In that draft, Param Energy was stated as the seller of the coal. Payment for the coal was to be made by a transferable letter of credit ("L/C") in order for Param Energy to use the L/C to pay its supplier. [note: 1]

6 As Gimpex was not agreeable to providing a transferable L/C, Lalit then asked that Unity be substituted as the contracting party in place of Param Energy if no transferrable L/C was to be provided. The reason for this change, as explained by Lalit, was because Param Energy did not have the required banking facilities needed to pay the supplier of the coal, whereas Unity had the required banking facilities and could pay the supplier directly instead of through a transferable L/C. These banking facilities, on clarification by Vinay during cross-examination, were actually funds provided by the shareholders of Unity. Gimpex alleged that it agreed to the change of contracting party on Samir's understanding that Unity was a Singapore-incorporated company when, in fact, it is a BVI-incorporated company. Samir's evidence was that he was wary of contracting with Indonesian coal companies, and only wanted to do business with a Singapore-incorporated company as he had a "good impression of the Singapore legal system". [note: 2] He alleged that he had told Vinay that it gave him great comfort that Vinay was in Singapore and owned a Singapore company. [note: 3] He also alleged that he had sought confirmation from Lalit (who replied in the affirmative) that Unity was a Singapore company when the change in contracting party was proposed. [note: 4]

7 A contract for the sale of the coal was eventually entered into between Gimpex and Unity on 2 March 2010 ("the Contract"). The context within which the Contract was entered into by the parties is particularly important in understanding the dispute. For Gimpex, it did not purchase the coal for its own use. Instead, it was to on-sell the coal at a marked-up price to Awan Trading Co Pvt Ltd ("Awan"), a Pakistan-incorporated company, under a contract which it had earlier concluded with Awan ("the Sub-contract"). As Gimpex had agreed with Awan that the coal to be supplied would be of a certain quality, it was therefore important that the coal to be delivered by Unity was of the requisite quality which was stated in the Contract. The profit which Gimpex would make from this arrangement was approximately US$80,000. At the time of the Contract, Lalit's evidence was that he knew that the Plaintiff was in need of the coal in order to fulfil a sub-sale. However, Lalit neither

knew the identity of the sub-buyer nor the terms of the Sub-contract. [note: 5]

8 From the defendants' perspective, Unity was also a middleman of sorts, in that it purchased the coal from another company, PT Planet Resources ("PT Planet") which was an Indonesia-incorporated company, at a price slightly lower than the sale price stated in the Contract. PT Planet was owned by Unity and Classic, and Vinay was also a director of PT Planet. But PT Planet, however, was not the ultimate supplier of the coal; instead, it purchased the coal from CV Berkah Mulya Abadi ("Berkah"), another Indonesia-incorporated company, at an even lower price. Unity stood to make a profit of 1.83% from this arrangement. Lalit explained that the defendants were willing to enter into the Contract for such a small profit margin in order to cultivate a long-term commercial relationship with Gimpex. This was corroborated in a way by Samir's evidence that Vinay had intimated to him that the defendants wanted to do business with Gimpex in relation to marble and granite. [note: 6]

9 We now come to the salient terms of the Contract. The coal was to be shipped Free On Board from Kalimantan to Karachi with the loading to be done between 25 March 2010 to 3 April 2010. The price of the coal was US$68 per MT on the basis of it being of a certain quality, *viz*, having a Gross Calorific Value on an Air-Dried Basis ("GCV") of not less than 6,300Kcal/kg and a total moisture ("TM") of 16%. The price was subject to adjustments based on the quality of the coal. The Contract further provided for Gimpex to reject the coal if it did not meet the minimum quality of 6,100Kcal/kg or 18% TM. Payment for the coal was to be made through "an Irrevocable Single restrictive Letter of Credit payable at 100% Sight". A US$50,000 performance bond was also provided for by SMASL on behalf of Unity to Gimpex.

10 Central to the Contract were the terms as to how the quality of the coal was to be ascertained, and this was provided for in these various provisions: [note: 7]

> 4.1 The quality of coal to be supplied hereunder shall be with the following typical specifications determined and analysed as per ASTM standard by Sucofindo, Indonesia. ...
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> …
>
> 4.3 The consignment should be accompanied by Certificate of Sampling and Analysis as per ASTM standard issued by Sucofindo Indonesia.
>
> 4.4 All reported findings on all inspections/surveys conducted at Origin in relation to quality, quantity and weights etc done at origin and/or port and place of loading shall be FINAL and binding to both Buyer and Seller.
>
> 4.5 At least ten (10) days prior to the 1st day of load port laycan, Buyer has the option to appoint an independent inspection agency of their choice. All costs for this would be borne by the Buyer.
>
> 4.6 One set of raw samples drawn by the surveyors on board the vessel would be duly sealed and signed by the surveyors.
>
> …
>
> 5.1 Seller shall appoint Sucofindo, Indonesia to determine the weight of cargo loaded onto the mother vessel at loading point and issue a Certificate of Weight, which shall be final and binding on both parties.

The loading of the coal at Kalimantan

11 The coal was to be shipped from Kalimantan to Karachi by the MV Michalakis ("the Vessel"), a ship nominated by Gimpex pursuant to the Contract. During the loading of the coal from the port in Kalimantan to the Vessel, PT Sucofindo ("Sucofindo") (as provided for in the Contract) was to conduct a number of tests and produce survey reports which would include the quality and quantity of the coal shipped.

12 The process of loading the coal on board the Vessel and the sampling of the coal by Sucofindo during the loading process was particularly crucial to the dispute. The entire process of having the coal loaded on board the Vessel could be broken up into three stages: (1) delivering to and stockpiling of the coal at the jetty from source; (2) loading of the coal from the jetty to barges; and (3) loading of the coal from the barges onto the Vessel. Sucofindo conducted a variety of sampling and testing of the coal at each of these three stages. The entire process of loading the coal did not take place at one location but two: 32,000MT out of the 41,510MT of coal was loaded from a place known as Sungai Putting, and the remaining 9,510MT of coal was loaded from Batulicin, a place quite a distance from Sungai Putting. The reason for this, as alleged by Lalit, was that there were difficulties in obtaining a jetty slot for the last barge to be loaded at Sungai Putting, and also because there was insufficient amount of coal at Sungai Putting. Lalit's evidence was that he decided to obtain the shortfall from Batulicin even though this would mean incurring more cost on his end.

13 During the first stage of the loading process, Sucofindo conducted an analysis of the coal stockpiled at Sungai Putting. The sampling took place on or about 3 April 2010, and Sucofindo produced a Report of Sampling and Analysis (Certificate No 02641/GAEDAD) dated 7 April 2010 ("the Pre-shipment Analysis Report"). The Pre-shipment Analysis Report reflected that only 32,000MT of coal was surveyed, since Sucofindo only conducted sampling at Sungai Putting and not at Batulicin. This was because Sucofindo could not provide any surveying services at Batulicin.

14 For the second stage of the loading process, this was done from 4 to 13 April 2010 using a total of five barges. One barge loaded the coal at Batulicin from 4 to 7 April 2010 and the remaining four barges did so at Sungai Putting from 8 to 13 April 2010.

15 The second stage of the loading process is significant because that was when the sampling of the coal for the purposes of ascertaining the various parameters for quality of the coal (apart from the TM) was supposed to take place. This included the GCV, which is material to the dispute. The coal was loaded from the stockpiles onto a conveyor belt leading onto the barges and the sampling was taken by Sucofindo when the coal was on the conveyor belt. The samples taken by Sucofindo were sent for analysis and a number of reports reflecting the quality and quantity of the coal loaded onto each of the barges ("the Barge Reports") were prepared.

16 For the third stage of the loading process, this was done from 11 to 21 April 2010. At this stage of the loading, samples were taken primarily for the purpose of ascertaining the TM. The reason for this was because the TM was especially susceptible to external elements such as rainfall when the barge was travelling from the jetty to the Vessel. Apparently, the journey from the jetty to the Vessel took about 24 hours. Therefore, it was more accurate to test for TM using samples actually loaded onto the Vessel.

17 For the barge that was loaded at Batulicin, the coal was sampled only once when it was loaded from the barge onto the Vessel. As mentioned earlier, this was because Sucofindo could not do any sampling when the coal was at Batulicin. A barge report was produced from the samples taken, and

was used to analyse all the parameters of the coal, including *both* the GCV and the TM.

18 During the third stage of the loading process, Gimpex and Awan sought to exercise what they claimed was their right to have an independent survey agency to inspect and collect samples of the coal as it was being loaded from the barges onto the Vessel. This was based on Arts 4.5 and 4.6 of the Contract (which we will set out again):

> 4.5 At least ten (10) days prior to the 1st day of load port laycan, Buyer has the option to appoint an independent inspection agency of their choice. All costs for this would be borne by the Buyer.
>
> 4.6 One set of raw samples drawn by the surveyors on board the vessel would be duly sealed and signed by the surveyors.

19 Kulkarni's evidence was that Gimpex encountered great difficulty in doing so. In an email dated 11 April 2010, Awan wrote to Kulkarni informing him that the surveyors appointed by Awan, PT Surveyor Carbon Consulting Indonesia ("SCCI"), had been prevented from sampling or even witnessing the sampling of the coal. Kulkarni then brought this issue to the attention of Lalit and Prem. On 13 April 2010, Prem informed Lalit, who relayed the message to Gimpex, that Unity would prepare samples and deliver them to SCCI and that was the "maximum [they] can do". Unity's first explanation for stopping SCCI from doing any sampling was that they had caught SCCI taking coal samples of low grade which were not representative of the entire cargo that was being shipped. Later, the defendants changed their explanation, saying instead that Prem had stopped SCCI from collecting samples because he thought that it was not allowed under the Contract. When Kulkarni protested, Lalit replied stating that it was never agreed between the parties that SCCI would be allowed to witness sampling of the coal. Eventually, after a further exchange of emails, Lalit agreed to allow SCCI to witness the *loading* of the coal onto the Vessel. However, SCCI did not witness *sampling* of the coal, nor *conduct sampling* of the coal itself.

The issuing of the Sucofindo Report

20 After the Vessel departed for Karachi, Sucofindo produced a number of reports which were given to Berkah who in turn passed them on to Prem. Amongst these reports was the Certificate of Sampling and Analysis dated 26 April 2010 ("the Sucofindo Report").

21 The Sucofindo Report indicated that there was a minor deficiency in the quality of the coal which led to a price reduction from US$66 per MT to US$65.6438 per MT, but nevertheless certified the coal as compliant with the contractual specifications. Material to the dispute was the Sucofindo Report's analysis of the GCV and TM of the coal which were stated to be 6,266Kcal/Kg and 18% respectively.

After the coal was discharged at Karachi

22 The coal arrived at Karachi on or about 8 May 2010, and was discharged and stockpiled in a coal yard which was under Awan's control. Awan arranged for the coal to be sampled by Intertek Pakistan Pvt Ltd ("Intertek"), who issued an Inspection Certification of Quality and Quantity dated 24 May 2010 ("the Intertek Report"). The sampling of the coal was done by Intertek as the coal was being discharged from the Vessel. Gimpex also appointed its own surveyors, Inspectorate Griffith India Pvt Ltd ("Inspectorate"), who issued a Certificate of Sampling and Analysis dated 30 June 2010 ("the Inspectorate Report"). Inspectorate sampled the coal by extracting some coal from the stockpiles at the Karachi coal yard.

23 The Intertek Report stated that the GCV was 5,638.86Kcal/Kg and the TM of the coal was 26.44%, while the Inspectorate Report stated that the GCV was 5,255Kcal/Kg and the TM was 24.35%. These figures indicated that the coal was outside the contractual specifications, and could be rejected by Gimpex. Kulkarni alleged that upon discovering that the coal delivered was not of the requisite quality, he tried desperately to contact Lalit and Prem, but to no avail. Awan in turn rejected the coal because it was not of the quality required for its use, and the coal remained at the coal yard.

The negotiation of the L/C

24 On or about 10 May 2010, Unity presented the requisite documents under the L/C for negotiation. The L/C was issued by ING Vysya Bank, Chennai ("ING") and negotiated by Bank of India, Singapore ("BOI"). On or about 11 May 2010, BOI paid Unity under the L/C and submitted the documents to ING for payment. Gimpex responded by applying for an interim injunction on 31 May 2010 to restrain Unity from receiving payment under the L/C. A similar injunction was obtained by Gimpex in India on 25 May 2010 to prevent ING, the issuing bank of the L/C, from paying out under the L/C. The interim injunctions were eventually discharged by consent after Unity provided an undertaking not to pursue payment from ING.

25 Gimpex then called on the US$50,000 performance bond amounting to 2% of the contract value that had been provided by SMASL under Art 7.7 of the Contract.

Resale of the coal

26 In the meanwhile, Unity sought to resell the coal. The parties also began communicating with each other through their respective solicitors via emails. On 17 June 2010, the solicitor's for Gimpex, Rajah & Tann LLP ("R&T"), wrote to the solicitor's for the defendants, Oon & Bazul LLP ("O&B") informing O&B that as the coal was below the contractual specifications, the ultimate buyer, Awan, had rejected the coal.

27 In its reply of 18 June 2010 by way of an email, O&B informed R&T that their client was of the view that Gimpex had unlawfully rejected the coal, and that Unity would be taking steps to resell it to mitigate its losses. In fact, in the meantime, on 15 June 2010, Unity had entered into a contract with Rafeh Enterprises (Pvt) Ltd ("Rafeh") to sell the coal to the latter on an "as is where is" basis at a price ranging from US$48 to US$68, with the actual price to be determined after a survey of the quality of the coal had been carried out.

28 Unity sent Kishore to Karachi to facilitate the sale of the coal to Rafeh. Kishore arrived at Pakistan on 20 June 2010. The next day, Kishore engaged SGS Pakistan (Pvt) Ltd ("SGS") to conduct a survey of the coal. On 22 June 2010, Kishore and SGS entered the coal yard, where SGS proceeded to take samples of the coal. However, SGS was stopped by Awan from taking samples. Apparently this was due to Samir informing a representative of Awan that joint sampling, preferably by a reputed agency appointed by the Singapore court, should be done instead.

29 Kishore alleged that later that day, he saw three truckloads of coal being pilfered away by Awan, which caused him to lodge a police report for theft. Kishore also claimed that he received threats on his life via telephone. O&B then wrote to R&T on 23 June 2010, confronting R&T as regards the threats made to Kishore, and also the pilferage of the coal. O&B further questioned Gimpex's interference with SGS's surveying of the coal, and maintained that they wanted to undertake a survey immediately. R&T replied on the same day in two emails. R&T sought more information regarding the threats made against Kishore, and explained that Gimpex had stopped the SGS survey

because it was concerned that the defendants' conduct of the survey might be subject to manipulation in order to cover up their earlier fraudulent acts in delivering low-quality coal. R&T also proposed that the parties conduct a joint inspection of the coal by a court-appointed agency.

30 O&B replied the following day, on 24 June 2010, stating that the proposed joint inspection would be pointless as Unity was of the position that Gimpex had unlawfully rejected the coal. In other words, Gimpex had nothing more to do with the coal. On the other hand, Unity should be allowed to mitigate its losses, and was entitled to take whatever steps it deemed fit, such as conducting a survey of the coal in order that the coal could be sold to another buyer.

31 Kishore left Karachi on 24 June 2010, and Unity eventually aborted the sale of the coal to Rafeh.

32 Subsequently, on 1 July 2010, Unity sold the coal to M/s International Energy Resources ("FZC"), an associated company of Awan, on an "as is where is" basis at the price of US$48.63 per MT. [note: 8] The coal was paid for by FZC. Kishore explained that the defendants had agreed to sell the coal at such a low price because of the condition of the coal at that time, which they believed had deteriorated due to the coal being left to lie in the open for almost two months. Furthermore, they had very little control over the coal, and felt that this was probably their best option at mitigating their losses.

Summary of the pleadings in the Suit

33 In the Suit, Gimpex made a number of claims against the defendants jointly or against the defendants individually:

(a) A claim against Unity for delivering coal which did not conform to the contractual specifications, or in the alternative, non-delivery of coal ("the Breach of Contract Claim"). The remedies sought by Gimpex in this claim are for damages, and an indemnity against any claims by Awan against Gimpex for breach of contract on the part of Gimpex in failing to deliver coal of the correct specifications to Awan.

(b) A claim against Unity for payment of demurrage that was due from Unity to Gimpex pursuant to the Contract ("the Demurrage Claim"). This claim was based on the fact that loading of the coal at Kalimantan took longer than what was provided for under the Contract.

(c) A claim against the defendants for loss suffered as a result of an unlawful conspiracy to injure the Plaintiffs through unlawful and/or fraudulent means ("the Unlawful Means Conspiracy Claim"). [note: 9] In this regard, Gimpex averred that Vinay used Unity as a shell company to enter into the Contract with Gimpex, knowing and intending for the coal to be of grossly inferior quality, while trying to obtain payment under the L/C before the grossly inferior coal was discovered. In coming up with this fraudulent scheme, the defendants perpetrated the following: (1) the party to the initial draft contract was Param Energy, but this was switched to Unity when Gimpex entered into the Contract; (2) the defendants represented that Unity was a Singapore company, and did not disclose that Unity was instead a BVI company; (3) the Contract stated Unity's domicillium as Singapore and had a Singapore address; (4) the defendants fraudulently arranged for grossly inferior coal to be supplied to Gimpex by procuring the coal from PT Planet which was controlled by the defendants; (5) the defendants sought to hide the true quality of the coal by preventing SCCI from inspecting and drawing samples of the coal while it was being loaded onto the Vessel at Kalimantan; and (6) Unity failed to send the required documents in compliance with the L/C requirements and tendered instead a Beneficiary Certificate stating that it had done so,

in order to deceive and to receive payment under the L/C.

(d) That Vinay was the alter ego of Unity and Param Energy, such that the corporate veils over Unity and Param Energy should be lifted with the effect that Param Energy and/or Vinay be liable for Unity's liability to Gimpex because: (1) Vinay had directed or procured the fraud perpetrated against Gimpex; (2) Param Energy and/or Vinay were the true parties liable for Unity's failure to deliver the Cargo; (3) Unity was merely an agent of Param Energy and/or Vinay; and (4) Param Energy and/or Vinay were the true parties liable for Unity's failure to deliver the Cargo according to contractual specifications ("the Lifting of Corporate Veil Claims").

34 For the Breach of Contract Claim, Unity averred that it had delivered coal that conformed to the contractual specifications. This was because the Sucofindo Report reflected that that was the case, and pursuant to Arts 4.4 and 5.1 of the Contract, the Sucofindo Report was binding on the parties in so far as the quality and the quantity of the Cargo were concerned. [note: 10] Furthermore, Gimpex had failed to take reasonable steps to mitigate its losses by not sourcing for or purchasing alternative coal to supply to Awan. [note: 11]

35 In addition, the defendants counterclaimed against Gimpex for its alleged unlawful rejection of the Cargo and its conduct following that, resulting in the defendants suffering losses, which included:

(a) Damages arising from Gimpex's unlawful rejection of the Cargo, amounting to US$643,360.02 (being the difference between the Contract price of US$2,661,991.32 and the sale price to FZC US$2,018,631.30), US$750 (for charges paid to SGS) and US$6,804 (for the expenses incurred in the aborted sale to Rafeh).

(b) Damages suffered by Unity arising from the interim injunction obtained by Gimpex in Singapore.

(c) Reimbursement of US$50,000, being the sum Gimpex received from calling on the performance bond provided under Art 7.7 of the Contract.

(d) An indemnity from Gimpex for any claims arising from Rafeh for Unity's breach of the contract of sale entered into with Rafeh.

36 The claims in [35] will henceforth be collectively referred to as ("the Counterclaims").

37 For the Demurrage Claim, Unity argued that the term of the Contract regarding demurrage had been varied between the parties such that Unity would not be liable for any demurrage or was entitled to despatch. [note: 12]

38 For the Unlawful Means Conspiracy Claim, the defendants argued that no representations were made to Gimpex that Unity was a Singapore company, and Gimpex was not induced by any such representations to enter into the Contract. They further argued that they did not commit any wrongful acts against Gimpex. In any event, the defendants averred that they never intended to cause injury to Gimpex.

39 In response to the Corporate Veil Claims, Vinay further denied that he was the alter ego of Unity and Param Energy. In particular, Vinay pointed out that he was only one of five directors of Unity, and only indirectly held 25% of the shares in Unity through Param Energy.

The decision below

40 The Judge dismissed the Unlawful Means Conspiracy Claim, the Demurrage Claims, and the Corporate Veil Claims, but allowed the Breach of Contract Claim. Consequently, she dismissed the Counterclaims. The Judge further ordered that damages against Unity (with the question of interest on the damages together with the issue of costs of the assessment) be assessed by the Registrar. She also awarded costs to Gimpex for its claim against Unity and the costs of the defendants' counterclaim, and one set of costs (on a standard basis) to be awarded to Param Energy and Vinay for Gimpex's claims against them.

41 At this point we would observe that Gimpex has not appealed against the dismissal of its Demurrage Claim. Therefore, we give no further consideration to that claim in this judgment.

The Judge's findings in relation to the Breach of Contract Claim

42 In relation to the Breach of Contract Claim, the Judge's main finding in this regard was that the coal discharged at Karachi did not meet the contractual specifications, and this was in all likelihood because the coal that was loaded from the jetties onto the barges was not the same coal that was loaded onto the Vessel and shipped to Karachi.

43 The Judge held that the Sucofindo Report was hearsay evidence. The defendants sought to adduce that Report via the testimony of one Nonot Imam Norbintoro ("Nonot"). Nonot was an employee of Sucofindo who signed some of the reports issued by Sucofindo. However, the Judge found (at [160]) that:

> It was clear from his evidence in cross-examination that Nonot did not conduct any survey at Sungai Putting or Batulicin, he did not deliver to the laboratory the coal samples that were taken by Sucofindo's inspectors, he did not conduct the laboratory tests, he was not on the barges when the coal was delivered to the ship, he was not on the ship when the coal was loaded and he did not prepare any certificates of Sucofindo including the certificate of origin that he signed.

44 The defendants sought to admit the Sucofindo Report under a number of the exceptions to the hearsay rule found in s 32 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"). However, the Judge rejected their arguments. The Judge held that the defendants were wrong in relying on the case of *Toepfer v Continental Grain Co* [1974] 1 Lloyd's Rep 11 ("*Toepfer*") for the proposition that the contents of the Sucofindo Report could not be challenged because it was final and binding on the parties under the Contract – until and unless the defendants have proved the truth of the contents of the various reports issued by Sucofindo to the court's satisfaction, the Sucofindo Report could not be admitted and relied on.

45 More importantly, the Judge also held that the Sucofindo Report was not accurate and reliable, and made a number of findings to that end:

> (a) First, the date of intervention indicated in the Sucofindo Report (*ie*, the date Sucofindo was involved in the shipment of the coal) was between 11 and 21 April 2010. Under cross-examination, Nonot admitted that the sampling could not have covered the barge-loading operations as loading of the coal from the jetty onto the four barges at Sungai Putting took place between 7 and 13 April 2010 while loading at Batulicin was between 4 and 6 April 2010. The date of intervention must have been a reference to the loading of the Vessel. That being the case, the Sucofindo Report did not reflect the fact that the sampling of the coal for the purposes of ascertaining, *inter alia*, the GCV, was to be done when the coal was being loaded from the jetty onto the barges.

(b) Secondly, the Sucofindo Report itself stated that the samples were prepared and tests started on 8 April 2010, and Nonot relied on this to say that the first sample was taken on 8 April 2010 on one of the barges such that the problems arising from the Sucofindo Report concerning the date of intervention could be ignored. The Judge found Nonot's explanation unconvincing.

(c) Thirdly, Sucofindo had, at PT Planet's request, changed the standard wording in its certificates from "gross samples were taken during loading *of barge* and sample TM were taken during loading to the vessel" [emphasis added] to "gross samples were collected during loading and sample TM were taken during loading of the vessel". [note: 13] The words "of barge" were removed. This was misleading as it gave the reader the wrong impression that the samples of the coal were taken while the coal was being loaded onto the Vessel and that the loading was done on 8 April 2010.

(d) Fourthly, the Pre-shipment Analysis Report was defective as it pertained to 32,000MT of coal leaving a balance of 9,510MT of coal unaccounted for. The stockpiles from which the coal samples were taken were also not identified.

46 The Judge went on to consider the admissibility of the Inspectorate Report and the Intertek Report. For the Inspectorate Report, one Majeed Qazi Muhammad Abdul ("Majeed") and another Mallik Shyamal Kumar ("Mallik") were called to testify. Gimpex submitted that Majeed and Mallik were the makers of the Inspectorate Report and therefore the Inspectorate Report was not hearsay evidence. Majeed was the operations manager of Inspection Services Incorporated (Pvt) Ltd ('ISIP") who was the Pakistani agent of Inspectorate, and collected the samples and gave evidence on that. Mallik was an assistant manager in charge of carrying out the analysis of the coal samples which were carried out at Inspectorate's laboratory at Bhubaneswar, India. [note: 14] In cross-examination, however, Mallik admitted that he neither carried out the tests on the coal himself nor visually supervised the chemists who did. He also admitted that he could not confirm that the coal sampled was the coal that came from the Vessel. Due to Mallik's testimony, the Judge held that the Inspectorate Report was hearsay evidence. For the Intertek Report, the Judge found that the surveyors of the coal from Intertek declined to give evidence in court and it was therefore hearsay evidence. The Judge then rejected Gimpex's attempts at relying on the exceptions to the hearsay rule found in s 32 of the EA in order to admit both the Inspectorate Report and the Intertek Report.

47 Notwithstanding that all the reports were not admitted into evidence, the Judge held on a balance of probabilities the coal that was discharged in Karachi was not the coal that was sampled by Sucofindo at Sungai Putting. The Judge after considering the evidence held that the coal that was sampled at the jetty and on the barges was not actually loaded on board the Vessel. In arriving at that conclusion, the Judge made the following findings:

(a) The evidence of Gimpex's expert, one Sebastian Norager ("Norager") was preferred over that of the defendants' expert, Robert Gunn ("Gunn"). This was because Norager's report was balanced and took into consideration all relevant factors and evidence while Gunn's evidence was overly biased in the defendants' favour.

(b) Norager's evidence was that in his experience, he had witnessed barges with rejected cargoes of coal being towed to another ship to be loaded. In that regard, Norager noted the Sucofindo Report's analysis of the TM of the coal did not accord with the fact that there was heavy rain during three of the days when the coal was being loaded from the barges onto the Vessel.

(c) Norager's evidence was also that even if he took into account the wetting of the coal by the rain, this could not explain the difference in the TM shown in the Sucofindo Report, the Inspectorate Report, and the Intertek Report. Furthermore, the vast discrepancies in the GCV and TM of the coal shown in the Sucofindo Report, the Intertek Report, and the Inspectorate Report, could not be explained to be a result of the coal deteriorating in quality while being shipped on board the Vessel to Karachi.

(d) The defendants refused Gimpex's suggestion of conducting a joint survey of the coal at Karachi without providing a valid or credible reason for the refusal. On this point, the defendants raised a number of reasons for rejecting this, *viz*, that it was pointless because the Sucofindo Report was final and binding as to the quality of the coal, that there were threats made on Kishore's life, and that the coal was being pilfered by Awan. The Judge rejected all these explanations, holding that she was sceptical regarding the threats on Kishore's life, and in any case, she did not think that those threats had anything to do with conducting a joint survey of the coal. Furthermore, if the defendants had really thought that the coal was being pilfered, a joint survey would have been all the more necessary to determine the actual quantities and quality of the coal that remained in the yard. From this, the Judge inferred that the defendants knew that the coal that was discharged at Karachi did not conform to the contractual specifications.

(e) The defendants should not have stopped SCCI from conducting sampling of the coal on board the Vessel, as that was allowed under Art 4.5 of the Contract. The Judge also held that the defendants' initial explanation for stopping SCCI from conducting sampling of the coal, which was that the defendants were told that SCCI was sampling low quality coal, was unconvincing. This was because, on Prem's evidence, the coal would have been blended at least twice by the time it was loaded onto the Vessel (*viz*, first was the loading of the coal from the jetty onto the barges, and second was the loading of the coal from the barges onto the Vessel) and there was therefore no possibility of SCCI only taking samples of poor quality coal.

48 The Judge therefore concluded that the coal supplied by the defendants was not in accordance with the contractual specifications. Accordingly, the Judge allowed the Breach of Contract Claim, and dismissed the Counterclaims.

The Judge's findings in relation to the conspiracy claim

49 First, the Judge held that Gimpex did not inform any of the defendants that it required the seller of the coal to be a Singapore company and also that the defendants did not represent to Gimpex that Unity was a Singapore-incorporated company. In the Judge's view, there was insufficient evidence to substantiate Gimpex's claim that it had made known to the defendants that it would only enter into the transaction with a Singapore-incorporated company ("the Singapore Entity Claim").

50 To substantiate the Singapore Entity Claim, Gimpex made the point that when the defendants presented Gimpex with a draft of the Contract, Gimpex proposed the inclusion of Art 21 of the Contract, which states a Singapore address as the domicillium of Unity. The Judge, however, held that none of the defendants gave much thought to Art 21 of the Contract. Furthermore, the only evidence relied upon by Gimpex was Samir's claim that he had orally informed Lalit and/or Vinay that Gimpex required the seller to be a Singapore company. There was no documentary evidence to that effect.

51 The Judge was also not persuaded by Gimpex's reliance on Art 21 to show that the defendants represented to Gimpex that Unity was a Singapore-incorporated company. First, the Judge held that

the word "domicillium" or "domicile" in English, was simply indicative of an address nominated by a party in a legal contract where legal notices could be sent, and to "equate the word domicillium with a representation by [Unity] that it is a Singapore-registered company is really stretching and/or straining the meaning of the word" (see Judgment at [190]).

52 Secondly, the Judge also held that it was Gimpex who rejected the first draft contract where Param Energy was the contracting party because Gimpex did not want to provide a transferable L/C. That, as alleged by the defendants, was the only reason why Unity was substituted as the seller of the coal in the Contract. The defendants did not engineer the switch.

53 Thirdly, the Judge held that, "no evidence was adduced in court that even remotely suggested that the third defendant conspired with either the first and/or second defendant to defraud the plaintiff" (see Judgment at [194]). The Judge then elaborated on this by observing that Unity's profit margin, if the transaction had gone through smoothly, was only 1.83%, and therefore there was not much benefit for Vinay to defraud Gimpex.

The Judge's findings in relation to the Corporate Veil Claims

54 The Judge held that Vinay was not the alter ego of Unity or Param Energy. In particular, the Judge noted that Vinay was not even a cheque signatory of Unity's bank accounts, and the major shareholder of Unity was not Vinay but SMIL, who had a 51% shareholding in Unity (see Judgment at [195]).

The parties' respective cases

CA 160/2013

55 In Civil Appeal No 160 of 2013 ("CA 160/2013"), Gimpex has appealed against the Judge's decision to dismiss the Unlawful Means Conspiracy Claim, and the Corporate Veil Claims. In this appeal, Gimpex also seeks to argue that the defendants should be liable for lawful means conspiracy and, that as between the defendants, there was a predominant intention on their part to harm Gimpex. Thus, Vinay and Param Energy should also be liable as joint tortfeasors ("the Joint Tortfeasor Claim"). In addition, in respect of the Breach of Contract Claim, Gimpex is asking this court to assess the damages due to it instead of letting the damages be assessed later by the Registrar as ordered by the Judge as all the relevant evidence relating to damages is already before the court.

56 Gimpex submits that the Judge's reasoning, in relation to there being no motivation for the defendants to defraud Gimpex because the profit margin under the Contract was only 1.83%, was wrong. However, the remaining elements of Gimpex's case in CA 160/2013 are largely a repeat of their submissions made before the Judge.

57 The defendants did not respond to Gimpex's submission on the Judge's finding regarding the defendants' motivation to commit fraud. The remainder of their submissions was largely a repeat of their case before the Judge. They reiterated their point that there was no fraud on their part.

CA 161/2013

58 In Civil Appeal No 161 of 2013 ("CA 161/2013"), the defendants are appealing the Judge's decision to allow the Breach of Contract Claim and her decision to dismiss the Counterclaims. Their case may be summarised as follows:

(a) Gimpex, as the plaintiff, had the burden of proving its case that the rejection of the coal was lawful because the coal did not comply with the contractual specifications.

(b) The Sucofindo Report was final and binding on the parties pursuant to Art 4.5 of the Contract. This meant that Gimpex should not be allowed to challenge findings of the Sucofindo Report unless it has pleaded fraud or collusion on the part of Sucofindo, or that there was a manifest error with the Sucofindo Report. Gimpex did not allege fraud on the part of Sucofindo, and so the defendants did not have to prove the truth of the contents of the Sucofindo Report. The Sucofindo Report should have been admitted into evidence as a matter of course.

(c) In any event, the Sucofindo Report should be admitted under s 32(1)(*b*)(iv) and/or s 32(1)(*j*)(iii) of the EA.

(d) The Sucofindo Report did not contain inaccuracies as held by the Judge such that it should be inadmissible.

(e) The Inspectorate Report and the Intertek Report were both inadmissible, or should be given little or no weight if they are admitted. This is because the two reports were hearsay and were unreliable in terms of accuracy. The sampling of the coal that was conducted for those reports was grossly inadequate.

(f) There was sufficient evidence to show that the coal that was loaded from the jetty to the barges was also loaded from the barges onto the Vessel.

59 Gimpex's response is that:

(a) Art 4.4 of the Contract did not specifically provide for the Sucofindo Report to be final and binding as to the quality of the coal.

(b) The Sucofindo Report was not admissible under s 32(1)(*b*)(iv) and/or s 32(1)(*j*)(iii) of the EA. If it was, the court should find that it is inadmissible under s 32(3) of the EA.

(c) The Intertek Report was admissible in evidence under s 32(1)(*j)*(iii) and/or s 32(1)(*j*)(iv) of the EA.

(d) The Inspectorate Report was not hearsay evidence, and even if it were, it should be admissible under s 32(1)(*j)*(iii) and/or s 32(1)(*j*)(iv) of the EA.

(e) The Judge's finding that the coal that was loaded from the jetty to the barges was not the same coal that was loaded from the barges onto the Vessel, should be affirmed.

Issues before this Court

60 The issues that arise for determination in relation to both the appeals can be listed under the following main heads:

(a) Whether the coal delivered at Karachi was in compliance with the contractual specifications.

(b) Whether the claim for conspiracy is proved.

(c) Whether the defendants are liable as joint tortfeasors.

(d) Whether the corporate veils of Unity and Param Energy should have been lifted.

(e) Whether the court should have proceeded to assess the damages due to Gimpex for the Breach of Contract Claim.

Whether the coal delivered at Karachi was in compliance with the contractual specifications.

Who has the burden of showing that the Cargo supplied was within or outside the contractual specifications

61 The defendants submit that Gimpex, being the plaintiff, has the burden of proving that the coal supplied did not comply with the contractual specification. In this regard, they rely on s 103 of the EA which reads as follows:

> **Burden of proof**
>
> **103.**—(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

62 Gimpex accepts that it had the burden of proving its case. However, it submits that once it has shown that it had purchased coal of a specified quality from Unity under the Contract which Unity had the obligation to deliver, the evidential burden would shift to the defendants (or more specifically, Unity, as the seller of the coal) to show that they had delivered coal within the contractual specifications. If the defendants could not do so, Gimpex would have proven its case.

63 Gimpex relied on the Court of Appeal decision in *Zim Integrated Shipping Service Ltd and others v Dafni Igal and others* [2011] 1 SLR 862 ("*Zim*"). In that case, the plaintiffs brought claims premised on the defendants' breach of fiduciary duties, which included a claim based on one of the defendants receiving monies from a third party which was to be accounted for to the plaintiffs. The plaintiffs adduced evidence to the effect that the defendant received monies which corresponded in value to the amounts which were owed by the third party. The defendant's response, *inter alia*, was that the monies paid to him were gratuitous incentive payments given to it for its support and patronage of the third party. The Court of Appeal held (at [12]) that:

> In our view, although the [plaintiffs] bore the legal burden throughout of proving that the monies were received in connection with the [defendant's] role as the [plaintiffs'] agent (and, hence, establishing their legal entitlement to the [monies]), they had … in fact discharged the (initial) evidential burden that this was the case. The evidential burden then shifted, at this point, to the Fourth Respondent to demonstrate that the monies had not been received in that capacity (see also, in relation to the distinction between the legal burden and the evidential burden, the decision of this court in *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 (at [14])). …

64 As a matter of principle, the defendants are correct to say that it is for Gimpex to prove its case and that Gimpex bears the legal burden throughout. In order for Gimpex to satisfy that legal burden, it must prove three things: (1) what it was entitled to under the contract; (2) what was in

fact delivered; and (3) what was delivered did not comply with what it was entitled to. Gimpex's submission appears to be that so long as it can show (1), the burden would then shift onto the defendant to prove that it did ship conforming coal. The problem with this analysis is that it reverses the burden of proof that is placed on Gimpex by s 103 of the EA.

65 The case of *Zim* relied upon by Gimpex also does not help them. That was a case concerning a claim against fiduciaries. The plaintiffs' case in *Zim* was that: (1) they were supposed to receive certain sums of moneys from third parties; (2) those moneys were paid to one of the defendants; and (3) that defendant did not pay over those moneys to the plaintiffs. The Court of Appeal found that the plaintiffs had discharged their initial burden of proving their case. The evidential burden thus shifted over to that defendant to demonstrate that the monies had not been received by him in his capacity as a fiduciary and clearly, only the defendant would be able to answer in what other capacity, if at all, he was receiving the payment. Those were different circumstances. Here Gimpex has not discharge its initial burden of proving the second and the third elements set out in [64] above.

66 In this connection, the same must be said about the defendants' counterclaim for unlawful rejection. In order for the defendants to succeed in their counterclaim, they must show that: (1) there was a contract for Gimpex to take delivery of the coal in exchange for payment to the defendants; (2) the coal delivered to Gimpex was of the quality specified under the Contract; and (3) Gimpex did not accept delivery of the coal.

67 What follows from this analysis is that in order for Gimpex to succeed, it must show that either the Intertek Report or the Inspectorate Report is admissible into evidence in order to discharge its initial burden that the coal delivered was deficient. Only then would the evidential burden shift to the defendants, who seek to admit the Sucofindo Report as countervailing evidence as to the quality of the coal delivered. Similarly, as regards the Counterclaim, it is for the defendants to first show that the coal delivered was of a satisfactory quality. To do that, they must show that the Sucofindo Report is admissible into evidence and is reliable. Only when the defendants have proved that, would the evidential burden shift to Gimpex. Where neither party is able to discharge its initial burden, then both parties will equally fail in their claims.

68 The Breach of Contract Claim and the Counterclaims therefore heavily hinge upon the admissibility of the three reports.

Whether the Sucofindo Report was final and binding on the quality of the coal such that the truth of its contents need not be proven by the defendants

69 Before analysing the admissibility of the three reports proper, we pause here to consider a submission made by the defendants in relation to the Sucofindo Report. The defendants contend that under Art 4.4 of the Contract, parties had agreed that the Sucofindo Report shall be final and binding on the parties as to the quality of the coal. We will refer to Art 4.4 again:

> 4.4 All reported findings on all inspections/surveys conducted at Origin in relation to quality, quantity and weights etc done at origin and/or port and place of loading shall be FINAL and binding to both Buyer and Seller.

70 Furthermore, Art 4.1 provides that the quality of the coal shipped was to be determined and analysed by Sucofindo, while Art 4.3 expressly states that the "consignment should be accompanied by Certificate of Sampling and Analysis as per ASTM standard issued by Sucofindo Indonesia" (*ie*, the Sucofindo Report). Thus the defendants say that having the Sucofindo Report to be regarded as final

and binding as to quality of the coal was consistent with the commercial purpose of such a clause, which was to minimise disputes about the quality of the coal.

71 Gimpex, on the other hand, contends that Art 4.4 makes no specific mention of a quality certificate issued by Sucofindo, and refers instead to findings in general. Gimpex contrasted Art 4.4 with Art 5.1, which is a provision in the Contract relating to ascertaining the *quantity* of coal. Art 5.1 provides that:

> 5.1 Seller shall appoint Sucofindo, Indonesia to determine the weight of cargo loaded onto the mother vessel at loading point and issue a Certificate of Weight, which shall be final and binding on both parties.

Gimpex argues that if the parties had intended the Sucofindo Report to be final and binding as to quality, they would have said so expressly in a manner similar to that in Art 5.1.

72 In addition, Gimpex relies on Art 4.5, which allows the buyer to appoint an independent inspection agency, and Art 4.6, which provides that one set of raw samples drawn by surveyors on board the Vessel should be duly sealed and signed by "the surveyors". Gimpex argues that by virtue of these provisions, the Contract appears to envisage that Sucofindo's analysis of the coal was to be checked by another inspection agency.

73 The defendants' response is that SCCI was only allowed to witness the loading of the coal under Art 4.5. This is because if SCCI was allowed to sample the coal, this would run contrary to Arts 4.1 and 4.4 that the Sucofindo Report was meant to be final and binding as to quality.

74 We agree that reading Art 4.4 in isolation could leave one in doubt as to its proper sense. It is true that read in the context of the preceding provisions (see [10] above), and that must be the proper way to construe the provision, Art 4.4 would, *prima facie*, mean that the parties have agreed to regard the reports/findings of Sucofindo, including those as to quality, as being final and binding on them. That said, we must point out that there are difficulties to the above construction by virtue of Arts 4.5 and 4.6, with the former providing that the buyer has the option of appointing "an independent inspection agency" and the latter stating that "one set of raw samples drawn by the surveyors on board the vessel would be duly sealed and signed by the surveyors". What would be the role of the surveyor appointed by the buyer (here, it was SCCI)? There is nothing in Art 4.5 which indicates that SCCI could only witness what was being done by Sucofindo so why could SCCI not collect samples? Moreover, there must be a purpose in requiring that the samples taken on board the vessel be "duly sealed and signed by the surveyors". Should the sealed samples also bear the signature of the surveyor (SCCI) appointed by the buyer? And if the samples taken need only bear the signature of the surveyor appointed by the seller (in this case Sucofindo), what would be the point of Art 4.6? The position is far from clear. We would also highlight that Art 22 of the Contract even provides that:

> BUYER'S at their own expense shall reserve the right at any time to observe or appoint an observer/representative/third party international inspection agency during mining and stockpiling of the coal for the shipment, sampling and analysis, loading and weighing at the stockpile/jetty/loading port/anchorage for which SELLER'S to extend all necessary cooperation.

In the light of Arts 4.5 and 4.6, we do not think a certificate issued by Sucofindo as to the quality of the coal should be regarded as final and binding on the parties. Here, Gimpex did appoint SCCI as its own independent inspection agency in accordance with its entitlement to do so under the Contract. It follows, and also bearing in mind that any ambiguity in the Contract could possibly be construed

contra proferentem vis-à-vis the drafter (in this case, the defendants) that the defendants should not be permitted to insist that the Sucofindo Report was final and binding between the parties as to the quality of the coal.

75 What this means is that if the defendants are to rely on the Sucofindo Report as proof of the quality of the coal, the defendants must prove the truth of the contents of the Sucofindo Report. It is to this issue which we now turn our attention to.

The admissibility of the Sucofindo Report

76 As alluded to earlier, the admissibility of the three reports are crucial to the present case. We first examine the admissibility of the Sucofindo Report, followed by the admissibility of the Intertek Report and finally the Inspectorate Report.

77 The parties have placed much reliance on s 32 of the EA and we will begin with looking at the significant amendments to s 32 brought about by the Evidence (Amendment) Act 2012 (Act 4 of 2012) ("the EA(A) 2012"). The objects of the amendments to s 32 of the EA were summarised at the Second Reading of the Evidence (Amendment) Bill (*Singapore Parliamentary Debates*, *Official Report* (14 February 2012) vol 88) ("the *Parliamentary Debates*") by Minister for Law, Mr K Shanmugam:

> … The hearsay rule provides that an out-of-court statement shall not be admitted as proof of its contents, unless the maker of the statement is produced in Court. The rule has been much criticised and exceptions have been carved out. Strong views have been expressed to us that the hearsay rule should be abolished. The present amendments, however, do not go that far. There is still a core of sense – common sense – in the hearsay rule that, *prima facie*, a statement should not be admitted to prove the truth of its contents if its maker cannot be cross-examined as to its veracity. What we have done is to introduce more flexible exceptions to the hearsay rule.
>
> Section 32 is amended, so that the exceptions in that section will no longer be predicated on the unavailability of the maker. The business records exception in section 32(b) is extended. Existing exceptions under the Criminal Procedure Code 2010 will now be moved to the Evidence Act; they will now apply to both civil and criminal proceedings. The Court is given a residual discretion to exclude hearsay evidence in the interests of justice. This ensures that the expanded exceptions are not abused. This is in addition to the Court's inherent jurisdiction to exclude prejudicial evidence. A party who intends to rely on hearsay evidence would also have to give advance notice of his intent, in accordance with the relevant rules of procedure.

78 The material parts of s 32 of the EA (as amended by the EA(A) 2012) are as follows:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> **32.**—(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> **or is made in course of trade, business, profession or other occupation;**

(*b*) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —

(i) any entry or memorandum in books kept in the ordinary course of a trade, business, profession or other occupation or in the discharge of professional duty;

(ii) an acknowledgment (whether written or signed) for the receipt of money, goods, securities or property of any kind;

(iii) any information in market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations; or

(iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation,

and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons;

…

or is made by person who is dead or who cannot be produced as witness;

(*j*) when the statement is made by a person in respect of whom it is shown —

(i) is dead or unfit because of his bodily or mental condition to attend as a witness;

(ii) that despite reasonable efforts to locate him, he cannot be found whether within or outside Singapore;

(iii) that he is outside Singapore and it is not practicable to secure his attendance; or

(iv) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to do so;

…

(3) A statement which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

(4) Except in the case of subsection (1)(*k*), evidence may not be given under subsection (1) on behalf of a party to the proceedings unless that party complies —

(a) in the case of criminal proceedings, with such notice requirements and other conditions as may be prescribed by the Minister under section 428 of the Criminal Procedure Code 2010 (Act 15 of 2010); and

(b) in all other proceedings, with such notice requirements and other conditions as may be

prescribed in the Rules of Court or the Family Justice Rules.

(5) Where a statement is admitted in evidence under subsection (1), the court shall assign such weight as it deems fit to the statement

Was the Sucofindo Report hearsay evidence?

79 The defendants rely on the Sucofindo Report in order to prove that *the coal shipped on board the Vessel and discharged at Karachi* had a GCV of 6,266Kcal/Kg and TM of 18%, and was therefore within the contractual specifications. That is the fact in issue which the defendants are seeking to prove by the Sucofindo Report.

80 The defendants submit that the Sucofindo Report is admissible as proof of that fact in issue through Nonot's oral testimony, whom the defendants alleged was the maker of the report. The Sucofindo Report was therefore not hearsay evidence, or in other words, the statements contained in the report are not just statements of relevant facts which are admissible under s 32(1) of the EA (see *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [67]).

81 The defendants' submission that Nonot was the maker of the Sucofindo Report is premised on a legal proposition they seek to advance, namely, that the person who authenticates the document is the maker of the document. The defendants rely on the Kuala Lumpur High Court case of *Public Prosecutor v Abdul Rahim Bin Abdul Satar* [1990] 3 MLJ 188 ("*Satar*") where objection was taken as to the admissibility of a list bearing the serial numbers of some dollar notes on the basis that it was hearsay evidence. The list was used for the purposes of showing that the accused person had received those bank notes in contravention of the then Prevention of Corruption Act 1961 (Act 57) (M'sia). An issue arose as to who was the maker of the list since the investigating officer who produced this list in court had received the list from another police officer who prepared the list. However, the investigating officer had compared the numbers on the prepared list with the bank notes and found that the notes correlated to the numbers on the list. He was also the person who signed off on the list as the person who passed the notes to the accused. Wan Yahya J held that the investigating officer was the maker of the list because:

> … By comparing the unsigned list against the notes and then signing the same, the [investigating officer] had in effect authenticated and endorsed the [list] as his own document. After all *he was the person who compared the notes and could vouch for the correctness of the numbers that had been inscribed and he had authenticated the list by setting down his signature on it and not [the police officer]*. …
>
> …
>
> The mere deed of composing, framing, ascribing, or preparing a document or reducing certain details into writing, does not ipso facto turn the writer into the maker of a document within the contemplation of the hearsay rule. *In my opinion, the affirming person for whose purpose or on whose behalf the averments contained in the documents are made is the actual maker of the document*. The petition writer, typist or even a lawyer who prepares a document for his client is not himself a maker but is the person who assists in the preparation of the document. The maker is the person who authenticates the document.
>
> [emphasis added in italics and in underline]

On that basis, the court held that the list was not hearsay evidence and was admissible.

82 The defendants relied on the underlined portion of the quotation above in support of the proposition advanced. However, this reliance is misconceived. That statement was made in the context of the court determining that the maker of the list was the investigating officer *and not* the police officer who prepared it. Instead, the crucial part of the court's decision was the first italicised portions of the quotation above. The reason why the maker of the list was the investigating officer was because he had checked the numbers on the list against the actual bank notes and could thus testify as to the truth of the numbers inscribed on the list as matching the bank notes he passed on to the accused person. The other police officer who prepared and gave the list to the investigating officer was no more than someone who did the clerical work.

83 The position in the present case is different from *Satar* in all material respects. Factually, it was not clear that Nonot was the person who signed the Sucofindo Report. During examination-in-chief, Nonot testified that the only certificate he signed on Sucofindo's behalf was the certificate of origin, and the rest of the certificates (including the Sucofindo Report) were signed by one M Eko Supriana. The Judge also held that this was the case. This is a direct contradiction to the defendants' submission that, "[i]t is not disputed that Nonot signed [the Sucofindo Report]", and that the Judge had erred in that regard. Gimpex unequivocally denies that this issue is undisputed.

84 In any event, Nonot's evidence during cross-examination was that he was not personally involved in the entire process of sampling, testing, and loading of the coal: (1) he did not conduct the sampling of the coal at Sungai Putting or Batulicin; (2) he did not deliver the coal samples to the laboratory for testing; (3) he did not conduct the laboratory tests; (4) he did not witness the coal being loaded onto the barges; (5) he did not witness the coal being loaded on the Vessel from the barges; and (6) he did not prepare the Sucofindo Report (or any of the various Sucofindo certificates issued). His involvement was restricted to giving instructions to the Sucofindo personnel during sampling, calling to check that the coal samples arrived at the laboratory in Batulicin, being informed of the test results, obtaining updates on the loading process from the Sucofindo personnel involved, and checking the Sucofindo Report against time sheets provided by the Sucofindo personnel who had collected the samples. In other words, he could not testify as to whether the statements contained in the Sucofindo Report about the quality of the coal shipped on board the Vessel and discharged at Karachi were true – he had no first-hand knowledge at all. This is unlike what the investigating officer did in *Satar* who in fact checked the numbers on the list against the actual bank notes. Therefore, the Sucofindo Report is hearsay evidence.

The defendants' reliance on s 32(1)(b)(iv)

85 Next, the defendants' argue that the Sucofindo Report is admissible under s 32(1)(*b*)(iv) of the EA. In their submissions, the defendants rely principally on two things: (1) the amendments to s 32(1)(*b*) in 2012, where it was made clear that the statements made pursuant to s 32(1)(*b*) included statements made based on information supplied by other persons; and (2) the High Court decision of *Press Automation Technology Pte Ltd v Translink Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 ("*Press Automation*").

86 Turning first to *Press Automation*, the issue there was whether a survey report which incorporated a verbal inspection report was admissible without the person who made the verbal inspection report being called to testify. The plaintiff there relied, *inter alia*, on the previous s 32(1)(*b*) in the EA ("the old s 32(1)(*b*)"), which read:

> **32. Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, ... are themselves relevant facts in the following cases:**

...

> (b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money goods, securities or property of any kind, or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;...

87 Judith Prakash J held that because the verbal inspection report was made in the ordinary course of business and the making of the survey report was done as part of the maker's ordinary duties, the report should be admissible pursuant to the old s 32(1)(*b*). Prakash J further held that the survey report was admissible for another reason. The defendant there had waived its right to object to the admissibility of the survey report by agreeing that it should be included as part of the Agreed Bundle without making any reservations on admissibility, with the effect that the report would be admissible without formal proof.

88 The defendants submit that the circumstances surrounding the admission of the Sucofindo Report were similar to that in *Press Automation*. Here, Nonot testified that he had verified the sampling and analysis process with the Sucofindo survey and laboratory personnel. The sampling of the coal and the testing of the samples were done in the ordinary course of business, and the making of the Sucofindo Report was done as part of Nonot's ordinary duties.

89 On the other hand, Gimpex submits that the Court of Appeal decision in *Vaynar Suppiah & Sons v Abdul Rahim K M A and Another* [1974–1976] SLR(R) 112 ("*Vaynar*") held that the old s 32(1)(*b*) only applied to: (1) reports made in the course of business which were prepared first-hand by a person with knowledge of the truth of the contents of the report; and (2) only to statements of facts made by experts in the course of business and not to statements of opinion. In so far as *Press Automation* is contrary to the holdings in *Vaynar*, it ought not to be accepted, since *Press Automation* was a High Court decision which did not consider the Court of Appeal decision in *Vaynar*. Furthermore, Gimpex submitted that the Sucofindo Report consisted of statements of opinion, and that in making the Report Nonot did not have personal knowledge of the information required to give those opinions stated in the Report.

90 Be that as it may, the cases above were decided under the previous version of s 32, which does not concern us here. The current s 32(1)(*b*) expressly includes, "a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation *based on information supplied by other persons*" [emphasis added]. It would appear that Gimpex's objection that the Sucofindo Report was made by a person without personal knowledge of the information required to make the report can no longer hold good in light of the current provision.

91 It was clear from the Explanatory Statement to the Bill which eventually was enacted as EA(A) 2012 that s 32 was amended, "to expand the scope of existing exceptions, *especially the exception for statements made in the course of a trade, business, profession or other occupation*" [emphasis added]. We should add that the expansion of the scope of s 32(1)(*b*) was also discussed in greater detail in the Ministry of Law draft consultation paper in relation to the Bill ("the Consultation Paper").

92 As background, the Consultation Paper noted (at p 8) that the Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings* (May 2007) at para 15 (Chairman: Philip Jeyaretnam SC) ("the

Law Reform Committee Report") critiqued the old s 32(1)(*b*) for being limited in the following ways:

(a) The exception is confined to first-hand reports made by the transactor himself. It does not apply to business records compiled by a third-party record keeper from information supplied by a transactor.

(b) It is unclear whether the exception applies to composite business reports.

(c) As applied to expert reports, the exception is limited to statements of fact (as opposed to opinion) made by the experts in the course of business.

The Consultation Paper stated that the intention of the draft Bill was to (at pp 8–9):

> … *remove these technical limitations to the scope of the "business statement" exception*, and to allow a court the discretion to admit all business records produced in the ordinary course of business which appear prima facie authentic (see section 32(1)(*b*) of the Draft Bill). … It would remain open to the party against whom such evidence is raised to challenge the weight which should be attributed to such evidence. Further, the court's discretion to decline to admit such hearsay evidence would also apply to business statements. [emphasis added]

93 It is also apposite to note that the limitations of the old s 32(1)(*b*) as mentioned in the *Law Reform Committee Report*, were made with reference to the decision in *Vaynar* (see the *Law Reform Committee Report* at para 15). In fact, that report stated that the position on the admissibility of "composite business reports" was still unclear despite the decision of *Press Automation* (*ibid*). There is, therefore, cause to believe that the scope of the current s 32(1)(*b*) is meant to remove the limitations under the old law set out in *Vaynar*.

94 We would observe that s 32(1)(*b*)(iv) appears to be a new sub-provision which was not there in the old s 32(1)(*b*). However, on the face of it, s 32(1)(*b*)(iv) does not purport to alter the scope of the admissibility of business documents apart from making it absolutely clear that business records would also fall within the exception to the hearsay rule. This is evidenced by the *Parliamentary Debate* on the Bill (see above at [76]) where the Minister had expressly stated that, "[t]he business records exception in section 32(b) [*sic*] is extended". However, the real extension of the scope of this exception to the hearsay rule would appear to lie in the last phrase of s 32(1)(*b*), "based on information supplied by other persons", which qualifies all sub-paragraphs (i) to (iv) of s 32(1)(*b*). This phrase is commented on by Professor Jeffrey Pinsler SC ("Prof Pinsler") in his work, *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013) ("*Pinsler*"), in the context of s 32(1)(*b*)(iv), as follows (at para 6.008):

> The term 'record' is not defined in the EA. It may consist of a single document which includes information or two or more documents which contain information. In any event, it must be compiled by a person in the ordinary course of his trade, business, profession or other occupation. *There is no express requirement that the compiler and the persons who supplied the information included in the record must have personal knowledge of that information.* Therefore, s 32(1)(b)(iv) is broader than the repealed s 272 of the current CPC (and its predecessor, s 380 of the former CPC), which required the supplier of information to have, or to be reasonably supposed to have had, personal knowledge concerning the facts. Moreover, where the supplier of information was merely an intermediary (as when he received information from another supplier of information, who might have been an intermediary himself), the intermediary or intermediaries had to have been acting under a duty. *The absence of these requirements in s 32(1)(b)(iv) means that hearsay upon hearsay (multiple hearsay) to an unlimited degree may be admitted without*

safeguards concerning the knowledge of the persons involved in transmitting the information. Furthermore, the condition in the repealed s 272 that direct oral evidence of the facts would have been admissible (ie, the court could have accepted direct testimony of the facts if it had been available) is also absent from s 32(1)(b)(iv). Additionally, the protection in the repealed s 272, which precluded the admissibility of a statement in the record if the person who supplied the information did so after the commencement of investigations into the offence, has not been retained by s 32(1)(b)(iv). *These omissions raise the real possibility that documentary records admitted under s 32(1)(b)(iv) may be unreliable*, a particular concern where the accused has to face such evidence in criminal proceedings. … [emphasis added]

95 In the premises, we are of the view that the current s 32(1)(*b*)(iv) is *prima facie* broad enough to permit the admission of the Sucofindo Report for the purposes of proving that the coal shipped on board the Vessel and discharged at Karachi was of the quality stated in the report. However, this is not the end of the matter. There is still s 32(3) which requires the court to examine whether it should exercise its discretion to exclude the Sucofindo Report in the interest of justice.

The defendants' reliance on s 32(1)(j)

96 But before we consider how s 32(3) should be construed and applied, it may be convenient for us to deal briefly with the parties submissions on the admissibility of the Sucofindo Report based on s 32(1)(*j*)(iii) of the EA, which is an exception to the hearsay rule where the maker of the statement "is outside Singapore and it is not practicable to secure his attendance". We should add that s 32(1)(*j*) is a new addition to the EA pursuant to the EA(A) 2012. As explained in *Pinsler* (at paras 6.028–6.029):

> … [Section 32(1)(*j*)] is different from paras (a)–(h) of the section in two main respects. First, its operation does not depend on a specific factual scenario as in the case of the latter paragraphs. Second, its underlying principle is that the witness's statement is the best evidence available in the face of his unavailability. In contrast, the availability of the maker as a witness is not an issue for the purpose of admissibility pursuant to paras (a)–(h) of s 32(1). As the only requirement for admissibility under s 32(1)(j) is the unavailability of the maker of the statement as a witness, it is essential that the ground put forward by the party seeking to admit the statement is strictly proved by him. …
>
> …
>
> 6.029 Whether the ground of unavailability relied upon is satisfied must depend on the particular facts of the case. …

97 In light of the nature of s 32(1)(*j*), we agree with the views of Prof Pinsler that the burden is on the person seeking to rely on s 32(1)(*j*) to prove the ground of unavailability and that a mere allegation of unavailability is not acceptable. This follows as a matter of reason and logic. This was also the position under the old s 32(1), where the unavailability of a witness was one of the conditions which had to be fulfilled before any of the exceptions contained within the old s 32 could even be engaged (see, *inter alia*, *Jet Holdings Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769; and *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and Another* [2007] SGHC 50). In the present case, it is therefore incumbent on the defendants to prove that they were entitled to invoke s 32(1)(*j*) to admit the Sucofindo Report.

98 As to what the defendants need to show in order to invoke s 32(1)(j), a plain reading of the

provision reveals that there are two cumulative requirements: (1) that the witness is outside Singapore; and (2) that it is not practicable to secure his attendance. The first requirement is obvious in itself. The second requirement is less straightforward, in the sense that what is "practicable" is open to interpretation and would depend on the circumstances.

99 On the second requirement, Prof Colin Tapper ("Prof Tapper") in *Cross and Tapper on Evidence* (LexisNexis, 12th Ed, 2010) observed with regard to s 116(2)(c) of the Criminal Justice Act 2003 (c 44) (UK) ("the CJA") (which is *in pari materia* to s 32(1)(*j*)(iii) of the EA) (at p 607) that:

> … The second condition, however, refers not to inability to attend, but to *secure* attendance, and may be satisfied by the recalcitrance of a witness outside the United Kingdom. Reasonable practicality implies assessing the likely effectiveness of taking normal steps to secure the attendance of the witness, and considering in relation to such a judgment the importance of the evidence, the degree of prejudice to the defence if it is admitted, and the expense and inconvenience involved in securing attendance. … [emphasis in original]

100 The defendants' submissions also referred, in reliance on the case of *R v Castillo* [1996] 1 Cr App Rep 438 (which concerned the previous incarnation of s 116(2)(c) of the CJA), to these various considerations alluded to by Prof Tapper. They averred that 30 surveyors were involved in the survey project. They were from Indonesia, and it would not have been reasonably practicable to have them testify at the trial. Furthermore, the surveyors would not have been able to provide any useful testimony on Gimpex's pleaded case that the coal sampled by Sucofindo was not shipped on board the Vessel and was not the coal that was discharged in Karachi. In addition, Unity had requested for the contact details of these 30 surveyors but was informed by Sucofindo that most of them had resigned and were no longer contactable. The defendants submit that the fact that the witness in question has left the employ of the party seeking to admit the evidence, is a factor that points to it being impracticable for the witness to be produced (see the English High Court decision of *Elafonissos Fishing and Shipping Company v Aigaion Insurance Company SA* [2012] EWHC 1512 (Comm) at [5]). Finally, the defendants also stated that they had in their Notice to Admit Documentary Hearsay Evidence dated 29 April 2013 ("the defendants' Notice to Admit") set out the names of 27 of the surveyors.

101 We make a number of observations with regard the defendants' submissions. First, the defendants appear to have failed to place sufficient importance on the testimony of the surveyors in admitting the Sucofindo Report for the purpose of showing that the coal shipped on board the Vessel and discharged at Karachi was of the requisite quality. The evidence of how the coal was sampled was crucial in determining whether the Sucofindo Report was accurate as to the quality of the coal which the defendants alleged was shipped on board the Vessel and discharged at Karachi. It is a critical piece of document for the present action. Secondly, while we agree that the witnesses having resigned from Sucofindo is a relevant factor to consider, this does not necessarily suggest that they are no longer contactable. Evidence as to how they were previously contacted and what efforts had been made to contact them would have been more germane. Thirdly, while we appreciate that this may be a result of loose drafting, to say that the witnesses were from Indonesia is equivocal. The issue is whether the witnesses are outside Singapore; where they came from is irrelevant. Lastly, the setting out of the names of the surveyors in the defendants' Notice to Admit would not overcome the deficiencies of the defendants' case. The setting out of the names was but a procedural *requirement* under s 32(4)(b) and O 38 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules of Court"), which the defendants had to comply with in order to even attempt to adduce hearsay evidence under s 32 and this will be further analysed below at [135]–[141].

102 Given that the burden was on the defendants to prove their case for admissibility of the

Sucofindo Report under s 32(1)(*j*)(iii), and in light of the inadequate evidence adduced in that regard, we find that the Sucofindo Report should not be admitted pursuant to s 32(1)(*j*)(iii). However, given our earlier findings as regards s 32(1)(*b*)(iv) (see [81] to [91] above), our holding here is not determinative of the admissibility of the Sucofindo Report.

Section 32(3) of the EA

103 The fact that a document is admissible under s 32(1) of the EA is not the end of the matter. Section 32(3) of the EA must also be considered; it reads:

> A statement which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

The purpose of s 32(3) as understood from the Minister's speech in the *Parliamentary Debates* appears to be a balancing counter to the potential increase in the admission of hearsay evidence due to the amendments made in the EA(A) 2012, which (as mentioned earlier at [77]) were enacted to "introduce more flexible exceptions", while giving the courts a "residual discretion to exclude hearsay evidence in the interests of justice".

104 In this regard, the application of s 32(3) must be considered especially for evidence admitted pursuant to s 32(1)(*b*), the scope of which was expressly stated by the Minister to have been expanded (see above at [91]). The expanded scope dispenses with the requirements under the previous s 32(1)(*b*) for the maker of the statement to have personal knowledge of the facts contained in the statement and that the direct oral evidence of the facts must have been admissible, and therefore "raise the possibility that documentary records admitted under s 32(1)(b)(iv) may be unreliable" (see *Pinsler* at para 6.008).

105 Prof Pinsler in "Admissibility and the Discretion to Exclude Evidence: In Search of a Systematic Approach" (2013) 25 SAcLJ 215 ("*Pinsler (SAcLJ)*"), analysed the theoretical basis of s 32(3) of the EA, and helpfully proposed the following (at para 30):

> As the word "relevant" is used in the EA to express the admissibility of a fact, it must be assumed that this is the meaning intended by [s 32(3)]. It is clear that [s 32(3) confers] upon the court a discretion to exclude the hearsay statement … if its admissibility would not be in the interests of justice. The terminology does raise conceptual and practical concerns. First as s 5 of the EA (which is the sole pillar of the admissibility scheme) declares the admissibility of the facts set out in [s 32(1)], their status is established once and for all. By empowering the courts to reverse their status (by deciding that the statement … "shall not be relevant"), [s 32(3)] creates a legal fiction to the effect that those facts were never relevant (admissible) or somehow lost their relevancy (status of admissibility) pursuant to the court's discretion. The second point is related to the first. One must assume that the provisions of the EA … were drafted with a view to the interests of justice. Therefore, as a matter of principle, how is it that the court should be entitled to decide that the admissibility of facts within the scope of [s 32(1)] would not be in the interests of justice? *The real issue here is not whether the status of admissible evidence might somehow be converted to inadmissible evidence at the pleasure of the court, but whether admissible evidence (its status as admissible evidence does not change) should nevertheless be excluded because of other countervailing factors that outweigh or override its value (its benefit to the process of adjudication) to the case*. While the effect of the exclusion of admissible evidence would be the same as if it had been regarded as inadmissible, the distinction between the two approaches is vital to the balancing operation just referred to. Moreover, in exercising its discretion to exclude admissible evidence as opposed to reversing the effect of s 5 of the EA, the

court would not interfere with the scheme of admissibility of the EA. [emphasis added]

We agree with Prof Pinsler's view that the issue in applying s 32(3) is whether admissible evidence should be excluded because other countervailing factors outweigh the benefit of the having the evidence admitted.

(1) The considerations to be taken into account by the court

106 Turning now to the question of the application of s 32(3), we note that Prof Pinsler (in *Pinsler* at para 6.052), observed that, "[i]t is immediately noticeable that there are no criteria to guide the court" as to how s 32(3) ought to be applied. He then suggested some factors which the court could take into consideration in determining whether a relevant statement should nevertheless be excluded under s 32(3) (*ibid*):

> Ideally, the court would balance the significance of the evidence (its probative value or importance to one or more of the issues) against any factors that militate against its admission. That is, the admissible evidence may be excluded if it does not justify the disadvantages that would result from its admission. Such disadvantage would include the danger of unreliability or other harm which might compromise fair adjudication, additional costs (as when a hearsay statement is not necessary because it essentially duplicates other evidence in the case), delay in the proceedings (where additional time is needed to adduce the evidence or the proceedings have to be postponed), the distraction of the court and/or the parties (where the evidence raises collateral issues that require undue attention), its tendency to confuse or its misleading effect (as when there are doubts about authenticity and good faith), lack of reliability (where the circumstances of the author of a statement or in which the statement was made raise concerns about its truthfulness) and prejudice (in the sense of evidence that would have the effect of being substantively unjust or procedurally oppressive). It seems to be clear that the less significant or probative the statement, the less forceful the countervailing factors would need to be to justify exclusion. Nevertheless, as the evidence is declared to be admissible by s 32(1) of the EA, the court should not normally exercise its discretion to exclude the statement unless the countervailing factors clearly outweigh the benefit that would be gained by its admission.

107 Prof Pinsler in *Pinsler (SAcLJ)* further opined that the terminology of "in the interest of justice" used in s 32(3) was broad, and it would therefore "be of considerable assistance to the court if ss 32(3) … were to include a list of considerations that (the court) might take into account in determining whether to exercise its discretion to exclude" (at para 31). He then proceeded to note that this was the approach taken in a number of jurisdictions such as the United States of America (see r 403 of the Federal Rules of Evidence (2015)), Australia (see s 135 of the Evidence Act 1995 (Act No 2 of 1995 (Cth)), and the United Kingdom (see s 126(1) and s 114(2) of the CJA).

108 We are largely in agreement with Prof Pinsler's suggestions, and also accept that the factors which he set out (see [103] above) are germane and appropriate as a *general* basis from which the court may go about its analysis when deciding whether to exercise its discretion to exclude otherwise admissible evidence pursuant to s 32(3) of the EA. Indeed, the factors he set out are based on good sense, having due regard to the purposes of admitting hearsay evidence in order to promote the objectives of the trial process. They are of a sufficient level of generality that could be applicable to the different circumstances that could arise on the particular facts of each case, although we supplement this with a caution that it is not necessary that all the factors *must* be considered in each case; the myriad of possible fact circumstances would throw up situations where only some of the factors may be relevant, but where relevant, those factors should be taken into account by the court when exercising its discretion under s 32(3). In addition, we note that the factors were largely

consonant with the list of considerations found in the various foreign jurisdictions referred to in the preceding paragraph.

109 In particular, we think that where the hearsay evidence sought to be admitted is of limited probative value, such evidence should properly be excluded. The effect of this is that the party seeking the admission of the hearsay evidence must be able to show the court that there were certain safeguards or measures that applied to that evidence which would ensure a minimal degree of reliability. Of course, the court in doing so must bear in mind the fine line between a decision not to admit hearsay evidence (under s 32(3)) and a decision to admit the hearsay evidence but to accord it less weight (under s 32(5)). The court should not normally exercise its discretion to exclude evidence that is declared to be admissible by the EA.

110 For completeness, we observe that Prof Pinsler in *Pinsler (SAcLJ)* has commented that s 32(3) does not distinguish between criminal and civil proceedings. Whilst this is not material to the appeals before us, we note that the learned author's view in that regard has a degree of merit, and should constitute one of the considerations for a court to take into account in exercising its discretion under s 32(3). However, we will leave a definitive ruling on this specific issue to the next case that requires a definitive ruling on this.

(2) The considerations applied to the facts

111 It is not in doubt that the Sucofindo Report had very significant importance for the defendants' case in relation to the fact in issue, namely, whether the quality of the coal loaded onto the Vessel and shipped to Karachi met the contractual specifications. Weighed against that, as submitted by Gimpex, is the fact that the Sucofindo Report was unreliable, and had the tendency to confuse or mislead.

112 Gimpex relies on the Judge's findings that the Sucofindo Report was not accurate and reliable (see above at [45] and on the Judge's finding that the coal that was sampled at the jetty and on the barges was not actually loaded onto the Vessel (see above at [47]). This meant that even if the Sucofindo Report reflected the true quality of the coal that was sampled when loaded from the jetty to the barges, this was irrelevant to the issue of the quality of the coal that was loaded onto the Vessel.

(A) The Judge's findings on the reliability of the Sucofindo Report

113 The defendants challenge the Judge's findings that the Sucofindo Report was not accurate and reliable. The Judge's first and second findings (see [43] above) show that the Sucofindo Report was not clear whether it covered the sampling of the coal when the coal was being loaded from the jetty onto the barges. The defendants sought to construe the Sucofindo Report using various methods of interpretation to try to persuade us that the date of intervention covered the dates when the coal was being loaded from the barges onto the Vessel. However, this was not the Judge's point. Her issue with the Sucofindo Report was that it was simply *prima facie* misleading.

114 Those findings were closely related to the Judge's third finding, that the Sucofindo Report was misleading because of the deliberate removal of the words "of barge", which gave the reader the wrong impression that the samples of the coal were taken while the coal was being loaded onto the Vessel and that this loading was done on 8 April 2010. Nevertheless, the defendants argue that the Sucofindo Report could not have been misleading, at least in so far as Gimpex and Awan were concerned. This was because the sampling of the coal at the second and third stage of loading was explained in an email from Nonot to Awan, which Awan then forwarded to Gimpex.

115 However, it is this same email which justifies the Judge's finding that the removal of the words "of barge" from the Sucofindo Report was misleading. After Nonot had explained the sampling process to Awan, he proceeded to mention that:

> We also put information that sample "Gross sample were taken during barge loading" at our draft Certificate of Sampling Analysis which I sent to your shipper last night (draft certificate attached) since we are taken sample during loading to the barge.

Bad English aside, this shows that Nonot himself recognised that it was important to make clear that sampling was done while the coal was being loaded onto the barges. This contradicted Nonot's attempted explanation that the removal of the two words "of barges" did not change the meaning in the Sucofindo Report. It is also pertinent to note that Nonot removed the two words at the request of the "shipper". With the benefit of much explanation, it is now apparent that sampling of the coal did take place during loading of the barges. But what all these show is that Sucofindo was all too willing to make alterations to its report at the request of the defendants (who obviously wanted the change because it suited them) without regard to what was the true position. Moreover, the confusion as to the dates on the Sucofindo Report (see [45] above) shows sloppiness on the part of Sucofindo in its preparation. It is also not clear whether the results obtained were the results of analysis of the samples obtained while the coal was being loaded from the jetty onto the barges or of the samples taken while the coal was being loaded from the barges onto the vessel or were they the results of the combination of both categories of samples. All these questions go towards showing the unreliability of the Sucofindo Report. As the Contract envisaged that the report was binding on the parties to some extent, it is vital that it should be prepared with care to ensure reliability. This was obviously missing in the Sucofindo Report.

116 A related point concerned the Judge's finding that the coal that was sampled at Sungai Putting and on the barges was not actually loaded onto the Vessel. Given that one possible way of challenging the probative value of the Sucofindo Report in proving the quality of the coal shipped on board the Vessel and discharged at Karachi was to show that the coal that was tested by Sucofindo at Sungai Putting was not the same coal that was loaded onto the Vessel, we understand why the defendants wanted to have the words "of barge" deleted from the Sucofindo Report.

(B) The Judge's finding that the coal loaded onto the barges was not the coal loaded onto the Vessel

117 Moving on to the issue of whether the coal loaded onto the barges was the coal that was being loaded onto the Vessel, the defendants did not quite address what is, in our view, the Judge's most important reason for answering that issue in the negative. The Judge accepted Norager's evidence that the value for the TM in the Sucofindo Report of 18% was suspicious. Norager had calculated the weighted average TM of the coal in the five barges based on the various Barge Reports to be 19%. This was 1% above the figure of 18% in the Sucofindo Report. This discrepancy was even more surprising given the fact that there were at least five stoppages due to rain during the loading of the coal from the barges onto the Vessel. In particular, Norager's view was that the TM of the coal loaded from Batulicin was too low because there were at least three stoppages due to heavy rains during the time of loading of the coal onto the barges at Batulicin which commenced on 4 April 2010. If anything, the TM should have been higher than 19%. [note: 15]

118 The defendants' expert, Gunn, also calculated the TM of the coal to be 19% based on the Barge Reports. He explained that the 1% difference was not significant and could have been caused when the coal at Sungai Putting was being loaded from the jetty to the barges via conveyor belt and exposed to more rainfall. Norager's response was that a difference of 1% of TM was not insignificant

because the difference in weight of the coal on account of that 1% of moisture would be 415MT (or 415m^3 of water). Moreover, he felt that the effect of the exposure on the conveyor belt was overstated because that also meant that the coal on the conveyor had more exposure to the sun as well. We also note that Gunn's explanations did not explain why the TM stated in the Sucofindo Certificate did not reflect the heavy rain during the loading of the coal onto the Vessel.

119 There are of course two possible explanations as to why the coal loaded from the jetty onto the barges was not the same coal that was loaded from the barges onto the Vessel. One is that the defendants fraudulently swapped the barges with other barges containing low quality coal, and the other is that by an accident or misfortune, the coal on wrong barges was inadvertently loaded onto the Vessel. However, regardless of which might be the true cause, the fact of the matter is that the coal which was sampled by Sucofindo at Sungai Putting might not be the same coal that was loaded onto the Vessel.

120 For these reasons, we find that the Sucofindo Report had serious issues concerning its reliability. The defendants have not managed to produce evidence that sufficiently assures us that there is a minimal degree of reliability in the Sucofindo Report. We therefore find it in the interest of justice not to admit the Sucofindo Report into evidence pursuant to s 32(3) of the EA.

121 Again, for completeness, we ought to mention that the Judge had noted certain circumstances which suggested that the defendants had something to hide in relation to the quality of the coal loaded onto the Vessel. These included her scepticism concerning why the defendants refused Gimpex's proposal to conduct a joint inspection of the coal, and why Unity (besides being in breach of the Contract) disallowed SCCI to witness the sampling of the coal. We share the Judge's concerns and will address these issues more fully in a moment when analysing the Unlawful Means Conspiracy Claim (see [170]–[173] and [181]–[182] below).

The admissibility of the Intertek Report

122 Gimpex relies on the Intertek Report in order to show that *the coal delivered* to it had a GCV of 5,638.86Kcal/Kg and a TM of 26.44% and was therefore outside of the contractual specifications. Accordingly, Gimpex was within its rights to reject the delivery of the coal as provided for under Art 6 of the Contract.

123 The Intertek Report was adduced by the affidavit of Mr Balagurusamy Nagamania Pillai Shakara Subramaniam ("Shankar"), the legal manager of Gimpex. However, the people involved in the sampling, testing, and preparation of the Intertek Report, (*ie*, those who could prove the truth of the statements in the Intertek Report regarding the quality of the coal), did not testify. It was undisputed that the Intertek Report was hearsay evidence and Gimpex sought to admit the Intertek Report under s 32(1)(*j*)(iii) and/or s 32(1)(*j*)(iv) of the EA.

Gimpex's reliance on s 32(1)(j)

124 In his affidavit, Shankar explained that the Intertek personnel involved in sampling and testing the Cargo were unwilling to testify in court. At the trial, counsel for Gimpex, Philip Tay ("Mr Tay"), also produced an email which includes a statement from the Intertek Director and Chief Executive Officer, Shahid Salim, explaining why Intertek was not willing to give evidence before a Singapore court. [note: 16] Some of the reasons given were that Intertek was not commissioned by Gimpex to conduct the survey and report; that it was Intertek's policy and code of conduct not to "disburse the report to anyone but the nominating company/person"; and that it was not Intertek's policy to side a party in a lawsuit or appear as an expert witness for that party.

125 It appears that the Judge could have overlooked this email when she held that there was no evidence to "show what steps [Gimpex] had taken to persuade the surveyor in question to come to Singapore to testify at this trial" (see [206] of the GD), and she decided not to admit the Intertek Report under s 32(1)(*j*).

126 Apart from the email itself, there was also some evidence in relation to this issue given by Shankar at trial. In cross-examination, Shankar was asked whether he contacted Awan "to request that [Awan] speak to Intertek and ask Intertek to appear in this Court to give evidence". Shankar's reply appeared to be no, but this was not clear on the face of the transcripts of the hearing. Later on in re-examination, Mr Tay followed up on that question, by asking why Shankar did not ask Awan to request Intertek to come and give evidence. Shankar's evidence was that this was because "Awan rejected the cargo", and then later stated that he could not remember. Mr Tay pressed Shankar on this point, and asked Shankar why the fact that Awan rejected the cargo would stop him from asking Awan to ask Intertek to come to Singapore. At that point in time, Shankar's answer was that there was no specific reason, and he simply contacted Intertek. In addition, Shankar gave evidence that he had followed up on the attempt to ask Intertek to give evidence in Singapore by talking to them, but his attempts were rebuffed. [note: 17]

127 In our view, the email produced by Gimpex, and the evidence given by Shankar at the trial, was evidence of Gimpex's attempts at procuring the attendance of the witnesses at trial, and the witnesses refusing its request. We find that this is sufficient for the Intertek Report to be admitted under s 32(1)(*j*)(iv) of the EA given that the current scheme of admissibility of hearsay evidence under the EA envisages a broader scope for admissibility which is balanced by the exclusionary discretion of such evidence under s 32(3).

Application of s 32(3) and s 32(5) of the EA to the Intertek Report

128 The defendants submit that the Intertek Report was so unreliable that its admission should be excluded pursuant to s 32(3), or if not, little weight should be given to it pursuant to s 32(5). We note that at trial, the Intertek Report was not challenged by the defendants with expert evidence. However, the defendants now argue that the number of samples of coal taken by Intertek for analysis was grossly inadequate. The Intertek Report indicates that only 55 samples of coal were taken by Intertek in coming up with that report as compared with the ASTM sampling standards which prescribe a minimum of 225 samples for 41,510MT of coal. Norager's evidence under cross-examination was also that a minimum number of 226 samples should be taken.

129 On balance, taking into account the considerations that we have stated earlier (at [103]), we do not think that this rendered the Intertek Report *so unreliable* that the court should exclude it under s 32(3). While we felt that more could have been done to procure Intertek's cooperation to give evidence, there was perhaps a limit to what Gimpex could do. Shankar's evidence was not the most illuminating, but the sense of it is that Gimpex had tried their level best to get Intertek to come forward to give evidence. If anything, the main criticism against Gimpex was that it should have obtained the help of Awan in getting Intertek to give evidence. Shankar's explanation for not doing so was that Awan had rejected the coal. Implicit in this answer was the suggestion that Awan would not want to have anything to do with the dispute between the parties anymore. This could well have been the case seeing that FZC (an associate company of Awan) eventually purchased the coal discharged at Karachi from the defendants at a much lower price (see [32] above).

130 Bearing in mind what we have stated earlier (at [108]) that the court should carefully consider whether evidence should not be admitted under s 32(3) or should be admitted under s 32(5) but

accorded less weight, we are of the view that the Intertek Report, unlike the Sucofindo Report, was not so deficient that it should be excluded pursuant to s 32(3). The fact of the matter is that, in so far as the Intertek Report is concerned, apart from there being an inadequate number of samples taken in producing the Intertek Report, there was no other complaint that could be raised against it. Indeed, that was the only challenge against the Intertek Report's reliability raised by the defendants. The Intertek Report did not suffer from the same defects as those of the Sucofindo Report. There was no proof or, indeed, any allegation that the Intertek Report was tampered with and neither did the defendants take issue with the fact that the coal discharged at Karachi was not the coal that was sampled in preparing the Intertek Report. All in all, the countervailing factors against the admission of the Intertek Report do not clearly outweigh the benefit that would be gained by its admission.

131 However, we note that s 32(5) of the EA requires the court to assign the appropriate weight to the evidence admitted under s 32(1). In light of the fact that the sampling size for the coal should have been significantly more than what was indicated in the Intertek Report, we hold that the Intertek Report should be accorded less weight.

The admissibility of the Inspectorate Report

Was it hearsay evidence?

132 Like the Intertek Report, Gimpex also relies on the Inspectorate Report in order to prove that the *coal delivered* to it was outside of the contractual specifications, such that it was lawful for Gimpex to reject delivery of the goods as provided for under Art 6 of the Contract.

133 Gimpex submits that the Inspectorate Report was not hearsay evidence as Majeed and Mallik had direct knowledge of the samples and tests and were the makers of the Inspectorate Report. Gimpex further juxtaposed the situation of the Inspectorate Report with that of the Sucofindo Report, and Nonot's evidence, in that regard.

134 However, this does not cure the defect in Mallik's evidence as was found by the Judge. Mallik's evidence was that he neither carried out the tests on the coal himself nor visually supervised the chemists who did. He also could not confirm that the coal sampled in the laboratory he was in charge of came from the Vessel. We therefore affirm the Judge's finding that the Inspectorate Report was hearsay evidence.

The requirement for notification

135 As mentioned earlier at [76]–[78], an additional safeguard is prescribed in s 32(4)(*b*) (in light of the expanded scope of the admission of hearsay evidence under s 32), requiring a party who wishes to admit hearsay evidence under s 32(1) (apart from s 32(1)(*k*)), to give notice of this to the opposing party.

136 Section 32(4)(*b*) is to be read with O 38 r 4 of the Rules of Court, which sets out the procedure and the prescribed form for the notice, the details of which are not material in these appeals. What is not as clear but is important for the present purposes is the consequence of a failure to give notice under O 38 r 4, as the latter is silent on it. Gimpex only fulfilled the notice requirements to admit the Intertek Report but not the Inspectorate Report. We observe that this issue was not raised at all by the defendants.

137 As a matter of plain construction, it must follow that non-compliance with O 38 r 4 of the Rules

of Court would mean that s 32(4) of the EA is not satisfied, such that "evidence *may not be given* under [s 32(1)]" [emphasis added]. Of course, that is not to say that the non-compliance with O 38 r 4 cannot be cured subsequently. This also appears to be the view of Professor Pinsler (in *Pinsler* at para 6.046) who stated that:

> … No doubt, a party can apply for an extension of time pursuant to [O 3 r 4] and to cure an irregularity under [O 2].

138 The more difficult question is when and under what circumstances should a court exercise its discretion to cure such non-compliance. It seems to us that this is ultimately a question much dependant on the extent to which the non-compliance causes prejudice to the opposing party which would render it unfair for the hearsay evidence to be admitted. As stated in *Pinsler* (at para 6.042):

> The purpose of notice is to enable the opposing party to carry out his own investigation prior to the trial in order to ascertain its significance and veracity and to secure information which may refute it or reduce its weight (if necessary). The right of the opposing party to notice should be considered in conjunction with the procedures under s 32C, which permit him to adduce evidence concerning the credibility of the maker of the statement (and the original supplier of information under s 32(1)(b)) and the reliability of the statement.

139 The curing of any irregularity and/or non-compliance with O 38 r 4 must also be considered in light of the court's discretion pursuant to s 32(3) to exclude evidence otherwise admissible under s 32(1). The various considerations as set out above (at [106]) must be taken into account where appropriate, and again, the issue of prejudice to the opposing party will inevitably surface (see also *Pinsler* at para 6.046).

140 We have noted the manner in which Gimpex had conducted its case in the trial below, and it was clear to us that they took the position that the Inspectorate Report was not hearsay evidence, it having been adduced through the evidence of Majeed and Mallik. We recognise that it would have been more prudent for Gimpex to have given the notice as an alternative position just in case the court does not agree with its primary contention.

141 Be that as it may, it is difficult to see how the defendants were prejudiced by this lack of notice. The defendants had indeed challenged the evidence of Majeed and Mallik to the extent of showing that they had no personal knowledge of some of the facts contained in the Inspectorate Report that Gimpex sought to rely on to prove that the coal discharged at Karachi did not meet the contractual specifications. They took full advantage to discredit the reliability of that report and sought to convince the court of the same. When one looks at the position of the Inspectorate Report and compares it with the Intertek report (where proper notice was given), the defendants in fact had a better opportunity to demolish the Inspectorate Report than the Intertek Report because Majeeb and Mallik were available for cross-examination by the defendants. All considered, we think this is an appropriate instance for us to exercise our discretion under O 2 to cure the non-compliance by Gimpex of O 38 r 4.

142 That being the case, we proceed to examine whether the Inspectorate Report can be admitted under the relevant provisos in s 32(1) relied on by Gimpex.

Is the Inspectorate Report admissible under s 32(1)?

143 Gimpex's submission was that the Inspectorate Report should be admissible under s 32(1)(*j*)(iii) or (iv) of the EA because it had sought the attendance of the relevant surveyors and laboratory

personnel to give evidence in court as evidenced by Shankar's affidavit. There seems to be some confusion or a mistake here. Shankar's affidavit related only to the Intertek Report. There was also no evidence suggesting that Gimpex had sought the attendance of the persons who could supplement the testimony of Majeed and Mallik in order to prove the truth of the contents of the Inspectorate Report; and neither was there any evidence who those people might be.

144 We accept that parties might sometimes be faced with the problem of having evidence they seek to adduce be adjudged as hearsay evidence notwithstanding their best endeavours at procuring what they believe to be the necessary witnesses to come forth and testify. In such situations, parties might be left hanging when the ruling as to whether the evidence is hearsay goes against them. Parties should therefore be alive to any such objections that may be raised by their opponents, and should then consider carefully whether the hearsay evidence they wish to admit falls within the scope of s 32(1), and if so, under which proviso of s 32(1). Parties must be prepared with the necessary evidence to satisfy the court to admit the hearsay evidence under the relevant proviso of s 32(1).

145 Gimpex, however, was not so prepared. It failed to satisfy the court that the Inspectorate Report fell within s 32(1)(*j*)(iii) or s 32(1)(*j*)(iv) simply because there was no evidence to that effect. We therefore find that the Inspectorate Report is inadmissible.

Was the coal delivered to Karachi within the contractual specifications?

146 Since the Intertek Report is admitted into evidence, only with less weight to be accorded to it, we find that Gimpex has discharged the initial burden of proving its case. The evidential burden would thus shift over to the defendants. Since the Sucofindo Report is not admitted into evidence, we find that the defendants have not managed to satisfy their evidential burden.

147 In this connection, it also follows that the defendants have failed to prove their counterclaim against Gimpex as they have not discharged their burden of showing that the coal delivered at Karachi was of the quality specified under the Contract.

148 Accordingly, we dismiss the defendants' appeal in CA 161/2013.

The claim for conspiracy

149 We now turn to consider the Unlawful Means Conspiracy Claim which was dismissed by the Judge. In CA 160/2013, Gimpex is seeking to appeal that decision, while attempting to put forward an alternative claim in lawful means conspiracy.

150 The elements to constitute unlawful and lawful means conspiracy are set out in *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR(R) 80 (at [23]) as follows:

(a) A combination of two or more persons and an agreement between and amongst them to do certain acts.

(b) If the conspiracy involves lawful acts, then the predominant purpose of the conspirators must be to cause damage or injury to the plaintiff. However, if the conspiracy involves unlawful means, then such predominant intention is not required; an intention to cause harm to the plaintiff should suffice.

(c) The acts must actually be performed in furtherance of the agreement.

(d) Damage must be suffered by the plaintiff.

151 It was noted in *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 (at [19]) that proof of conspiracy will normally be inferred from objective facts (see also *Visionhealthone Corp Pte Ltd v HD Holdings Pte Ltd* [2013] SGCA 47 at [45]).

The Unlawful Means Conspiracy Claim

152 In order to prove the Unlawful Means Conspiracy Claims, Gimpex needs to show that:

(a) the defendants committed fraud on Gimpex; and

(b) there was an agreement between Unity, Param Energy and Vinay to do so; and

(c) damage was suffered by Gimpex as a result.

Did the defendants commit fraud on Gimpex?

153 To establish fraud, it must be clearly pleaded and proved. Gimpex's case was that Vinay used Unity as a shell company to enter into the Contract with Gimpex, knowing and intending for the Cargo to be of a grossly inferior quality, while trying to obtain payment under the L/C before the grossly inferior coal was discovered.

154 The following are the sub-issues which need to be addressed in relation to Gimpex's case for fraud:

(a) Was the Judge's reason for not finding fraud because the defendants would gain little to defraud Gimpex as Unity's profit margin, if the transaction had gone through smoothly, was only 1.83%, wrong?

(b) Did Gimpex make known to the defendants that it only wanted to deal with a Singapore-incorporated company?

(c) Did the defendants represent to Gimpex that Unity was a Singapore company?

(d) Was Unity, a shell company, substituted to replace Param Energy as the contracting party at the last minute?

(e) Did the defendants know that the coal was of an inferior quality and thus rejected the request of Gimpex for joint inspection of the coal which was discharged at Karachi?

(f) Did the defendants sell the coal to FZC at a low price because they knew that the coal was of an inferior quality?

(g) Did the defendants fraudulently arrange with PT Planet, an entity controlled by the defendants, to supply sub-quality coal to Gimpex?

(h) Did the defendants seek to hide the true quality of the coal by disallowing SCCI from inspecting and drawing samples of the coal while it was being loaded onto the Vessel?

155 We will deal with each sub-issue *seriatim*.

(1) The Judge's finding that there was not much benefit for the defendants to defraud Gimpex as Unity's profit margin was only 1.83%

156 One of the reasons why the Judge found that there was no fraud was because "[Unity]'s profit margin would only have been 1.83% if the transaction had gone [through] smoothly (which evidence [Gimpex] did not challenge)". There was therefore little incentive for Vinay to defraud Gimpex.

157 With respect, the Judge's finding on this point is not correct. If the quality of the coal discharged at Karachi was actually much inferior to what was contracted for, then the price which the defendants would have to pay for the same would also be much lower. Based on the evidence of Gimpex's expert witness, Liang Yun, whose affidavit evidence was not challenged at trial, the price of the quality of coal discharged at Karachi would be in the range of US$38 per MT to US$44 per MT. [note: 18] Taking the median price of US$41 per MT compared to the contract price of US$66 per MT, the profit margin would have been US$25 per MT, which would amount to US$1,037,500 for 41,510MT of coal. Thus the profit margin for Vinay in defrauding Gimpex would actually be 37.87%, a sufficient incentive indeed. This means that the defendants would stand to earn 2,000% more than what they would have gained if no fraud was perpetrated.

(2) Did Gimpex make it known to the defendants that it only wanted to deal with a Singapore-incorporated company?

158 The Judge's finding was that Gimpex did not make known to the defendants that it only wanted to deal with a Singapore-incorporated company. While Gimpex disputed this finding of the Judge, it sought to downplay the importance of this finding by arguing that whether they made such an intention known to the defendants is immaterial to their case.

159 Having considered the evidence, we affirm the Judge's finding of fact (see above at [50]) in this regard. We agree with the Judge that the mere inclusion of Art 21 into the Contract, which stated a Singapore address as the domicillium of Unity, would not amount to a substantiation of Gimpex's assertion that they had made known to Lalit/Vinay that Gimpex only wanted to deal with a Singapore-incorporated company. There is nothing to prove this apart from what was barely stated in Samir's affidavit evidence.

160 In addition, we would also clarify that Gimpex's submission that this finding was immaterial to its case is not correct. Gimpex's case is that the defendants made Unity out to be a Singapore-incorporated company in order to defraud Gimpex. However, unless Gimpex had actually made known its intention to the defendants that it would only deal with a Singapore-incorporated company, there would have been no need for the defendants to have tried to masquerade Unity as a Singapore-incorporated company as alleged by Gimpex. Without such an intention being made known by Gimpex to the defendants, all that the defendants needed to do to defraud Gimpex would have been to ensure that whichever corporate entity used by the defendants to enter into the Contract with Gimpex was a separate legal entity that was devoid of assets so that there could not be any enforcement against that corporate entity in substance. The only possible reason why the defendants would make it seem as if Unity was a Singapore-incorporated company, which is Gimpex's case for fraud, must be because Gimpex had made known to the defendants that it only wanted to deal with a Singapore-incorporated company.

(3) Did the defendants represent that Unity was a Singapore company

161 The Judge found that there was not enough evidence to suggest that the defendants had

indeed represented to Gimpex that Unity was a Singapore company. Gimpex was relying on Samir's evidence that that was what was told to him by the defendants. Gimpex also relied on the various references to Singapore found in the Contract, including the choice of law and jurisdiction clauses which referred to Singapore law and the Singapore courts respectively. Gimpex also pointed to the fact that in the Contract, Unity's address was stated to be "33 Ubi Avenue 3 #07-12, Tower "B" Vertex, Singapore 408868".

162 The defendants' response was that the Singapore address in the Contract was only for ease of communication and nothing more. They unsurprisingly aligned themselves with the Judge, and submitted that they never intended to represent to Gimpex that Unity was a Singapore-incorporated company. We would further add that the fact that the Contract is subject to Singapore law as well as the jurisdiction of the Singapore courts is neither here nor there.

163 Having considered the evidence and the arguments of the parties, we do not think that there is a sufficient basis for this court to disturb the finding of the Judge on this issue.

(4) Whether Unity is a shell company and was it substituted in place of Param Energy as the contracting party at the last minute

164 There are two elements to this point. The first relates to Gimpex's allegation that Unity is a shell company, with the effect that it had no assets for Gimpex to enforce against should Gimpex succeed against Unity in its claims. It is undisputed that Unity is a BVI company. It is also admitted by Vinay that Unity had no employees in Singapore.

165 However, the evidence adduced by various witnesses for the defendants is that Unity has a substantial paid-up capital of US$8,213,750. Gimpex sought to challenge this in cross-examination of Dev, and one Ajay Kumar ("Ajay"), who was an employee of SMASL and was involved in the payment of the coal from PT Planet to Berkah. Ajay's evidence was that around US$7m of Unity's paid-up capital was invested in shares in PT Planet. Unity owned 99% of the shares in PT Planet, with the remaining 1% being owned by Classic (which was itself a 24% shareholder of Unity). The money was then used by PT Planet to acquire some mines in Kalimantan. Dev's evidence was that Unity would be paid dividends by PT Planet.

166 Gimpex challenged this evidence by suggesting to Dev that since the mines were owned by PT Planet, any judgment debt could not be enforced against the mines themselves. This is not disputed. However, Gimpex seems to have missed the point. Even if Unity did not own the mines directly and the mines are owned by PT Planet, then as a 99% shareholder of PT Planet, it would mean, in a loose sense, that the mines are very much owned by Unity.

167 Therefore, we do not think that Unity was a shell company such that any enforcement of a judgment debt against it would be pointless.

168 The second element of this submission is that Unity was swapped to replace Param Energy as the contracting party at the last minute as part of the fraud perpetrated by the defendants on Gimpex. However, as found by the Judge, it was Gimpex (and not the defendants) who rejected the first draft contract where Param Energy was to be the contracting party. The reason for Gimpex's rejection was because they did not want to provide a transferable L/C. But this was entirely up to Gimpex. If Gimpex did not reject the draft contract in the first place, Param Energy would not have been substituted by Unity. There was also no evidence that the defendants somehow knew that Gimpex would not be willing to provide a transferable L/C and therefore deliberately included that as a term in the draft contract in anticipation of Gimpex's refusal such that they could carry out the swap.

169 We are therefore not persuaded by Gimpex's submission in this regard.

(5) The defendants' refusal to conduct the joint inspection

170 It is not disputed that Gimpex proposed to the defendants that a joint inspection be conducted on the coal which arrived in Karachi, but the defendants refused. Gimpex submits that this is because the defendants knew that the coal shipped on board the Vessel was grossly off-specifications as a result of the defendants' fraudulent acts. There was no other reason why the defendants would refuse a joint inspection as that would put to rest all doubts over the quality of the coal, and that such an inference should be drawn by the court from the defendants' refusal.

171 The defendants' response was that the Sucofindo Report was agreed to by the parties to be final and binding, and so there was no further need to conduct a joint inspection. Furthermore, Kishore's experience in Karachi where he witnessed the pilferage of the coal and received death threats made them wary as to whether a joint inspection would be fair. This was not to say that the court-appointed surveyor would be biased, as explained by Vinay. Instead, the concern was that there was no knowing what Gimpex and/or Awan might have done to the coal in the meantime. Any agreement by the defendants for a joint inspection would only lend credibility to Gimpex's allegation of manipulation of the coal by the defendants.

172 The Judge did not agree with the defendants' submission on this issue, explaining that it was doubtful that threats were in fact made on Kishore's life, and that pilferage of the coal would make it all the more necessary for a joint inspection to be conducted. While we decline to disturb the Judge's factual finding as to the credibility of Kishore's evidence on the threats made against him, we find that the defendants' argument regarding the pilferage is a fair one. We find that it was not entirely unreasonable for the defendants to think that a joint inspection would not give a fair result given that the coal was in Awan's control and that Kishore had witnessed the pilferage of the coal.

173 We would, however, add that in the reply by O&B to R&T, after R&T (on behalf of Gimpex) proposed the joint inspection, the first (and only) response by the defendants was that the joint inspection was pointless because Gimpex having rejected the coal had nothing more to do with the coal (see above at [29]–[30]). Apart from the fact that this was a self-serving statement which assumed that the rejection of the coal was unlawful in the first place, the defendants did not raise any of the arguments which they now rely on in that reply email. This diminished the credibility of their reasons for rejecting the joint inspection. But in fairness to the defendants, the facts supporting these various reasons now raised by the defendants were included in the earlier emails between O&B and R&T (see above at [28]). Therefore, we do not think that the reasons given by the defendants were entirely an afterthought. In that connection, we decline to draw the inference that the joint inspection was rejected *only* because the defendants *knew* that the coal was of grossly inferior quality and did not meet the contractual specifications.

(6) The sale of the coal to FZC at the low price

174 Gimpex submits that the fact that the defendants sold the coal to FZC at US$48.63 per MT is itself damning on their case. Gimpex's point is that if the defendants were confident that the coal delivered at Karachi conformed to the contractual specifications, there would be no reason for them to have sold the coal at such a low price.

175 Vinay's explanation for this was that he was left with no choice but to sell the coal to FZC, which was an associate company of Awan. This was because the coal was stored in Awan's coal yard, and the defendants did not have any control over the coal. The defendants also believed that

the coal was being pilfered, as witnessed by Kishore. Furthermore, the coal was being left out in the open and its quality would likely deteriorate over time.

176 In the same vein as that relating to the defendants' refusal of the proposed joint inspection of the coal, we find that there was some basis for the defendants' concern in this regard. The fact that the coal was sold to an associate company of Awan could be argued to be a circumstance which bolstered the defendants' case because it indicated that they were at their wits' end regarding the mitigation of their losses bearing in mind that the coal then was no longer in their control.

(7) The missing Berkah contract

177 It is undisputed that the source of the Cargo supplied by Unity was PT Planet, which in turn bought the coal from Berkah. Unity paid US$63.50 per MT for the coal which suggests that the coal was of good quality. [note: 19] Gimpex's case is that it would be easy for Unity to collude with PT Planet to enter into a contract with an inflated purchase price since PT Planet is owned by Unity and Classic, and Vinay was a director of both Unity and PT Planet. If there was a document which could show the true quality of the coal delivered by Unity to Gimpex, it would have been the contract between PT Planet and Berkah.

178 However, Vinay's evidence in court was that they had lost their copy of the contract because "we were shifting offices at that time". [note: 20] When pressed to give details on this shifting of office, Vinay could not do so. [note: 21] Vinay was also cross-examined on whether there were any email exchanges between Berkah and himself which could possibly shed light on the quality of the coal purchased, but Vinay replied that there were none and perhaps Lalit was the better person to ask. When Lalit took the stand, he gave evidence that his contact in Berkah was one Raymond. He also said that he had tried to contact Raymond subsequently to obtain a copy of the Berkah contract but was unable to do so. He therefore on 11 Jan 2013 sent an email to PT Planet to ask for the contract. [note: 22] In that email, the response from one Doddy Purwana was that PT Planet was trying to get a copy of the Berkah contract.

179 The defendants' other response was to say that there was nothing sinister at all for Unity to purchase coal from PT Planet, and for PT Planet in turn to purchase coal from Berkah. They explained that the reason for Unity having procured the coal via PT Planet was not to defraud anyone, but rather to ensure that the ultimate supplier of the coal was not exposed. This was because the defendants were trying to protect their interests as the middleman in future purchases/sales of coal, and were afraid that Gimpex might purchase coal directly from Berkah at a cheaper price.

180 While we accept that there is nothing wrong with having the coal supplied via another party, what remains disturbing is the fact that the contract between PT Planet and Berkah could not be found. The defendants' explanations for this are also unsatisfactory, and are indicative that they may be trying to hide something.

(8) The prevention of SCCI from inspecting and sampling the coal

181 Gimpex's submission was that SCCI was stopped from inspecting and sampling the coal because the defendants knew that the coal was of grossly inferior quality and did not meet the contractual specifications.

182 The defendants' submission was that under Art 4.5, SCCI was only allowed to witness the loading of the coal, and that was allowed by the defendants eventually. However, as we find that Art

4.5 did not limit SCCI to only witnessing the loading of the coal, and did not preclude them from collecting samples themselves, there is no basis for the defendants' submissions (see above at [73]). We therefore affirm the Judge's finding that the defendant should not have stopped SCCI from conducting sampling of the coal on the Vessel.

(9) Was the Unlawful Means Conspiracy Claim made out?

183 The Unlawful Means Conspiracy Claim, as previously mentioned, is premised on the defendants committing fraud on Gimpex. The standard of proof in finding fraud has been espoused in a number of Singapore decisions. In *Tang Yoke Kheng trading as (Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 ("*Tang Yoke Kheng*"), the Court of Appeal (at [14]) rejected that there was a third standard of proof which existed in between the civil burden of balance of probabilities and the criminal burden of proving beyond reasonable doubt. However, the court went on to explain (*ibid*) that:

> … because of the severity and potentially serious implications attaching to a fraud, even in a civil trial, judges are not normally satisfied by that little bit more evidence such as to tilt the "balance". They normally require more. …
>
> Therefore, we would reiterate that the standard of proof in a civil case, including cases where fraud is alleged, is that based on a balance of probabilities; but the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case.

184 This ruling in *Tang Yoke Kheng* was recently affirmed in the Court of Appeal decision of *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308, which referred, *inter alia*, to the High Court decision of *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469. In the latter decision, Andrew Phang Boon Leong J (as he then was), explained (at [159]) that:

> … the standard of proof in civil proceedings where fraud and/or dishonesty is alleged is the civil standard of proof on a balance of probabilities. However, where such an allegation is made (as in the present proceedings), *more* evidence is required than would be the situation in an ordinary civil case. Such an inquiry lies, therefore and in the final analysis, in the sphere of practical application (rather than theoretical speculation). [emphasis in original]

185 Having regard to the fact that more evidence is required in order for the party alleging fraud to prove it in a civil case, we do not think that Gimpex has proved its case. Although there are some issues which we find troubling and might suggest a lack of good faith on the part of the defendants (for example, non-production of the Berkeh contract; and disallowing SCCI to witness and conduct sampling), we also find that there are circumstances which lend support to the defendants' case. Breach of contract does not necessarily constitute fraud. A very important premise of Gimpex's claim for fraud is the assertion that Unity was switched for Param Energy with an improper motive in mind. But the switch was brought about by Gimpex (see [168] above). Neither is Unity a shell company. Our conclusion is that the evidence before this court is insufficient to satisfy us that the defendants consciously and in full knowledge entered into the Contract with Gimpex with a deliberate intention to deliver poor quality coal to Gimpex which did not meet the contractual specifications, while attempting to collect the purchase price and dissipate the money, leaving Gimpex with a cause of action for breach of contract against a Unity which was a shell company incorporated in the BVI.

186 We therefore do not find that the defendants have committed fraud on Gimpex. It follows that Gimpex's Unlawful Means Conspiracy Claim fails *in limine*, and there is no need for us to consider the

further issues of whether there was an agreement between Unity, Param Energy and Vinay to commit fraud on Gimpex, and whether Gimpex suffered damage as a result.

The Lawful Means Conspiracy Claim

187 In order to establish a claim in lawful means conspiracy, there is a need for the plaintiff to show that the predominant purpose of the conspirators was to cause damage or injury to the plaintiff: (see, *inter alia*, *Quay Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637; *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd* [2006] 4 SLR(R) 451).

188 In the present case, there is simply insufficient evidence to suggest that Unity, Param Energy, and Vinay came together and caused Unity to enter into a contract with Gimpex with the predominant purpose of harming Gimpex. In fact, Lalit's evidence was that the defendants were willing to enter into the Contract for a small profit margin of 1.83% because they wanted to cultivate a long-term commercial relationship with Gimpex.

189 We therefore dismiss Gimpex's claim in lawful means conspiracy.

The issue relating to joint tortfeasor

190 Gimpex relies on the Privy Council decision on appeal from Singapore in *Wah Tat Bank Ltd and others v Chan* [1974–1976] SLR(R) 284 to establish that Vinay should be liable as well. However, this is premised on a tort having been committed in the first place. Given our earlier findings that both the Unlawful Means Conspiracy Claim and the lawful means conspiracy claim are not made out, there is no tort upon which Param Energy and Vinay can be held to be joint tortfeasors.

The issue relating to the lifting of the corporate veil

191 Turning to the issue of the lifting of corporate veils of Unity and Param Energy, we can be brief. First, the presence of SMIL as the major shareholder of Unity (51%) makes it difficult to find that Vinay had control over Unity. Furthermore, there is no evidence which suggests that Vinay had any ownership interest or was a director of SMIL. Vinay only had an indirect 25% shareholding in Unity through Param Energy.

192 Secondly, as found by the Judge, Dev who was one of the directors of Unity and also a director of SMASL, gave evidence that Vinay was not even a signatory to any of Unity's bank accounts. Unity had a bank account with Standard Chartered Bank of which Dev was the sole signatory, and another bank account with the Bank of India of which Dev and one Rudra Sen Sindhu were the only signatories. [note: 23]

193 We therefore find that the corporate veil of Unity should not be lifted in the present case. Consequently, there is also no reason to lift the corporate veil of Param Energy.

The issue relating to damages

194 Gimpex's submission is that if the appeal by the defendants in CA 161/2013 against the Judge's decision to allow the Breach of Contract Claim is dismissed, damages should be assessed by this court, and not, as ordered by the Judge, be assessed later separately by the Registrar. This is because both parties adduced evidence and made submissions on this issue below. In light of our decision to dismiss the appeal in CA 161/2013, and having reviewed the evidence and the submissions, we are minded to do so as urged upon us by Gimpex.

Gimpex's submissions on damages

195 Gimpex's primary claim is for breach of warranty on the part of Unity in delivering off-specification coal, and its alternative claim is for non-delivery of coal.

196 In relation to its claim for breach of warranty, Gimpex relies on s 53 of the Sale of Goods Act (Cap 393, Rev Ed 1999) ("the SGA"), which reads:

> **Remedy for breach of warranty**
>
> **53.—**(1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may —
>
> (*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or
>
> (*b*) maintain an action against the seller for damages for the breach of warranty.
>
> (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
>
> (3) In the case of breach of warranty of quality, such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.
>
> (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

197 Gimpex submits that pursuant to s 53(3), the measure of damages should be the difference between the market price of the low quality coal delivered at Karachi and the market price of coal that meets the quality specified in the Contract.

198 With regard to the market price of the low quality coal delivered at Karachi, as mentioned earlier at [157], Gimpex's pricing expert, Liang Yuan, gave evidence that the price would be US$38 to US$44 per MT. This would give a median price of US$41 per MT. Liang Yuan's evidence was not challenged by the defendants in cross-examination.

199 As regards the market price of coal that met the quality specified in the Contract, Gimpex submits that the relevant time at which the price should be ascertained would be the time when the defect was discovered (relying on the cases of *Van Den Hurk v R Martens & Co, Limited (in liquidation)* [1920] 1 KB 850 and *Naugthon v O'Callaghan* [1990] 3 All ER 191). Gimpex's position is that this would be in May 2010. Liang Yuan's evidence was that when the coal was discharged in Karachi between 8 to 12 May 2010, the price of the coal of the quality specified in the Contract was then US$83 per MT. Gimpex also took pains to point out that Gunn's evidence was that in June 2010, the price of coal that met the said quality was even higher, at US$88.19 per MT.

200 Gimpex then concluded that the quantum of damages based on its claim for breach of warranty for the delivery of off-specification coal should therefore be (US$83 - US$41) × 41,510MT =

US$1,743,420.

201 However, there are two problems to this approach of assessing the appropriate damages to be award to Gimpex. First, the buyer (Gimpex) must have taken delivery of the sub-quality coal. Secondly, the buyer must have paid the contract price for the sub-quality coal. Neither of these events had taken place here. Gimpex cannot simply assert that they had not in fact rejected the coal. The coal was in fact sold by Unity to FZC, a subsidiary of Awan, at a much reduced price (see [32] above). The way in which Gimpex has calculated the damages due to it as shown in [200] is to overcompensate itself. Not having paid for the coal in accordance with the Contract price, it is not entitled to claim for the difference between the sub-quality coal price and the contract price. It would only be entitled to claim as damages the sum representing the difference between the contract price and the price at which the coal could have fetched in the open market if the coal delivered had been of the right quality. This brings us to the alternative basis of assessing Gimpex's loss and the application of s 51 of the SGA:

> **Damages for non-delivery**
>
> **51.**—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
>
> (3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.

202 Gimpex submits that pursuant to s 51(3), the measure of damages should be the difference between the Contract price (which is US$66 per MT) and the market price of the coal at the time the coal ought to have been delivered. Liang Yuan's evidence was that the open market price of the coal of the quality sold by Unity to Gimpex in Pakistan in May 2010 was US$89. On this basis, the loss suffered by Gimpex would therefore be (US$89 - US$66) × 41,510MT = US$954,730. In the normal case, this would indisputably be the loss suffered by a buyer in similar circumstances. This manner of assessing damages would also be in line with the principles established in *Hadley v Baxendale* (1854) 9 Exch 341 ("*Hadley v Baxendale*").

The defendants' submission on damages

203 The defendants submit that based on the case of *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 ("*Robertson Quay Investment*"), which applies the rule in *Hadley v Baxendale*, the measure of damages should be the loss of profit suffered by Gimpex instead. This was the measure of damages that flowed directly, naturally, and in the ordinary course of events.

204 The defendants therefore submit that the damages payable should be based on the difference between the prices of coal contracted for between Gimpex and Unity (which is US$66 per MT), and Gimpex and Awan (which is US$68 per MT). This would give a sum total of (US$68 - US$66) × 41,510MT = US$83,020.

205 In the alternative, the defendants submitted that Gimpex should be entitled to claim damages

calculated based on the difference between the prevailing market price of the off-specification coal and the agreed contract price between Gimpex and Awan. No reason or authority was cited for this submission.

206 In addition, the defendants made the submission that the court "should reserve this specific claim for assessment [until] a claim is brought by [Awan]", relying on the Court of Appeal decision in *China Resources Purchasing Co Ltd v Yue Xiu Enterprises (S) Pte Ltd and another* [1996] 1 SLR(R) 397 ("*China Resources*"). In *China Resources*, the plaintiff claimed against the defendant for the non-delivery of goods. It was not disputed by the parties that the plaintiff's purchase of the goods was for the purpose of immediate resale to a sub-buyer. The plaintiff obtained an interlocutory judgment against the defendant by way of judgment or declaration that the plaintiff be entitled to recover from the defendant such damages and costs for which the plaintiff may be held liable to pay to the sub-buyer. The court proceeded on that premise, and assessed and awarded damages for the loss of profit to the plaintiff, but reserved the issue of the indemnity for the plaintiff's liability to the sub-buyer. The reason for this was because until proceedings had actually been commenced against the plaintiff by the sub-buyer, the extent of the plaintiff's liability was uncertain, and so the proper course would be to defer dealing with that issue until such time as was appropriate. In arriving at this decision, the court did not have to consider what the appropriate *measure of damages* was. It simply proceeded on the basis of the declaration obtained by the plaintiff.

207 The defendants argue that since Gimpex has not established liability in respect of a claim from Awan, "the Court should likewise reserve this item of [Gimpex's] claim for assessment if and when a claim is brought by Awan against [Gimpex] …". [note: 24] It should be apparent that the head of damage reserved by the Court of Appeal in *China Resources* related to an indemnity claim. This, however, is not what Gimpex is claiming for before this court. Its claim is for damages based on either breach of warranty of quality or non-delivery.

208 In the present proceedings, Gimpex in its pleadings did include a claim for an indemnity against any liability it might have incurred towards Awan for the former's breach of contract to the latter. The defendants' suggestion at [206]–[207] is probably its response to that (although the defendants' submissions are unclear on this). Before us (and, indeed, before the Judge as well) this particular head of damage was not sought for by Gimpex. In addition, for reasons explained immediately below, the premise for the application of *China Resources* in this case does not even arise. There, the damages claimed were for loss of profit plus an indemnity against third party liability. In the present case, before both the High Court and this court, Gimpex no longer pursued the claim for an indemnity against third-party liability but only prayed for damages for the breach of contract on the part of Unity.

The appropriate measure of damages

209 The main issue before us is whether the measure of damages should be the difference between the Contract price and the market price of the coal at the time the coal ought to have been delivered (which is Gimpex's position) or the loss of profit plus an indemnity against any future liability to Awan (which is the defendants' position). Given that there has been no action taken by Awan against Gimpex for Gimpex's failure to deliver coal of the correct specifications, and having regard to the drastic increase in the market price of the coal, it is not surprising that the parties have adopted different approaches.

210 In this regard, the House of Lords decision of *Williams Brothers v ED T Agius, Limited* [1914] 1 AC 510 ("*Williams v Agius*") is very much on point. In that case, the buyer contracted with the seller for coal to be shipped and delivered at the price of 16s 3d. Before the date of delivery, the buyer

agreed to sell the coal to a sub-buyer at the price of 19s. The seller, in breach of contract, failed to deliver the coal to the buyer. At the date of breach, the market price of the coal was 23s 6d. The issue before the court was whether the measure of damages in respect of non-delivery of the coal was the difference between the contract price and the market price of the coal at the time of breach (as contended by the buyer), or the difference between the contract price and the price at which the buyer had sold the coal to the sub-buyer (as contended by the seller). The court unanimously found for the buyer.

211 As explained by Lord Dunedin, this was premised on an application of the trite principle of contract law that the innocent party must be put in the same position as if the breach of contract had not occurred (at 522–523):

> … when there is no delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day—and barring special circumstances, *the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward resale at over the market price* (*Great Western Ry. Co. v. Redmayne*), *nor can he take benefit of the fact that the buyer has made a forward resale at under the market price.*
>
> [emphasis added]

212 Viscount Haldane LC (at 520) also made the important point that the existence of a sub-sale by the buyer should have no effect on the damages payable by the *seller to the buyer* under the agreement entered into between them, and reaffirmed the judgment of Lord Esher MR in the English Court of Appeal decision in *Rodocanachi, Sons & Co v Milburn Brothers* (1886) 18 QBD 67 ("*Rodocanachi v Milburn*"). In *Rodocanachi v Milburn*, the court had to consider the same issue of whether the measure of damages should be the difference in contract price and the market price of goods or the difference between the contract price and the price as set out in the sub-sale. Lord Esher MR held (at 76–77) that:

> I think that the rule as to measure of damages in a case of this kind must be this: the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost. What, then, is that difference? … If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern but the contract price. I think, that if the law were so, it would be very unjust. I adopt the rule laid down in Mayne on Damages, which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for sale of the goods.

> That rule gives the mode of estimating the value which is to be taken for the purpose of arriving at the damages. ….

213 Reverting to *Williams v Agius*, Lord Dunedin also made the same point as Lord Esher MR that any contract between the buyer and the sub-buyer was not something that should be of concern to the court in determining the liabilities vis-à-vis the buyer and seller. The liabilities between the buyer and the sub-buyer should be left to those two parties (at 523):

> The truth is that the respondents' argument leaves them in a dilemma. Either the sub-sale was of the identical article which was the subject of the principal sale or it was not. If it was not, it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract. If, on the other hand, the sub-sale is of the selfsame thing or things as is or are the subject of the principal sale, then *ex hypothesi* the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller. And how can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract? All that will depend upon what the sub-buyer will be able to make out. *The only safe plan is, therefore, in the original contract, to take the difference of market price as the measure of damages and to leave the sub-contract and the breach thereof to be worked out by those whom it directly concerns*. [emphasis added]

214 Applying these principles to the present, Unity should not be allowed to rely on the contract between Gimpex and Awan to reduce its liability. As a matter of logic, there is also no reason why any benefit arising from Awan not suing Gimpex should go to Unity. There may be many reasons why Awan is not suing Gimpex. It could be because of, for example, certain differences in the terms of the Contract and the contract between Awan and Gimpex, the relationship between Awan and Gimpex, or any commercial considerations which this court is not privy to and should not speculate on.

215 Gimpex should be put in the position as if the defendants did not breach the Contract. That means that Gimpex should have obtained the coal of the quality specified in the Contract, and if there is an increase in the market value of the coal from the time of contracting and the time of delivery, then Gimpex must be compensated on the basis of the coal having a higher value. As it is undisputed that there is a market for the coal at the time of the breach, it should be clear that the measure of damages should be the difference between the Contract price and the market price of the coal at the time the coal ought to have been delivered. This is the *prima facie* measure of damages under s 51(3) of the SGA.

216 For completeness, we would observe that had it been the understanding of the parties at the *time of contracting*, that Gimpex had bought the coal specifically in order to fulfil its contractual commitment to Awan to provide coal of the exact same quantity and quality, and if the Contract had provided for sub-sales down the line, the defendants could have had a much stronger case to say that Gimpex's loss flowing from the breach of Contract was its loss of profit plus any potential liability to Awan (see the House of Lords decision in *Hall (R and H) Ltd v W H Pim (Junior) & Co's Arbitration* (1928) 33 Com Cas 324; the Singapore High Court decision in *Fazlur Rahman v Bombay Trading Co ((Pte) Ltd* [1992] 2 SLR(R) 529; and generally *Benjamin's Sale of Goods* (M G Bridge, gen ed) (Sweet & Maxwell, 8th Ed, 2010) at paras 17–028–17–033). However, since the evidence is that the defendants did not know or have knowledge of the exact terms of the Sub-contract until much later, and the Contract did not contain any term providing for sub-sales down the line, we do not need to consider a claim on such a basis any further.

217 Finally, we come to the ascertainment of the market price of the coal at the time of breach. Gimpex's evidence of this is based on Liang Yuan's expert report. As mentioned earlier, the defendants did not cross-examine Liang Yun on his affidavit evidence, but raised certain queries in a Notice of Objections to Contents of Affidavit of Evidence-in-Chief. [note: 25] The main issue the defendants had with Liang Yun's evidence was that a lot of it was based on assertions made without much explanation. It was therefore surprising that Liang Yun was not challenged on the stand by the defendants' counsel.

218 This was especially troubling because Liang Yun's evidence on the market price of the coal at the time of breach was problematic. In the same report, Liang Yuan was asked to give his opinion on four issues. One of those issues was, "What was the market price of coal at the time of discharge in Pakistan between 8-12 May 2010?". Liang Yuan's answer was that, "the market price of the 6300 GAD (5815 GAR) calorific value coal FOB Indonesia between 8-12 May 2010 would be about USD 83 [per MT]".

219 Another issue was, "What was the price of coal on the Pakistan market on 8-12 May 2010?". This time, Liang Yuan's response (just two pages later) was that the price of the coal was US$89 per MT.

220 First, we fail to understand what the difference between the two issues put to Liang Yuan as set out in the preceding paragraphs is. The issues although framed slightly differently from each other are essentially asking the same question. Even the dates of "8-12 May 2010" were the same and hence the different answers provided from Liang Yuan were incomprehensible. Secondly, Gimpex relied on the figure of US$83 per MT in calculating the market price of the coal in respect of its claim based on the breach of warranty for the off-specification coal pursuant to s 53(3) of the SGA. Yet, Gimpex relied on the figure of US$89 per MT in calculating the market price of the coal under its claim for non-delivery of coal pursuant to s 51(3) of the SGA. We do not understand why the two figures should be different as they relate to the market value of the same quality coal at the same relevant period.

221 In light of this confusion, and given the lack of explanation by Liang Yun, we do not think that Gimpex should be allowed to simply rely on the higher figure of US$89 per MT as the market price of the coal. The burden is on Gimpex to prove its loss. While Gunn's evidence was that the market price of coal of the contractual specifications was US$88.19, that was as at June 2010, not May 2010 (the date of the breach). The benefit of the uncertainty should be given to Unity. We therefore hold that the damages to be awarded to Gimpex should be based on the lower figure of US$83 per MT.

222 We therefore find that Unity is liable to Gimpex for the sum of (US$83 - US$66) × 41,510MT = US$705,670.

Conclusion

223 In conclusion, the appeal in CA 160/2013 is allowed in so far as damages for the Breach of Contract Claim are assessed by this court at US$705,670. The appeal in CA 161/2013 is dismissed. Parties are to make written submission on costs within two weeks hereof.

[note: 1] CA 160/2013 Appellants' Core Bundle ("ACB") Vol I at p 88.

[note: 2] Record of Appeal ("RA") Vol III(A) at p 219 at para 34.

[note: 3] RA Vol III(A) at p 219 at para 33.

[note: 4] RA Vol III(A) at p 220 at para 39.

[note: 5] RA Vol III(F) at p 16 at para 16.

[note: 6] RA Vol III(F) at p 11.

[note: 7] CA 160/2013 ACB Vol II at pp 142–143.

[note: 8] CA 160/2013 ACB Vol II pp 6–11.

[note: 9] RA Vol II(B) at p 11 *et seq*.

[note: 10] RA Vol II(B) at p 81 *et seq*.

[note: 11] RA Vol II(B) at p 71 *et seq*.

[note: 12] RA Vol II(B) at p 44 *et seq*.

[note: 13] RA Vol III(M) at pp 249–250.

[note: 14] RA Vol III(A) at p 200.

[note: 15] RA Vol III(D) at p 49 at para 70.

[note: 16] RA Vol V at pp 205–206.

[note: 17] RA Vol III(K) pp 219–220.

[note: 18] RA Vol III(B) at p 258.

[note: 19] CA 160/2013 ACB Vol I at p 265.

[note: 20] RA Vol III(L) at p 32.

[note: 21] RA Vol III(L) at p 58.

[note: 22] RA Vol III(F) at p 243.

[note: 23] RA Vol III(G) at p 235.

[note: 24] CA 160/2013 Respondent's Case at para 146.

[note: 25] RA Vol IV(A) at pp 50–53.