IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC(I) 04

Suit No 1 of 2016

Between

Teras Offshore Pte Ltd

… *Plaintiff*

And

Teras Cargo Transport (America) LLC

… *Defendant*

JUDGMENT

[Contract] – [Breach] – [Non-payment]

[Contract] – [Contractual terms] – [Scope of work]

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Teras Offshore Pte Ltd
v
Teras Cargo Transport (America) LLC

[2017] SGHC(I) 04

Singapore International Commercial Court — Suit No 1 of 2016
Sir Henry Bernard Eder IJ
13–16 February; 20 March 2017

04 April 2017 Judgment reserved.

Sir Henry Bernard Eder IJ:

Introduction

1 The Plaintiff ("TO") is a company incorporated in Singapore. It is a wholly-owned subsidiary of Ezion Holdings Limited ("Ezion"). The Defendant ("TCT") is a company incorporated in Delaware, United States of America and based in Gig Harbour, Washington. Ezion holds a minority indirect interest (some 19%) in TCT and to that extent TO and TCT are related companies. However, for present purposes at least, they operated at arm's length. TO provides marine logistics and support services to the offshore oil and gas industry worldwide as did TCT at least until recently.

2 The present proceedings concern disputes between TO and TCT in relation to work and services provided by TO in relation to the construction of three liquefied natural gas ("LNG") plants on Curtis Island (which is a small

island with a landmass of approximately 15 square kilometres off the coast of Queensland, Australia) namely the Queensland Curtis LNG Project ("QCLNG Project"), the Australia Pacific LNG Project ("APLNG Project") and the Gladstone LNG Project ("GLNG Project") – collectively the "LNG Projects".

3 The main contractors for the LNG Projects were Bechtel International Inc and Bechtel Oil Gas and Chemicals, Inc. For convenience only, I shall refer to these companies without distinction as "Bechtel".

4 Each LNG Project was confined to its own specific area on Curtis Island with its own berthing area for loading and unloading. By three separate contracts between Bechtel and TCT as described more fully below, TCT agreed to provide tugs and barges, administrative, technical and professional services in the performance of the marine transportation operations in respect of the LNG Projects (the "Main Contracts"). This work was then sub-contracted by TCT to TO on back-to-back terms under three separate "parallel" sub-contracts (the "Sub-Contracts"). In very broad terms, the Main Contracts required TCT and, in turn, the Sub-Contracts required TO to provide tugs and barges and related services to transport modules (for the purpose of building the gas plants) to Curtis Island from Batam (Indonesia), Lamchabang (Thailand) and Batangas (the Philippines). The modules weighed between 180 tonnes to 3,800 tonnes and measured about 12 storeys high. Pursuant to the contractual arrangements referred to below, the modules were loaded on to the barges from the ports referred to above. One tug was generally required to tow a barge to the loading port at all times. Upon arrival, two tugs were required to tow the barge to be berthed at the loading port. For barges transporting modules from Batam, bunkering had to be carried out in Singapore due to the voyage distance – a single voyage could take as long as 30 days to reach

Curtis Island. The unloading of the modules at Curtis Island had to be timed to be carried out during slack tide when the current was not strong. Ballasting operations were carried out to ensure that the barge remained level during unloading.

5 Over the course of the performance of these contracts, TO carried out approximately 87 voyages transporting 92 modules to Curtis Island for the LNG Projects. There were no reported losses or damages to any of the modules delivered to Curtis Island and all modules were delivered on time.

6 In summary, TO claims in debt, and alternatively by way of damages, (i) reimbursement of a total sum of US$3.5 million originally advanced by TO to TCT in or about 2012 (the "Advance Payments"); and (ii) further sums referred to as *"back-charges"* totalling US$24,500,178.99 and (as originally pleaded) A$984,815.59 as referred to below in respect of work done and services provided by TO in relation to the LNG Projects. The latter claims (which were also advanced in the alternative by way of a *quantum meruit*) were detailed in the form of a Scott Schedule together with references to a mass of underlying invoices and other documents where appropriate. In total, that Scott Schedule identifies no less than 70 separately-headed items, many of which include numerous sub-items. Some of those claims are very small in value amounting to only a few hundred dollars. Others are significantly bigger. Pursuant to an order I made at a case management conference at an early stage of the proceedings, TCT provided its responses as appropriate to the individual claims; and TO provided its own further replies thereto.

7 In summary, all of TO's claims were denied by TCT on various grounds set out in TCT's responses to the Scott Schedule as well as a defence

of set-off; and TCT advanced its own substantial counterclaim for various sums totalling approximately US$14 million also in relation to the LNG Projects.

8 In support of its various claims, TO served affidavits of evidence-in-chief ("AEICs") from seven witnesses, all of whom were called to give evidence and were cross-examined on behalf of TCT, as follows:

(a) Chew Thiam Keng. He is a Director of TO and also Chief Executive Officer ("CEO") and Executive Director of Ezion.

(b) Cheah Boon Pin. He is the Chief Financial Officer of Ezion and a Director of TO.

(c) Lee Kon Meng. He is also referred to as Peter Lee. He is the CEO of TO and also the Chief Operating Officer ("COO") of Ezion. At all material times until December 2014, he was the Deputy COO of TO reporting to Captain Larry Glenn Johnson, the then-COO of Ezion and TO.

(d) Michael David Gibson. He is the Operations Manager of TO. He joined TO in about mid-2012 as an independent contractor to assist with the operations and bunkering of the various vessels involved in the LNG Projects. In or around September 2013, he became a permanent employee of TO and oversaw the running of the day to day operations of the LNG Projects. In performing that role, he worked closely with Mr Eric Radford, TO's fleet manager.

(e) Ho Koon Chyuan. He holds the position of Project Manager for TO. When the LNG Projects commenced, he was involved as TO's

Operations Manager. He assisted in coordinating TO's marine operations and reported back to Peter Lee on the progress of the projects. His role also included liaising with TCT's representative, Mr Wayne Charles Hamilton.

(f) Ang Siew Leng. She is employed by TO as an Accounts Executive and has been in that position since 2010. She was not involved in any of the negotiations and discussions in relation to the LNG Projects. Rather her involvement extended to preparing the accounts for the LNG Projects as well as preparing the relevant invoices to be issued to TCT throughout the course of the LNG Projects.

(g) Png Chan Chan. She joined TO sometime in 2009 and worked in the Operations Department and is now an Operations Superintendent. Her role is to provide administrative support in relation to the operations of the various projects. She first got involved with the LNG Projects around mid-2012. Initially, her main role was to procure quotations for bunkers. However, that stopped sometime in 2013. Thereafter, her role was primarily focussed on providing administrative support to Mr Radford who was then TO's Operations Manager in charge of the LNG Projects. In particular, she assisted Mr Radford amongst other things by liaising with TO's Finance Department to verify the invoices generated for works carried out by TO; and was tasked to go through the amounts and the description of the charges stated in the various invoices and reviewing the supporting documentation. Mr Radford would then do a final check before the invoices were sent out to TCT.

9 In advance of the trial, TCT served three AEICs from the following individuals:

(a) Sonny Joe Sanders. He describes himself as the Director and Shareholder of TCT.

(b) Wayne Hamilton. He describes himself as the Vice President of Projects of TCT.

(c) Anita L. Ray. She describes herself as the Vice President and General Manager of TCT responsible for monitoring, tracking, and submission of invoices submitted by Bechtel to TCT and received by TCTA from TO. Exhibited to Ms Ray's AEIC were a number of spreadsheets which she had apparently compiled and over 2,000 documents.

It is noteworthy that all three AEICs were very short. Of itself, that is not necessarily a criticism. But the AEICs of Mr Hamilton and Ms Ray consisted largely of bare assertions using formulaic language which lacked any proper detail or explanation. In my view, this was most unsatisfactory.

10 These three witnesses were all originally scheduled to be called by TCT to give evidence at the trial – Mr Hamilton, in person; and Mr Sanders and Ms Ray by video conference. However, the position of TCT changed dramatically in the course of the trial. After TO had called its witnesses and at the close of its case, TCT elected not to call any of its three scheduled witnesses. Notwithstanding their absence, TCT then sought to put in evidence the documents exhibited to Mr Sanders' affidavit and over 2,000 documents originally exhibited to the affidavit of Ms Ray (i.e. ALR-1, ALR-2, ALR-3, ALR-4 and ALR-5) pursuant to s 32(1)(*b*)(iv) of the Evidence Act (Cap 97,

1997 Rev Ed) (the "Evidence Act"). This course was opposed by TO. After hearing full argument and for reasons set out in a separate ruling which I do not propose to repeat, I concluded that it would be contrary to the "interests of justice" to allow TCT to adopt such course and that I should exercise my discretion pursuant to s 32(3) of the Evidence Act in effect to exclude such documents as evidence in the trial. Following such ruling, TCT admitted the sums claimed totalling US$3.5 million and withdrew its set-off and counterclaim. TO's other claims remain in dispute although the issues in relation to such claims narrowed considerably in the course of the rest of the trial.

11 The result of the above is that, in any event, TO is entitled to judgment in the total sum of US$3.5 million, as TCT conceded, plus interest (which I deal with at the end of this Judgment); and that TCT's counterclaim should be dismissed. The issues that remain concern TO's various claims totalling approximately US$25 million for the additional back-charges which I now turn to consider.

12 As stated above, TO called seven witnesses in support of its claims. I found all these witnesses patently honest and, in relevant respect and subject to my comments below, I accept what they stated in their AEICs and in oral evidence. However, in expressing that conclusion, it is fair to say that the cross-examination of these witnesses was fairly perfunctory. I should make plain that the latter comment is not intended to be any criticism of Mr Timothy Ross Lord who acted as Counsel on behalf of TCT. He no doubt did the best he could on the basis of his instructions. However, the result was that a lot of the detailed points set out in TCT's pleadings and responses to the TO's Scott Schedule were never pursued in the course of cross-examination; and it is

therefore unsurprising that these were largely abandoned in the course of Mr Lord's final speech. More surprising perhaps were certain points which Mr Lord did attempt to raise in his final speech but which were not properly pleaded or otherwise put in cross-examination. For example, in the course of his final speech, he submitted on behalf of TCT that there was no or insufficient evidence to persuade the Court that *any* of the invoices relied upon by TO in support of its case had ever been sent by TO or received by TCT. However, quite apart from the fact that this point had never been pleaded by TCT and ignoring Ms Ray's own AEIC, it was obviously false in the light of, in particular, the evidence of Ms Ang and Ms Png which had not been the subject of any relevant challenge whatsoever in the course of cross-examination and which I accept without hesitation.

13 Of the other few remaining points that Mr Lord did pursue, it was the submission of Mr Peter Doraisamy on behalf of TO that some if not all of these were never the subject of any or any proper challenge in cross-examination as they ought to have been if they were to be pursued. In that context, Mr Doraisamy relied upon the so-called rule in *Browne v Dunn* (1893) 6 R 67 (HL) as explained in *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 at [42].

The LNG Projects and the contractual arrangements between Bechtel, TO and TCT

14 In summary, the contractual arrangements between Bechtel and TCT under the Main Contracts and between TCT and TO under the Sub-Contracts were as follows.

15 The first contract between TCT and Bechtel is entitled "QUEENSLAND CURTIS LNG PROJECT OCEAN BARGE TRANSPORT AGREEMENT" ("QCLNG OBTA") and is dated 19 July 2011. It consists of a two page Agreement (which identified TCT as the "CARRIER" and Bechtel as "CHARTERERS") and four exhibits, *ie*, Exhibit A (General Conditions), B (Special Conditions), C (Quantities, Pricing and Data) and D (Scope of Work and Technical Specifications). Clause 1 of the Agreement provides as follows:

> WORK TO BE PERFORMED: Except as specified elsewhere in the Agreement, [TCT] shall furnish all administrative, technical and professional services and perform all operations, including the furnishing and supervision of all technical personnel and labor and the furnishing of any equipment, material, tools, supplies and transportation necessary and required to satisfactorily provide Ocean Barge Transportation from Laem Chabang, Thailand to QC LNG Project MOF, Curtis Island, Australia, of fabricated modules and equipment supplied by [Bechtel] to [TCT] in the performance of the Queensland Curtis LNG project as defined within the Exhibits and Appendices.

Exhibit B included a definition of "Works" in the following terms: "…all the stated or implied activities to be performed by [TCT] as required by the Agreement Documents." Clause 3 of the Agreement provided for Bechtel to pay compensation "…as full consideration for the satisfactory performance by [TCT] of this agreement…a total amount *not to exceed* USD55,172,600…" [emphasis added]. Exhibit A included provision (*ie,* clause GC-37) for Bechtel to claim what are described as certain "back-charges". Exhibit C contained various "Commercial Terms" including a provision (*ie,* clause 2.0) specifying the "WORK TO BE PERFORMED" as follows:

> The Work to be performed by [TCT] comprises the furnishing of all professional and technical work, labor, Vessels, equipment and materials (except equipment and materials specified as furnished by others), and all other functions and operations including, but not limited to equipment, materials and supplies and related Work required to furnish and operate

> and manage an [*sic*] self sufficient marine transport of fabricated modules for the Queensland Curtis LNG Project all strictly in accordance with all requirements of the Agreement Documents.

Exhibit C also included provisions relating to changes to the Work (*ie,* clause 5.0) and adjustments (*ie,* clause 6.0) as follows:

> 5.0 CHANGES TO THE WORK
>
> Adjustments to the Final Price as a result of Additional Work (Work not pertaining to the original performance requirements i.e. [BECHTEL] generated) shall be developed at [BECHTEL'S] preference on a case by case basis utilizing the Unit Rates as identified in form A-1 "Schedule of Quantities and Prices" as the basis.
>
> 6.0 ADJUSTMENTS
>
> All prices are fixed for the duration of the contract and are not subject to escalation for any cause unless otherwise specified (bunker) Payment of the Total Agreement Price shall constitute full payment for performance of the Work and covers all costs of whatever nature incurred by [TCT] in accomplishing the Work in accordance with the provisions of the Agreement.

Exhibit D contained very detailed provisions with regard to the scope of work. Clause 1.3 was headed "Scope Overview" and included the following provision:

> [TCT] shall perform as detailed in this Exhibit "D", all procurement, supervision, operation and other Works necessary to perform the Works in accordance with all appropriate international, national, industry, and local codes, standards and regulations.

Clause 4 of Exhibit D was headed "WORK NOT INCLUDED" and provided as follows:

> 4.1 Work on the Mainland Sites, including operation and maintenance of facilities.
>
> 4.2 Work on the Curtis Island Site, including operation and maintenance of facilities.

4.5 Dredging.

4.6 Supply and installation of navigations aids.

16 The second contract between TCT and Bechtel is entitled "GLNG PLANT PROJECT TECHNICAL SERVICES AGREEMENT" ("GLNG TSA") and is dated 21 February 2012. It identifies TCT as the "SERVICE PROVIDER" and Bechtel as the "BUYER". It is in similar but not identical form to the QCLNG OBTA consisting of a two page Agreement and four exhibits. It specifies the "WORK TO BE PERFORMED" as follows:

> Except as specified elsewhere in the Service Agreement, [TCT] shall furnish all plant; labor; materials; tools; supplies; equipment; transportation; supervision; technical, professional and other services; and shall perform all operations necessary and required to satisfactorily:
>
> Provide Ocean Transportation services for the GLNG Plant Project modules in accordance to Exhibit "D" Scope of Work.

Clause 3 provided in material part as follows:

> COMPENSATION: The Recommended amount for performing all Work will be $31,177,371.00… As full consideration for the satisfactory performance by [TCT] of this Service Agreement, [Bechtel] shall pay to [TCT] compensation in accordance with the prices set forth in Exhibit "C" and the payment provisions of this Service Agreement.

Exhibit B defined "Work" to mean "… all the stated or implied material, equipment, goods, tools, services, work and other activities to be performed or provided by [TCT] as required by the Subcontract Documents". Exhibit C contained various "Commercial Terms" including a provision (*ie,* clause 2.0) specifying the "WORK TO BE PERFORMED" as follows:

> The work to be performed by [TCT] comprises the furnishing of all professional and technical work, labor, Vessels, equipment and materials (except equipment and materials specified as furnished by others), and all other functions and operations including, but not limited to, equipment, materials and

> supplies and related Work required to furnish and operate and manage an [*sic*] self-sufficient marine transport of fabricated modules for the GLNG Plant Project all strictly in accordance with all requirements of the Agreement Documents.

Exhibit C also contained terms relating to changes to the work (*ie,* clause 5.0) and adjustments (*ie,* clause 6.0) as in the QCLNG OBTA. Exhibit D contained detailed provisions with regard to the scope of work. Clause 1.3 was headed "Scope Overview" and included the following provision:

> The Scope of Work (herein called the Work) includes but is not limited to: personnel, equipment and services to provide Ocean Barge Transportation Services to the project site on Curtis Island.

Clause 4 of Exhibit D was headed "WORK NOT INCLUDED" and provided as follows:

> 4.1 Work on the Mainland Sites, including operation and maintenance of facilities.
>
> 4.2 Work on the Curtis Island Site, including operation and maintenance of facilities.
>
> 4.3 Dredging.
>
> 4.4 Supply and installation of navigations aids.
>
> 4.5 Loading and Offloading.
>
> 4.6 Design, supply, installation, and removal of grillage supports.
>
> 4.7 Provision of Cyclone Moorings.
>
> 4.8 [Bechtel] Furnished Drawings and Specifications.

17 In anticipation that the work and services to be provided by TCT under these two contracts would be subcontracted by TCT to TO, TO advanced to TCT the sum of US$1 million in respect of each of the anticipated subcontracts, *ie,* a total of US$2 million.

18 On 6 March 2012, TCT entered into the three agreements with TO which are the main focus of the present proceedings (the "Sub-Contracts"). All three contracts are in similar but not identical form.

19 The first sub-contract between TCT and TO related to the QCLNG Project and was, in effect, a sub-contract by TCT of its obligations under the QCLNG OBTA (the "QCLNG Sub-Contract"). After various recitals referring to the QCLNG OBTA, it provided in material part as follows:

> 1. TCT agrees to subcontract the Work to TO on back-to-back terms with the [QCLNG OBTA]…
>
> …
>
> 4. In consideration of TO agreeing to perform the Sub-contracted Work, TCT shall pay to TO an amount representing 93.2% of the Estimated Contract Value representing the marine spread and excluding bunkers ("Sub-contract Price"). On the assumption that the Estimated Contract Value is US$ 55,172,600, the Sub-contract Price shall be US$51,420,863.
>
> 5. TCT shall pay the Sub-contract Price to TO progressively in conjunction with the progress of payments from Bechtel to TCT under the [QCLNG OBTA]. In other words, it is agreed that TCT will pay to TO immediately 93.2% of all marine spread amounts as and when received by TCT from Bechtel.
>
> 6. TO will invoice TCT for the full cost of bunkers which will be reimbursed by Bechtel…

In addition, the QCLNG Sub-Contract acknowledged receipt of the advance of US$1 million and provided terms for its repayment.

20 The second sub-contract between TCT and TO related to the GLNG Project and was, in effect, a sub-contract by TCT of its obligations under the GLNG TSA (the "GLNG Sub-Contract"). After various recitals referring to the GLNG TSA, it provided in material part as follows:

> 1. TCT agrees to sub-contract the Work to TO on back-to-back terms with the [GLNG TSA]…
>
> …
>
> 4. In consideration of TO agreeing to perform the Sub-contracted Work, TCT shall pay to TO an amount representing 93.2% of the Estimated Contract Value representing the marine spread and excluding bunkers ("Sub-contract Price"). On the assumption that the Estimated Contract Value is US$ 31,177,371.00, the Sub-contract Price shall be US$ 29,057,309.77.
>
> 5. TCT shall pay the Sub-contract Price to TO progressively in conjunction with the progressive payments from Bechtel to TCT under the [GLNG TSA]. In other words, it is agreed that TCT will pay to TO immediately 93.2% of all marine spread amounts as and when received by TCT from Bechtel.
>
> 6. TO will invoice TCT for the full cost of bunkers which will be reimbursed by Bechtel…

In addition, the GLNG Sub-Contract acknowledged receipt of the advance of US$1 million and provided terms for its repayment.

21 The third sub-contract relating to the APLNG Project (the "APLNG Sub-Contract") was in slightly different form because it was made before and in anticipation of a definitive contract being entered into between TCT and Bechtel. However, as I understand, nothing turns on this point. After various recitals referring to the existing bid by TCT to Bechtel in respect of the APLNG Project and the fact that TCT was "confident" that it would be awarded the contract in respect of that project by Bechtel (referred to as the "Bechtel Contract"), it provided in material part as follows:

> 1. TCT agrees to sub-contract the Work to TO on back-to-back terms upon it being awarded the contract for the [APLNG Project]…
>
> …
>
> 4. In consideration of TO agreeing to perform the Sub-contracted Work, TCT shall pay to TO an amount representing

> 93.2% of the Estimated Contract Value representing the marine spread and excluding bunkers ("Sub-contract Price"). On the assumption that the Estimated Contract Value… is US$67 million, the Sub-contract Price shall be US$62.444 million.
>
> 5. TCT shall pay the Sub-contract Price to TO progressively in conjunction with the progressive payments from Bechtel to TCT under the Bechtel Contract. In other words, it is agreed that TCT will pay to TO immediately 93.2% of all marine spread amounts as and when received by TCT from Bechtel.
>
> 6. TO will invoice TCT for the full cost of bunkers which will be reimbursed by Bechtel…

In addition, the APLNG Sub-Contract provided for TO to make an advance of US$1.5 million to TCT and provided terms for its repayment.

22 Thereafter, as anticipated, TCT and Bechtel entered into a further contract dated 19 July 2012, for the provision of work and services in relation to the APLNG Project entitled: "AUSTRALIA PACIFIC LNG PROJECT GENERAL SERVICES AGREEMENT" (the "APLNG GSA"). It was in similar but not identical terms to the other Main Contracts referred to above consisting of a two page agreement and five exhibits. It specified the "WORK TO BE PERFORMED AS FOLLOWS" in Clause 1 as follows:

> Except as specified elsewhere in the Agreement, [TCT] shall furnish all administrative, supervision, technical, professional, and other services and shall perform all operations necessary and required, including the furnishing and supervision of all technical personnel and labor and the furnishing of all plant, labor, materials, tools, supplies, equipment, and transportation necessary, to satisfactorily provide ocean transport services for the APLNG Plant Project modules in accordance to Exhibit "D" Scope of Work.

Clause 3, entitled "COMPENSATION" provided that the "…Total Estimated Not to Exceed Price for performing the WORK is USD $70,790,244.00…". Exhibit B defined "Work" to mean "…all the stated or implied material,

equipment, goods, tools, services, work and other activities to be performed or provided by [TCT] as required by the Agreement Documents". Exhibit C contained various "Commercial Terms" including a provision (*ie,* clause 2.0) specifying the "WORK TO BE PERFORMED" as follows:

> The work to be performed by [TCT] comprises the furnishing of all professional and technical work, labor, Vessels, equipment and materials (except equipment and materials specified as furnished by others), and all other functions and operations including, but not limited to equipment, materials and supplies and related Work required to furnish and operate and manage an [*sic*] self-sufficient marine transport of fabricated modules for the APLNG Plant Project all strictly in accordance with all requirements of the Agreement Documents.

Exhibit C also contained terms relating to changes to the work (*ie,* clause 5.0) and adjustments (*ie,* clause 6.0) as in the other Main Contracts. Exhibit D contained detailed provisions with regard to the scope of work. Clause 1.3 was headed "Scope Overview" and included the following provision:

> The Scope of Work (herein called the Work) includes but is not limited to: personnel, equipment and services to provide Ocean Barge Transport Services to the project site on Curtis Island.

Clause 2.1 provided that the Work included but was not limited to "Furnish all necessary vessels, personnel, equipment, materials and consumables, including vessel water supply… Transport of Cargo from the loading berth(s) to the discharge berth(s)…" Clause 4 of Exhibit D was headed "WORK NOT INCLUDED" and provided as follows:

> 4.1 Work on the Mainland Sites, including operation and maintenance of berth facilities.
>
> 4.2 Work on the Curtis Island site, including operation and maintenance of berth facilities.
>
> 4.3 Dredging.
>
> 4.4 Supply and installation of harbor navigations aids.

4.5 Loading and offloading.

4.6 Design, supply, installation, and removal of grillage supports.

4.7 Provision of cyclone moorings.

4.8 [Bechtel]-furnished drawings and specifications.

TO's claims/TCT's defences

23 In essence, it was TO's primary case that its claims were in respect of work done or services provided in relation to the Sub-Contracts; that such work or services were (or at least were arguably) "out of scope" of the Sub-Contracts and had, in effect, been performed by TO at the request of and/or with the agreement of TCT; that pursuant to such requests and/or agreement, invoices were issued by TO to TCT as necessary from time to time in respect of such work and services; and that TCT accepted the relevant invoices without protest or query or at least did not reject them.

24 In considering these claims, Mr Lord submitted and I obviously accept that both the legal and evidential burdens lie on TO to satisfy the Court that these claims are well founded. Bearing that well in mind and in light of the evidence submitted on behalf of TO, I have no doubt that the monies claimed by TO are in respect of work done or services provided by TO in relation to the Sub-Contracts; and that all such work and services are properly reflected in the invoices issued by TO to TCT. For the avoidance of doubt, I reject the suggestion by Mr Lord that the relevant invoices were never sent by TO or received by TCT. As to the quantum of TO's claims, I have no reason to doubt the veracity of TO's witnesses. Moreover, Mr Lord did not seek to challenge any of them so far as quantum is concerned and there is no other evidence to the contrary.

25 It is fair to say that TCT's pleaded case as set out in its response in the Scott Schedule included various points and factual assertions by way of defence to TO's claims. For example, TCT asserted by way of defence with regard to certain claims (eg items 4, 9, 10, 11, 13, 14, 53 and 54) that such claims were included in what was described as a "Demobilization Fee" paid by TCT to TO on certain dates. However, there was no evidence to such effect; and Mr Lord never challenged any of TO's witnesses in relation thereto. The position is similar with regard to certain other claims, *eg,* 17(part), 26(part), 28, 33(part), 35(part), 36(part), 37(part), 38(part), 39(part), 43(part), 40(part), 41(part) and 52(part). Moreover, it is important to note that Mr Lord expressly refrained either in his opening or in his final speech from addressing the Court on any of the claims individually or the large number of specific points originally pleaded by TCT by way of defence in the Scott Schedule.

26 It follows, in my view, that TO is entitled to judgment for the full amount of the sums claimed by way of back-charges subject only to consideration of what ultimately boiled down to two important points of principle advanced by Mr Lord on behalf of TCT.

27 The first main point of principle raised by Mr Lord was to the effect that all three Main Contracts and, in turn, all three Sub-Contracts were, by their express terms, "all-inclusive" contracts; that TO's claims were in respect of work done or services provided which fell within the existing contractual scope of work; and that therefore all TO's claims must fail *in limine*.

28 The second point of principle raised by Mr Lord was that, at least in respect of some of TO's claims, there was no independent obligation on TCT

to pay unless and until TCT was itself paid the corresponding amount by Bechtel; that in other words, it was only *if* TCT were paid such corresponding amount by Bechtel that TCT came under any obligation to pay TO; that that had not yet happened or at least there was no evidence that it had happened; and that, given that the burden was on TO, TO's claims must again fail *in limine*. I deal with each of these points of principle in turn.

Scope of Work

29 In this context, Mr Lord referred me to a number of provisions in the Main Contracts to the general effect that these contracts were for a "maximum" fixed price and that the scope of work was extremely wide. In particular, he referred me to the very wide definition of the work to be performed both in Clause 1 of the Main Contracts and Exhibit C thereto; the very broad definition of "Work" or "Works"; Clauses 5.0 and 6.0 in Exhibit C; and the wording in Exhibit D defining the "Scope Overview". In addition, he emphasised that the compensation payable was, in effect, a maximum as reflected in the language "not to exceed" in Clause 3 of two of the Main Contracts. Since the Sub-Contracts were on back-to-back terms, Mr Lord submitted that the position was, in effect, identical under those contracts.

30 In broad terms, I accept that the scope of the work under both the Main Contracts and the Sub-Contracts was very broad. However, as submitted by Mr Doraisamy on behalf of TO, it is plain that both sets of Contracts were not all-encompassing and did *not* include certain work. That is made clear, in particular, by Clause 4 of Exhibit D of each of the Main Contracts headed "WORK NOT INCLUDED" which I have already quoted above. The language of those clauses in each of those Main Contracts is not identical but their effect is to identify in each case specific areas of work which were, in

effect, excluded from the scope of work to be performed by TCT under the Main Contracts and, in turn, TO under the Sub-Contracts. In addition, there are other specific provisions in the Main Contracts which specifically identify and delimit the work to be done or services to be provided. Thus, for example, in the APLNG GSA, Form A-4 of Exhibit C, in effect, required TCT and, in turn, TO to "commit" a total of seven barges and seven tugs. Here, Mr Doraisamy on behalf of TO submitted that the evidence showed that additional barges and/or tugs proved necessary; that this was, in effect, work and services which were "out of scope"; that such additional work and services were, in effect, accepted in the course of performance of the Sub-Contracts; and that, to that extent, TO are entitled to recover its claims in respect thereof. Mr Doraisamy submitted that another similar category of TO's claims relates to the removal of grillage supports. As explained by Mr Gibson, in order to carry out the transportation of the modules on the barges, grillages had to be installed on the barges to ensure that the modules were fastened properly and safely transported. At the end of the respective charters for the barges, the grillages had to be removed from the barges. TO's claims now include the costs incurred in removing the grillages from the barges. I accept that such work was indeed excluded from the relevant contracts and therefore "out of scope".

31 In summary, it was Mr Doraisamy's submission (at least initially) that all of TO's claims related to work or services which were similarly "out of scope" (or, at least, arguably so) and were recoverable simply on that basis. As formulated, I do not accept that submission. In principle, it seems to me that the *mere* fact that certain work done or services provided were "out of scope" does not, of itself, entitle TO to recover the cost of such work or services. In my view, in order to succeed in recovering the cost of such work or services,

TO would generally have to show that such work or services were not merely "out of scope" but done or provided pursuant to some special agreement (as contemplated by Exhibit C Clause 6.0 or possibly otherwise) or, at the very least, at the express or implied request of TCT.

32 In this context, Mr Doraisamy relied heavily on the evidence of Mr Gibson. As summarised in Mr Doraisamy's Opening Statement, this evidence (which I accept) was to the following effect:

(a) Mr Hamilton was the primary point of contact between TO and Bechtel during the course of the LNG Projects. TO was not allowed by TCT to have any communication with Bechtel. This is corroborated by the evidence of TO's CEO, Mr Lee.

(b) During the course of the LNG Projects, TO and TCT were continually engaged in ongoing discussions on an "as and when necessary" basis. In particular, the parties would discuss and agree on who would bear the charges when the charges were reasonably incurred. This is, again, corroborated by the evidence of Mr Lee.

(c) After agreeing with Mr Hamilton on what could specifically be back-charged to TCT, Mr Radford would then inform TO's finance team of the items that could be back-charged based on these discussions with Mr Hamilton. Thereafter, the finance team would prepare the invoices which were issued to TCT.

33 Mr Doraisamy submitted that, given Mr Hamilton's role as an intermediary between TO and Bechtel, the only logical conclusion is that Mr Hamilton must have sought Bechtel's authority for the items to be back-

charged to TCT and/or Bechtel; that it is telling that TCT has not disputed TO's entitlement to claim for the back-charges in TCT's AEICs or in response to TO's Scott Schedule, only going so far as to dispute the quantum claimed and/or denying TO's entitlement on the alleged basis that Bechtel did not accept/pay for the said back-charges; that at all times during the course of the LNG Projects, TO accepted the invoices without question; that it was only after the present action was commenced that TO, as an afterthought, raised objection to TO's quantification of its claim for back-charges; and that, in any event, TCT has failed to bring any evidence to dispute that it had not accepted the invoices when they were sent to it or at any time thereafter. I put on one side the reference to TCT's AEICs (because, as stated above, they were not adduced in evidence in the course of the trial). However, I accept the other points summarised above.

34 With these general considerations in mind and notwithstanding the fact (as I have already noted above) that Mr Lord refrained from addressing the Court on any of the claims individually or the large number of specific points originally pleaded by TCT by way of defence in the Scott Schedule, I turn to consider the evidence with regard to the dual related questions, *viz*. (i) whether the particular claims are "out of scope" in the sense referred to above; and (ii) whether there was any, and if so, what "special agreement(s)" between TO and TCT or, at the very least, any, and if so what, requests made by or on behalf of TCT with regard thereto. In that context, it is convenient to consider TO's claims under the various "heads" or "categories" referred to by Mr Gibson in his AEIC.

Charter Hire

35 This category relates principally to items 9(part); 10(b); 25; 28(b); 30(b); 32(a); 33(a)(part); 34; 35(a) and (d); 36(a); 37(a) and (e); 38(a), (b), (c) and (d); 39(a); 40(a) and (b)(part); 41(a), (b) and (c)(part); 42(a) and (b)(part); 43(a) and (b); 44(part); 45(part); 46(part); 47(part); 48(part); 63(b), (c) and (d); 64(a), (b), (c) and (d); 65(a), (b) and (c); 66(b)(part), (c) and (d); 67(a), (b) and (c); and 69(a) of TO's Scott Schedule.

36 As explained by Mr Gibson in paras 30 and 31 of his AEIC, under the Main Contracts and/or the Sub-Contracts, the marine spread contract price was intended to cover *inter alia* the charter of vessels (*ie,* tugs and barges) required for the marine operations under the LNG Projects; and TO's claims in this category are for unpaid charter hire for additional vessels that were requested by TCT during the course of the LNG Projects and subject to separate charter hire rates not covered under the marine spread contract price.

37 On its face, that is extremely vague and slender evidence to support a very large number of separate claims which run into many millions of US dollars and cover a number of discrete voyages over an extended period. In particular, there appear to be no documents of any kind to support TO's case that such additional vessels were "requested by TCT" – or, at the very least, I was shown no such documents. Be that as it may, there is no doubt that all these items are supported by detailed invoices which, as I have found, were issued by TO to TCT. It is true that that these invoices were issued after the relevant events. However, as Mr Doraisamy submitted, the relevant invoices were never disputed contemporaneously by TCT (although, as I was told, there were other invoices which were apparently disputed and in respect of which "credits" given as appropriate). Mr Doraisamy relied upon that fact in

support of a general submission on behalf of TO that such conduct gave rise to a new discrete contract to pay. I do not accept that submission. However, I do accept that the fact that the relevant invoices were never disputed contemporaneously is at least some and perhaps strong evidence that supports TO's case that these claims relate to work outside the scope of work in the Main Contracts/Sub-Contracts which must have been requested (whether expressly or impliedly) by TCT and for which TCT recognised that it was liable (subject to any other defences). Additionally, it seems to me significant that (i) Mr Gibson was never properly challenged in the course of cross-examination on this topic; and (ii) no evidence was called by TCT to contradict Mr Gibson's evidence. For all these reasons, it is my conclusion that TO has satisfied the burden on a balance of probability in relation to the claims for charter hire – subject to consideration of the second point of principle considered below.

Grillage Removal Charges

38 These charges relate principally to items 3; 12(part); 20(d); 35(e); 37(f); 40(d); 41(e); 57; 58(a); 59; 60; and 61 of TO's Scott Schedule. I have already explained briefly the nature of these claims; and as stated above, I accept that this work was "out of scope". However, the evidence as to how it came about that this work was carried out by TO remains, at best, sketchy in the extreme. The highpoint of TO's case is para 36 of Mr Gibson's AEIC where he refers to an email from TCT's representative, Marc Marling, to TO's representatives including Mr Lee and Mr Gibson himself where, according to Mr Gibson, "…TCT confirmed that Bechtel (and accordingly [TCT] on a back-to-back basis) would undertake the costs for removing the grillages off the barges". Mr Gibson then goes on to say in para 37 of his AEIC that:

"While the email was sent in the context of the APLNG Project, my understanding is that this arrangement applied to all three LNG Projects and the conduct of the parties throughout the course of the three LNG Projects supports this understanding." Again, it seems to me that this is extremely vague and slender evidence to support the large claims under this head. Moreover, I do not read the email from Mr Marling in the way explained by Mr Gibson. Rather, that email simply states in material part: "Please be advised that Bechtel APLNG will undertake the grillage removal and barge remediation. The Bechtel APLNG intentions are for this work to be undertaken at the McDermotts Batam facility…" In particular, it is noteworthy that that email does not contain any confirmation that Bechtel would undertake to pay for the "costs" for removing the grillages; still less that TCT would do so. All it states is that Bechtel would undertake the *work*. How it came about that TO carried out the work itself rather than Bechtel remains an unexplained mystery on the evidence in this case. Moreover, there is nothing in that email nor in any other document I was shown to indicate the parties' understanding with regard to such "arrangement" applying to the other LNG Projects. As it seems to me, all of this is somewhat unsatisfactory.

39 However, it is fair to say that TCT did not appear to dispute that the removal of the grillages was in fact carried out by TO. Moreover, there is no doubt that pursuant to the arrangement reflected in this email, TO duly invoiced TCT for such work; that TCT never raised any objection thereto prior to the commencement of these proceedings; and that TCT's case on the pleadings and in its response to the Scott Schedule was limited to disputing quantum (which was not pursued at trial) and the argument of principle that TCT has no liability to pay unless and until Bechtel pays TCT (which I consider below). For these reasons and not without hesitation, it is my

conclusion that TO has satisfied the burden on a balance of probability in relation to the claims for the cost of grillage removal – subject to the second point of principle considered below.

Fresh water

40 These charges relate principally to items 18; 21; 24; 27(part); 29; 31; 32(b); 36(c); 37(c)(part) and (d); 39(b); and 43(c) of TO's Scott Schedule. TO's various claims for freshwater relate to additional freshwater (*ie,* a second fill) that was required by some of TO's tugs. The evidence of Mr Gibson (which I accept) was that the requirement for a second fill of freshwater was mainly due to the delays in the LNG Projects works (through no fault of TO) which required TO's tugs and barges to remain anchored to wait before they could berth at the LNG Project sites. In this context, Mr Gibson referred to another email dated 25 September 2013 from TCT's General Manager, Ms Ray, to *inter alia* Mr Radford and Mr Ho confirming that (subject to the provision of certain documentation) various specific items could be "back-charged" to Bechtel including (as relevant for present purposes) the provision of fresh water, anchorage and wharfage fees, port disbursements and shifting/pilot fees (the "back-charge"). I accept the evidence of Mr Gibson that this email was sent following discussions between Mr Hamilton and Mr Radford on whether TO could back-charge certain items. It is right to say that I was initially unimpressed by this email because the first line refers simply to the specified costs being back-charged to *Bechtel*. I consider this point further below when addressing the second point of principle. However, for present purposes, it is sufficient to note that when read in context, it is plain that TO was seeking appropriate confirmation from TCT; that the last line makes plain that the confirmation sought from TCT was to "…assist [TO] in accurately

billing TCT…"; that TO did indeed invoice TCT for all these items in due course as was appropriate; and that TCT never disputed these invoices contemporaneously. I was also initially troubled by the fact that the first line of the email indicated that it was sent in the context of the GLNG Project alone. However, the evidence of Mr Gibson and Mr Ho (which I accept) was to the effect that this arrangement applied to all three LNG Projects and that the conduct of the parties throughout the course of the three LNG Projects supported that understanding; and TCT has not adduced any evidence to contradict this. For these reasons, I am satisfied that TO is entitled to recover these claims, subject again to the second point of principle considered below.

Anchorage/Wharfage Fees

41 These charges relate principally to items 19; 20(a) and (c); 30(c); and 58(b) of TO's Scott Schedule. TO's claims for anchorage/wharfage fees relate to costs that were incurred arising from delays and/or waiting time not due to TO's fault. This was confirmed by Mr Gibson in his evidence which I accept. Again this evidence was not the subject of any specific challenge; and TCT adduced no evidence to contradict it. TO's entitlement to recover these costs was also confirmed in the back-charge email as referred to above. For these reasons, I am satisfied that TO is entitled to recover these claims, subject again to the second point of principle considered below.

Port disbursements, shifting and pilot fees

42 These charges relate principally to items 2; 8; 13(b); 20(b); 22; 23; 30(a); 32(a); 33(a); 44(part); 45(part); 46(part); 47(part); 48(part); 49; 50; 62; 63(e) and (f); 64(e), (f) and (g); 65(d); 66(e); 67(d); 68; 69(b); and 70 of TO's Scott Schedule. TO's claims for port disbursements, shifting and pilot fees

relate to the costs and fees incurred while the vessels were berthed in port (*ie,* Singapore, Batam, Batangas or Laemchabang). The evidence of Mr Gibson (which I accept) was that TO's shipping agent would invoice TO for the port disbursements incurred for the respective vessels and TO would in turn invoice TCT for the same; that the port disbursements would typically include claims for port dues, agency fees, launch hire, anchorage dues and garbage removal fees; and that the claims for shifting and pilot fees relate to the fees and charges incurred when the vessels were being piloted and/or shifted to berth respectively. Again, this evidence was not the subject of any specific challenge; and TCT adduced no evidence to contradict it. TO's entitlement to recover these costs was also confirmed in the back-charge email as referred to above. For these reasons, I am satisfied that TO is entitled to recover these claims, subject again to the second point of principle considered below.

Lube oil

43 These charges relate principally to items 56; 63(a); and 66(a)(part) and (b)(part) of TO's Scott Schedule. TO's claims for lube oil arise from the provision of lube oil to two vessels, *viz*. the *Jaya Mermaid 3* and the *Posh Pahlawan* which TO chartered from third parties for the marine operations in connection with the LNG Projects. The evidence of Mr Gibson (which I accept) was that TO was charged for the lube oil provided to these vessels and in turn back-charged to TCT. It is fair to say that these claims do not appear to fall specifically within the back-charge email. However, it would appear from the pleadings that the only issue in dispute is TCT's allegation that Bechtel refused to make payment of the lube oil for the *Jaya Mermaid 3* and had already paid for the lube oil for the *Posh Pahlawan* which Mr Gibson denied. Once again, this was not challenged by Mr Lord in cross-examination and

there is no evidence to contradict Mr Gibson's evidence in relation thereto. For these reasons, I am satisfied that TO is entitled to recover these claims, subject again to the second point of principle considered below.

Inmarsat charges

44 These charges relate principally to item 12(part) of TO's Scott Schedule consisting of Inmarsat charges incurred by the vessels *Harrier K* and *T003* as part of the marine operations for the LNG Projects. The evidence of Mr Gibson (which I accept) was that these were additional vessels provided by TO based on the request of TCT and governed by separate charterparties entered into by TO as owners and TCT as charterers; and that these charges are recoverable under the terms of those charterparties – in particular, Part II Clauses 9(a) and 13(b). In the usual way, TO issued invoices to TCT in respect of these charges. Once again, this was not challenged by Mr Lord. There is no suggestion that they were ever disputed contemporaneously and TCT adduced no evidence to contradict such evidence. For these reasons, I am satisfied that TO is entitled to recover these charges, subject again to the second point of principle considered below.

Protection Letters

45 These charges relate principally to items 16; 17(a), (b) and (d); and 26(part) of TO's Scott Schedule. These claims relate to the costs incurred by TO in obtaining what was referred to as "protection letters" for three of TCT's personnel, *viz*. Messrs Grant, Hamilton and Jay. In summary, the evidence of Mr Gibson (which I accept) was that the Indonesian authorities require permits to be procured for personnel working on board vessels on Indonesian flag vessels who were not signed on as crew members; that such permits

"protected" the personnel from fines being imposed by the Indonesian authorities; that such permits or "protection letters" were issued by Indonesian ship agents and expired after two weeks or earlier if the personnel left Batam before the two-week period ended; that as TCT did not have an Indonesian shipping agent to procure the "protection letters" for these non-crew personnel working on board the vessels, it was agreed between the parties that TO would arrange for its own agent to procure the "protection letters" for these persons; and that the charges incurred by TO for these protection letters were then back-charged to TCT. Once again, this was not challenged by Mr Lord. There is no suggestion that these charges were ever disputed contemporaneously and TCT adduced no evidence to contradict such evidence. For these reasons, I am satisfied that TO is entitled to recover these charges, subject again to the second point of principle considered below.

46 For all these reasons, I am satisfied that TO is entitled to succeed in all its claims, subject to the second point of principle considered below.

47 Before turning to consider that second point of principle, I should mention that in preparing this judgment, I have noticed that there seems to be an arithmetical error in the calculation of the total of TO's claims for back-charges. The total amount claimed in the prayer of TO's Statement of Claim (Amendment No. 2) ("SOC") is (as stated above at [6]) A$984,815.59. This is said to be arrived at by adding together the various claims in A$ as set out in paras 12, 13 and 14 of the SOC. However, the proper calculation would appear to be A$81,314.91 + A$451,750.34 + A$86,274.66 = A$619,339.91.

Liability of TCT subject to payment from Bechtel

48 As summarised above, it was, as I understood, Mr Lord's submission that there was no independent obligation on TCT to pay any or at least some of TO's claims unless and until TCT was itself paid the corresponding amount by Bechtel; that in other words, it was only *if* TCT were paid by Bechtel that TCT came under any obligation to pay TO; that that had not yet happened or at least there was no evidence that it had happened; and that, given that the burden was on TO, TO's claims must fail *in limine*. This formulation of TCT's case does not appear in its pleadings and only emerged in the course of the trial.

49 TCT's pleaded case was somewhat different and more limited. In particular, the case as pleaded by TCT in the Scott Schedule in respect of *some* of the amounts claimed by TO was as follows:

> [TO] will be aware that Bechtel agreed to pay [TCT] only US$693,522.48. So [TO] was entitled only to that amount (less commission) pursuant to clauses 4 and 5 of the…Sub-Contract. Further and in the alternative, the parties shared a common understanding that [TO] would be paid only such amounts as Bechtel paid [TCT] (less commission).

As pleaded, that response by TCT in such terms related *only* to item 3. Similar (but not identical) pleas were made by TCT in respect of certain other items – although the precise wording of TCT's responses varied. In some cases (*ie,* items 6, 7, 22, 55 and 56), TCT's pleaded case was that TO was "aware" that Bechtel had denied payment; that TO was not therefore entitled to payment under clauses 4 and 5 of the relevant Sub-Contract; and/or that TCT was entitled to rely on a "common understanding" that TO would be paid only such amounts as Bechtel paid TCT (less commission). In other cases (*ie,* items 5, 8, 57–62), TO's pleaded case was that Bechtel had only agreed to pay in

each case a limited amount (*ie,* less than TO was claiming); that TO was therefore only entitled to claim such lesser amounts (less commission); and/or that TCT was entitled to rely on the same alleged "common understanding" that TO would be paid only such amounts as Bechtel paid TCT (less commission). Finally, in respect of items 63–69, TCT's pleaded case was simply that Bechtel had either denied payment or had paid only smaller sums.

50 In my view, there is no justification whatsoever in permitting TCT to extend this broad line of defence (in its various manifestations) to any of TO's other claims; and I proceed on that basis. In any event, these pleas are, in large respect, fatally flawed because they depend in whole or in part on TCT making good its various assertions that Bechtel had denied payment of certain items; or had only agreed to pay a limited sum in respect of certain items and that, in some respects, TO was "aware" that this was the case. However, in the event, TCT called no evidence to support any of these assertions. On that basis alone, they must inevitably fall away.

51 For the sake of completeness, I should mention that at a very late stage of the proceedings – only a few weeks before the commencement of the trial – TCT disclosed certain documents purporting to evidence settlements between TCT and Bechtel in respect of certain claims relating to the GLNG Project and the QCLNG Project. These documents included (i) a document purporting to be a Settlement Agreement and Release dated 11 June 2014 between TCT and Bechtel in respect of the QCLNG Project; (ii) a document purporting to be a Settlement Agreement and Release dated 27 June 2014 between TCT and Bechtel in respect of the GLNG Project; and (iii) a table of accounts describing certain payments allegedly received by TCT from Bechtel. Further, I should mention that it was asserted by Mr Sanders in para 8 of his AEIC

inter alia that (i) with the complete knowledge of TO, TCT settled all outstanding invoices and payment issues with Bechtel after the completion of the QCLNG and GLNG portions of the Bechtel Projects; and (ii) the APLNG portion was completed without the need for a settlement. The evidence of TO's witnesses (which I accept) was that TO was not aware of any such purported settlement negotiations; that it had not played any part in any such negotiations; and that it had not agreed to be bound by the alleged settlement(s) entered into between TCT and Bechtel. In any event, it was Mr Doraisamy's submission that the purported settlement(s) with Bechtel were a "bad compromise".

52 Be all this as it may, the position is that, as I have already noted, Mr Sanders was never called as a witness; nor was Ms Ray or Mr Hamilton. Thus, these purported settlement agreements and related documents were never put in evidence or proven by TCT. For present purposes, therefore, this material can be ignored. Indeed, in his final speech, Mr Lord positively asserted that what he referred to as the "settlement documents" were not in evidence; and that there was no evidence that TCT had received any monies from Bechtel.

53 Thus, the only remaining point which arises on the pleadings is Mr Lord's reliance upon Clause 5 of the Sub-Contracts in respect of some of the back-charges. (At the risk of repetition, I should make plain that this point is only available in respect of those items where it is pleaded by TCT.) In summary, Mr Lord submitted that the effect of Clause 5 was to limit TCT's obligation to pay the relevant amounts claimed "…as and when received by TCT from Bechtel…"; that the burden rested on TO to show that such amounts had indeed been received by TCT from Bechtel; and that TO had not satisfied that burden. Indeed, as already noted, it was Mr Lord's positive

submission that there was no evidence at all that TCT had received any relevant amounts from Bechtel in relation to the disputed items. In response, Mr Doraisamy raised three main points which I deal with below.

54 First, it was Mr Doraisamy's submission that the claimed back-charges do not fall within the scope of Clause 5 of the Sub-Contracts. In summary, he submitted that Clause 5 was of limited scope; that the back-charges did not fall within the 93.2% of the "marine spread" amounts set out in Clause 5 of the Sub-Contracts; that they were incurred in addition to the services rendered pursuant to the Sub-Contracts; and that the only logical conclusion that can be drawn is that the back-charges were not caught within the ambit of Clause 5. My mind has frankly wavered on this point. As submitted by Mr Doraisamy, there is no doubt that the back-charges now claimed by TO are in addition to the original Sub-Contract price. I also recognise that there is a very strong argument, based on the strict literal wording of Clause 5, that these back-charges do not fall within its ambit. However, it seems to me somewhat odd if not bizarre that the parties should be regarded as having intended that their respective rights and obligations with regard to these back-charges should be different from the regime in respect of the 93.2% of the "marine spread" amounts referred to in Clause 5. I accept, of course, that such different regime might have been expressly agreed by the parties. But there is no or at least no sufficient evidence to this effect. Indeed, if anything, it seems to me that the back-charge email referred to above which was relied upon so heavily by Mr Doraisamy suggests the contrary. Thus, the first line of that email reads: "Please confirm that the following items can be back charged to Bechtel…". In my view, this suggests that the objective intention of the parties was, in effect, consistent with the regime set out in Clause 5 of the Sub-Contracts. For the avoidance of doubt, I do not consider that this view is necessarily affected

by the last line of that email (*ie,* "By providing this information, it will assist us in accurately billing TCT…"|). In the event, I do not consider that it is necessary to reach a firm conclusion one way or another on this point. For present purposes, it is sufficient to say that I am prepared to assume in favour of TCT that the back-charges do fall – or at least are to be regarded as falling – within the ambit of Clause 5 of the Sub-Contracts.

55 Second, Mr Doraisamy submitted that the nature of Clause 5 is that of a "*pay when paid*" clause and not a "*pay if paid*" clause; that case law is clear that such a clause merely alludes to the time for payment; and that it cannot stand as an outright bar to payment. In support of that submission, Mr Doraisamy relied, in particular, upon the decision of the High Court in Malaysia, *Rira Bina Sdn Bhd v GBC Construction Sdn Bhd* [2011] 2 MLJ 378 ("*Rira Bina*") at [67]–[70] and also *Engineering & Construction Contracts Management: Post Commencement Practice* (LexisNexis, 2002) at paras 385–392 as cited in in *Rira Bina* at [68]. After close of arguments at the end of the trial, my attention was drawn to two further authorities in Singapore, neither of which was cited in *Rira Bina*. These authorities are *Brightside Mechanical & Electrical Services Group Ltd and another v Hyundai Engineering & Construction Co Ltd* [1988] 1 SLR(R) 1 ("*Brightside*") in particular at [16]; and *Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd* [1997] 3 SLR(R) 668 ("*Interpro*") in particular at [8]–[19].

56 Accordingly, I invited the parties to make further written submissions in relation to these two authorities which the parties duly provided to the Court. The latter case, *Interpro*, is of particular interest because it contains a very useful review of various authorities in Hong Kong and Australia as well as certain textbook references with regard to the nature of a "pay when paid

clause". I do not propose to repeat what is there set out. For present purposes, it is sufficient to note that (i) Mr Lord relied on certain passages in *Interpro* to support TCT's case that TO were not entitled to any of the back-charges unless and until equivalent payments had been received by TCT from Bechtel; and (ii) both he and Mr Doraisamy submitted that *Brightside* and *Interpro* were distinguishable for various reasons. In the event, I do not consider that it is necessary to reach a final conclusion on this point. Nor, in my view, is it necessary to express any view on a slightly different point advanced by Mr Doraisamy based on a further passage in *Interpro* at [7] that, in any event, the literal interpretation of Clause 5 should not be applied on the basis that its application to Clause 5 would yield "no sensible meaning" and would lead to an "absurd result" that neither TO nor TCT would have intended. Once again, I am prepared to proceed on the basis of an assumption in favour of TCT, *viz*. that on its face and as a matter of construction, the effect of Clause 5 is that TCT was only obliged to pay TO the back-charges as and when equivalent payments were received by TCT.

57 Third, even on the assumption that TCT is entitled to rely upon Clause 5 by way of defence to the claim for back-charges and even if it is to be construed in the manner stated above, Mr Doraisamy submitted that it is trite law that (i) a party cannot rely on a "pay when paid" clause if the reason for non-payment is its own breach of contract or default; and (ii) a contractor (*ie,* TCT) impliedly undertakes that it will pursue all means available to obtain payment, or it will not be able to rely on the provision to defeat the claim of the subcontractor (*ie,* TO). In support of that twin submission, Mr Doraisamy relied in particular upon the decision the English High Court in *Durabella Ltd v J. Jarvis & Sons Ltd* [2001] EWHC 454 (TCC) ("*Durabella*") at [17]–[18] and also *Interpro* at [17]. On this basis, Mr Doraisamy submitted that (i) the

reason for the non-payment was TCT's own breach of contract; (ii) TCT was also in breach of the implied undertaking by failing to pursue all available means to obtain payment; and that accordingly (iii) TCT could not, in effect, rely upon Clause 5 by way of defence.

58 I readily accept the propositions of law advanced by Mr Doraisamy as set out in the preceding paragraph. Indeed I did not understand Mr Lord to suggest otherwise. However, it is necessary to consider carefully Mr Doraisamy's further submissions that TCT was, in fact, in breach of contract and/or the stated implied undertaking. That is because, unlike the facts in the authorities cited, the present case is perhaps somewhat unusual given (i) the absence of any proper disclosure by TCT in relation to their dealings with Bechtel; and (ii) the decision taken by TCT not to call any of their witnesses with the result that there is simply no evidence at all as to what payments were received by TCT from Bechtel or what steps were taken by TCT to obtain payment from Bechtel.

59 This gives rise to a potentially important threshold issue with regard to the burden of proof, *ie,* is the burden on TO or TCT to show that TCT has not received payment from Bechtel? So far as I am aware, there is no authority which specifically considers this point in any detail; and none was cited to me. However, it would seem from the last paragraph of the judgment of HHJ Humphrey Lloyd in *Durabella* that his view was that the burden lies on the party seeking to rely on the clause to show that payment has not been received and, if necessary, to show that such non-receipt is not due to any breach or fault on its part. As it seems to me, that is consistent with the general principle that he who alleges must prove. Further, the last part of Clause 5 operates, in effect, as an exceptions clause and, in the ordinary course, it seems right in

principle that it should be for the party seeking to rely on such clause to establish sufficient facts so as to bring itself within the clause. There is also obviously good practical sense in such approach because it will generally be the party seeking to rely upon the clause (*ie,* TCT) who will be able – or at least be in the best position – to adduce relevant evidence in relation thereto. (That is certainly the position here particularly since TCT's emphatic position throughout that TO should have no contact at all with Bechtel.) For these reasons, it seems to me that (i) the burden of proof is on TCT to demonstrate that it has not received relevant payments from Bechtel in order to rely upon its Clause 5 defence; and (ii) such defence must here fail because it cannot satisfy that burden.

60 However, even if that is wrong and I assume in TCT's favour that it has not received relevant amounts from Bechtel, the question remains as to whether TCT has complied with the implied undertaking that it would pursue all means available to obtain payment from Bechtel. Again, this raises a question as to the burden of proof. For present purposes, I am prepared to assume in favour of TCT that the legal burden of proving breach of such implied undertaking lies on TO. However, it is now over 2 years or so since the work under the Sub-Contracts has been completed. TCT has not sought to explain what, if any steps were taken to obtain payment from Bechtel; and although, as referred to above, there has been reference to the alleged settlement(s) with Bechtel, TCT deliberately decided to refrain from calling any evidence in order to prove such settlement(s) or otherwise in relation thereto. In such circumstances, it seems to me a justifiable inference that TCT has indeed breached such undertaking. However, in the event, it is unnecessary to decide this point.

Conclusion

61 For all these reasons, it is my conclusion that TO's claims succeed in full, *ie,* TO is entitled to judgment against TCT in respect of the following amounts together with interest and costs as follows, *viz*:

(a) US$3,500,000 for the Advanced Payments plus simple interest from the date of the Writ (*ie*, 21 October 2015) at the rate of 5.33% per annum until the date of this judgment; and

(b) US$24,500,178.99 and (subject to any further possible argument with regard to the appropriate calculation of the total figure of the back-charges as referred to in [47] above) A$619,339.91 plus simple interest from 20 May 2016 being the date when TO amended its Statement of Claim to include the back-charges claims at the rate of 5.33% per annum until the date of this judgment.

62 As to costs, it was Mr Doraisamy's submission that TO is entitled to costs in the sum of S$68,000. This is calculated on the basis that the trial lasted 4 days and a guideline rate of S$17,000 per day. In my view, this is unobjectionable; and I so order.

Sir Henry Bernard Eder
International Judge

Peter Doraisamy and Andrew Lee (Peter Doraisamy LLC) for the plaintiff;

Timothy Ross Lord (instructed) and Rajkumar Mannar (Peter Low LLC) for the defendant.
