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Jurisdiction	Australia
Tribunal	County Court of Victoria
Date of the decision	22 November 2023
Case no./docket no.	[2023] VCC 2134 / CI-21-01973
Case name	*C P Aquaculture (India) Pvt Ltd v. Aqua Star Pty Ltd*

Reasons for Judgment

Background

1 **1**
The plaintiff, CP (India), as the name suggests, is incorporated and based in India. In 2015 the CP Group of companies, including CP (India), established an export division. CP (India) appointed Mr Mohan Bhatkoorse as vice-president in charge of that division. Mr Bhatkoorse holds both graduate and post-graduate degrees in «fishery science» from the University of Agricultural Sciences Bangalore (Transcript («T») 323−4). According to Mr Bhatkoorse:

> «... CP is into complete integration, that is ... manufacturing, hatchery and farms. So that is why CP (India) wanted to start shrimp processing and export in a big way. So I'm the first person to join this and reporting to our president.» (T324, Line/s («L») 16−20)

2 **2**
The plaintiff's president is Wichit Kongkheaw, customarily referred to as «Mr Wichit» (T287, L24–25). According to Mr Bhatkoorse:

> «In the first year it was good, the business was going. It was going good. We have done almost 42–44 containers in the first year, mainly to Haiphong and to Japan, we used to export.» (T324, L27–30)

3 **3**
These initial figures represented business in 2016. Mr Bhatkoorse said that in the following year, 2017:

> «[I]t has gone up to 108 containers we sent alone to Aqua Star [the defendant] and others also, another 20, 30 containers, mainly to Japan.» (T325, L1−3)

4 **4**
In 2017, CP (India) was operating from a processing plant at Vizag on the east coast of India. In 2017 it began operations in western India at a place called Surat, and at the end of 2017 or the beginning of 2018 it began operations at Nellore, which is south of Vizag (*Ibid*, L14–19).

Mr Bhatkoorse said that he «was based at Visakhapatnam, going around all these three places.» (*Ibid*, L20–21)

5 **5**
In 2017, a Mr Chang Swe Ming, who was responsible for sales and marketing in the CP company based in Malaysia, introduced the defendant, Aqua Star, to Mr Bhatkoorse. The defendant was represented by a Mr Allen Wu.

6 **6**
The defendant, Aqua Star, is incorporated in Australia and commenced operations in 1996/97 (T756, L28). The product which has been referred to as «shrimp» is also frequently described as «prawn». In 2013, Aqua Star began purchasing «cooked shrimps» from the company CP (Malaysia), with Aqua Star dealing with Mr Chang (T756, L31–T757, L4). In 2016, Aqua Star commenced making purchases from CP (Thailand), which was the same year that Aqua Star was introduced to CP (India) by Mr Chang (T757, L7–12). Mr Wichit, it seems, was the overall owner or controller of all the CP companies (T757, L20–22).

7 **7**
In January 2016, Mr Wu met Mr Bhatkoorse. According to Mr Wu:

> «We discussed about how the business should be conducted. They took me to see their farms and also their factories for processing. At the time they didn't have their own factory, the fact [*scil* factory] was probably rented ...» (T758, L3–8)

8 **8**
Mr Wu and Mr Bhatkoorse, according to Mr Wu, attended two or three of the farms supplying CP (India) which were directly operated by CP (India) (*Ibid*, L11–13). Mr Bhatkoorse said that Mr Wu:

> «saw our processing line completely and the products which were lying on the – during the processing and he liked the colour very much.» (T326, L12–15)

9 **9**
Mr Bhatkoorse continued:

> «[H]e asked whether we check for the antibiotic and WSSV, that is white spot [syndrome]. So we told him that we checked for antibiotic but not for the WSSV.» (T326, L15–18)

10 **10**
Mr Bhatkoorse said that Aqua Star, via Mr Wu, placed an order almost immediately. The transaction proceeded satisfactorily. CP (India) was paid, and there were no complaints (T326, L21–25; T327, L1–3). Later in 2016, CP (India) received a visit from Mr Han Chen, referred to as «Mr Chen», who describes himself as «one of the founding shareholders» of Guolian and general manager of the company Guangdong Gourmet (T1003, L5–6 and 14–19). According to Mr Chen, [Guangdong] Gourmet is the «fully funded subordinate company of Guolian.» (*Ibid*, L21–23) I take this to mean that Guangdong Gourmet is a wholly-owned subsidiary of Guolian.

11 **11**
Gourmet and Guolian purchased product from Aqua Star which Aqua Star had bought from CP (India) and other CP companies. These were not simple sales transactions where Gourmet and Guolian simply on-sold to its own customers in the market or sold by retail. According to the Aqua Star's financial statements for the year ending 30 June 2021, under the heading «Inventory processing sales»:

> «The Company acquires inventories for which additional processing is undertaken by 3rd parties. Upon transferring the inventories to the 3rd parties the Company recognises a sale (with a wholesale profit margin usually recognised of around 2% to 4%), with appropriate invoices and supporting documentation executed.
>
> A sale is recognised at this point as the Company believes they have transferred to the buyer the significant risks and rewards of ownership of the goods…This treatment is adopted notwithstanding the majority of these inventories are re-purchased by the Company (approximately 15%), although the buyer is not obligated to sell the processed inventories to the Company.
>
> If the Company did not recognise a sale at this point there would be a reduction in sales, cost of sales receivables, payables and profit for the year...» (Court Book («CB») 1135)

12 **12**
Guolian and Gourmet, therefore, having processed the prawn or shrimp product, would typically resell to Aqua Star, which is based in Australia, for sale into the Australian market (T1004, L18–T1005, L4).

13 **13**
During his visit to the CP (India) facility, Mr Chen and his party «asked about the testing we do, like antibiotics, for the basic tests we do that we have shown» (T327, L25–27). Mr Bhatkoorse said that the testing which CP (India) carried out, *inter alia* relative to antibiotic contamination, was done «under the government authority. It's by the regulated body called Export Inspection Council.» (T328, L13–15) Mr Bhatkoorse said that these tests covered:

> «the main parameters like chloramphenicol, nitrofuran metabolites and even for sulphonamides, but it depends on which country it is going to. If it's going to Haiphong, only three parameters we use to check... [*viz*] chloramphenicol, nitrofuran and even tetracycline» (T328, L18–24).

14 **14**
Where a product is bound for China, he said «we have to do another few parameters and the dyes. That is malachite green and those things.» (*Ibid*, L25–28)

15 **15**
According to Mr Bhatkoorse, the product only «passes» if none of these chemicals is detected (T329, L21–24). Mr Bhatkoorse said that these tests were «done with LC-MS/MS methodology. That is a standard method.» (*Ibid*, L29–30) The «LC» stands for liquid chromatography (*Ibid*, L31).

16 **16**
As to its testing regime, CP (India) relied on the expert evidence of a specialist analytical chemist, Dr John Leeder. He said that, like most countries, India has adopted the European Union's Codex test in the form of the European Communities 2002/657/EC testing standards, which he said were:

> «...designed to ensure the quality and comparability of the analytical results generated by laboratories approved for official residue testing... This is achieved by using quality assurance systems and specifically by applying of methods validated according to common procedures and performance criteria and by ensuring traceability to common standards or standards commonly agreed upon. From the review of the briefing documents supplied [by CP (India)'s solicitors], it appears that the India labs uses High Performance Liquid Chromatography-Tandem Mass Spectroscopy (HPLC-MS/MS) analysis method, following the EU regulation for analysis and quality. The HPLC-MS/MS methodology is the gold standard in residue testing for food commodities. The Indian analysis reports indicate they have adhered to quality standards by identifying items such as standard operating procedures (SOP), validation protocol and method performance limits. The Indian analytical reports also list the limits of quantitation (LOQ) for the method as well as the levels obtained from spiked recovery tests. The level obtained for the recoveries is an important factor, as it measures the effectiveness of the extraction and analytical method used.» (CB 2188)

17 **17**
Aqua Star represented 60 to 70 per cent of CP (India)'s export sales in mid-2017. Mr Kenny Ma of Aqua Star provided an assurance to be given to Aqua Star by email that «[a]ll consignments must be antibiotic-free», and CP (India) represented to Aqua Star that it did not use antibiotics in the ponds where its prawns came from (T471, L2–11). Mr Bhatkoorse agreed that CP (India) «had established a regime which, in effect, excluded antibiotic contamination» (*Ibid*, L20–22). The purchase orders from Aqua Star dated 14 July and 22 September 2017 called for the product to be «100 per cent antibiotic-free» (*Ibid*, L24–28). Thirty per cent of the product supplied to Aqua Star by CP (India) was sourced from independent farmers who were required by CP (India) to use the same regime as CP (India) itself used, and the company's technicians would «monitor the complete farms». Seventy per cent of the product came from CP (India)'s own farm (T476). The testing regime was on the product itself, not on the ponds (T477–8).

18 **18**
The testing regime which CP (India) says it complied with was one imposed by the Indian government as a condition of export of the product, and as such was adopted by CP (India) (T484, L16–24). The government-mandated testing procedures entailed «taking a sample based on the number of cartons in a container» (T485, L7–9). Mr Bhatkoorse said that each «batch» would be sampled and tested in accordance with the government procedure, and each container would include typically four or five batch numbers: «Even sometimes a little more, depending on how much raw material we get from the farm» (T485–6). By way of example, a report from this testing regime appears at Court Book 1610. Next to the heading «No. Of Cases Selected for Sampling: 24», we see «Samples Cases Seal No (if any): 270906 to

270929». This is referred to as a «Composite Sample». The test report at CB 1610 indicates that it has been sourced from two farms: see the reference to «Registration Number of Aquaculture Pond / Farm» citing two numbers. Consequently, Dr Monckton, whose doctorate is in molecular microbiology and who gave expert evidence on behalf of the defendant Aqua Star, said:

> «if you're doing a composite sample, you take the two sets of prawns from the two farms, and then you would homogenise them, and then you would take a sample which is a blend of those two farms…[You] just chop it up.» (T1098, L5–9)

19 **19**
The testing therefore occurs after packing is complete and the prawns have been sorted for size. Testing was not carried out «pond side».

20 **20**
On 17 July 2017, Mr Ma, who assisted Mr Allen Wu of Aqua Star in framing emails in English at his direction, emailed Mr Bhatkoorse with the subject heading «RE: compliant [*scil* complaint] -- Antibiotic limit exceed [*scil* exceeded]», stating:

> «As per we agreed when signing the contract, that the product must be 100% free from antibiotic. Hence I request you to trace with these batch details, providing us your investigation result. And please do note compensation will be officially requested as well.» (CB 1383)

21 **21**
Mr Ma had commenced by stating:

> «I am getting new reports coming showing antibiotic limit exceed for some of the recent shipments.» (CB 1383)

22 **22**
Mr Ma had previously emailed on 8 June 2017:

> «I am writing to you as I received the first testing results for the arrived shipments – P1700494/0498. The report reflect [*scil* reflected] to positive results to couples of samples. See attachment.» (CB 1384)

23 **23**
In a further email dated 31 July 2017, Mr Ma said:

> «Thank you for your detailed investigation. We had review [*scil* reviewed] the reports but however the conclusion is completely opposite from our customer's, so now there is an argument occur.
>
> As we all know sampling for antibiotic is a matter of probability, which means there always chances of getting entirely different reports at each end. Moreover, it could also [be] due to different sensitivity of the testing equipment accordingly to the customer's point of view.

> We understand that CP farm do not use antibiotic, but could it be come from the environment itself? E.g. Soil and water source. This is questioned. And moreover, there could be risk of contamination during production, since raw materials are coming from CP farm and non CP farm at the same time.» (CB 1385)

24 **24**
Mr Bhatkoorse responded in an email dated 2 August 2017 stating that every aspect of antibiotic contamination was being investigated. He said:

> «Kindly let me know where is the facility of testing in China? Is it near to Shanghai? I will be in Shanghai from 19–21st. So, if I have to visit the facility, how much time it would take? Pls give me these info to plan my return trip.» (*Ibid*)

25 **25**
In an earlier email dated 24 July 2017, Mr Bhatkoorse said:

> «Based on the private laboratory report, even though its [*sic*] is approved, it may not stand as a proof as per the policy!» (CB 1386)

26 **26**
In a further email of 21 August 2018 – that is, a year later, with the controversy continuing – Mr Ma said:

> «This is really hard to identify which side is correct. You are telling everything is tested and good but the other side is worrying product contain risk. My feeling is probably the two sides are working on different standard thus lead to different conclusion.
>
> Please note, sending to Govt authority for checking is definitely not an option, this will bring even larger risk to customer as the product was not imported from China main port. You know this is very sensitive.
>
> The last option I could think of is, to send one of your technical representative (or yourself) to factory physically inspect the whole process. We sit done [*sic*] and discuss where went wrong. What is your idea? » (CB 1430)

27 **27**
A meeting was held in Kuala Lumpur on 13 July 2018 (T348, L27–28). Mr Wu attended the meeting on behalf of Aqua Star. Also present, according to him, were Mr Chang and Mr Wichit. Mr Wichit, it will be recalled was the overall owner and controller of the CP Group, and Mr Chang was in charge of CP (Malaysia). According to Mr Wu:

> «In July there are many factors that arose and one of the factors is that because of antibiotics, China wouldn't accept our goods.» (T787, L24–27)

28 **28**
Mr Bhatkoorse did not attend (*Ibid*, L30). In the wake of this meeting, Mr Bhatkoorse emailed Mr Ma, copied to Mr Wu, on 25 July 2018, saying the alleged antibiotic contamination was:

> «quite shocking and surprising for us because we check the sample of every pond. We send every lot or batch to outside approved laboratory for testing antibiotic using LCMSMS method.» (CB 545)

29 **29**
Mr Ma responded in an email dated 27 July 2018, stating:

> «After investigation, it turns out in total 3 out of 7 containers failed antibiotics testing, after knowing these results customer stopped further testing and purchasing.» (*Ibid*)

30 **30**
He continued:

> «*Customer normally carry out two tests to ensure product antibiotics free, the 1st test on deforested [*sic*] raw material and the 2nd test on finish product, either one of them failed then they can't use.» (*Ibid*)

31 **31**
Mr Ma complained:

> «We have already suffering [*scil* suffered] huge lost on these stock because of price, and if due to antibiotic reason they are not sellable then we will be in big trouble.» (*Ibid*)

32 **32**
In an email dated 16 July 2018, Mr Ma sought to summarise the situation as to CP (India). The meeting at Kuala Lumpur also dealt with issues as to payment for and quality of shipments from CP (Malaysia) and CP (Thailand). Mr Ma's summary was as follows:

> «**India**
>
> 1) Total outstanding 27 containers about $4.07mil, partial payment will be made every week, and all debt to be settle by end of August 2018.
>
> 2) Claims for 27 containers agreed to be compensated in new prices of 19 containers ex stock as follow:
>
> 16/20 $10.40
>
> 21/25 $8.10
>
> 26/30 $7.50
>
> 31/35 $6.60
>
> 36/40 $6.10
>
> 41/45 $5.50

41/50 $5.30

51/60 $4.90

61/70 $4.70

71/90 $4.40

91/120 $4.10

3) Agreed to ship out 2 containers out of the ex-stock 19 containers in August 2018.

4) Balance of 17 containers to be further discuss.» (CB 1418)

33 **33**

This email was directed to Mr Bhatkoorse, but also copied to Mr Benedict Tan of CP (Malaysia).

34 **34**

Mr Ma sent a further «follow up» email in the wake of the July meeting in Kuala Lumpur addressed to Mr Bhatkoorse in the following terms:

> «As per last Friday's meeting in KL, they have agreed to clear all debts by end of August (total of 27 containers, $4.07 million). Payment to be made partially every week towards the deadline.
>
> Meanwhile, they have confirmed new price of your ex-stock 19 containers. Pricing as below.
>
> 16/20 $10.40
>
> 21/25 $8.10
>
> 26/30 $7.50
>
> 31/35 $6.60
>
> 36/40 $6.10
>
> 41/45 $5.50
>
> 41/50 $5.30
>
> 51/60 $4.90
>
> 61/70 $4.70
>
> 71/90 $4.40
>
> 91/120 $4.10
>
> We are planning to ship two of them to Zhanjiang in the following week or next. Preferable sizes are majority 41/50 and below. Please note: you don't have to select out small size from different batches, ideal situation is to get those batches naturally come with small sizes. Please let us know what would be best assortment.

> For quality control purposes, start from these two container we are going to request both consignee and shipper to carry out quality inspection form and provide product photos. I will send you the inspection form for your study soon.
>
> Per Allen advised these two containers will be under 60 days LC term, please confirm on this as well.
>
> The remaining stock will be advised later, we are looking for customer to accept the stock while we clearing the outstanding payment.» (CB 1420)

35 **35**

Mr Ma sent an email dated 25 July 2018 to Mr Bhatkoorse covering three reports. He said:

> «As I reported to you yesterday, a number of containers in China we have detected antibiotics. This is creating huge resistance on selling these stock to China customer.
>
> So far today I have received 3 reports – I believe they have tested more. We will see the overall soon.
>
> For today's report I have included our PO number for you to identify. In report you will see what chemical is detected, and also the testing method.» (CB 1421)

36 **36**

The reports are to be found at Court Book 2105–2109. These are on the letterhead of «Inspection Center Of Guangdong Gourmet Aquatic Products Co., Ltd». The first report, dated 21 July 2018, detects «SEM» as «0.5» against a standard nominated as «<0.5µg/kg». The second, which is dated 23 July 2018, detects «CAP» at the rate of «0.4» judged against a standard of «<0.1µg/kg». The next of the four reports, dated 20 July 2018, detects «CAP», according to the same standard or limit as on the previous report, at the rate of «0.3». Also included at Court Book 2108–9 is a document styled «Guangdong Gourmet Aquatic Products Co., Ltd», «Standard & test item for routine inspection of fish, shrimp and semi-finished products».

37 **37**

Mr Chen, who it will be recalled was either the principal and majority shareholder of Guolian and Guangdong Gourmet Food Ltd, or at any rate a major shareholder, said:

> «So for every consignment that arrived at our factory we would be checking the products in terms of the specificities and the quantities and the weight, the size and chemical residues. If there's any issue as a result of the testing we would make a complaint to Aqua Star.» (T1009, L19–24)

38 **38**

He continued:

> «We would take samples, seven or 10 samples from each container, and carry out tests according to the Chinese standard.» (*Ibid*, L27–29)

39 **39**
According to Mr Chen, his two companies, namely Guolian and Guangdong Gourmet Food Ltd, held «Sona» certificates giving them some form of accreditation. These were not government establishments (T1010).

40 **40**
The Court Book contained documents styled «Test Reports» on the letterhead of «Testing Center Of Zhanjiang Guolian Aquatic Products CO., LTD» with original red stamps and initials. It was not suggested that these documents were in the possession either of Aqua Star, or that they were passed to CP (India) at the time of the disputation. These documents were produced *ex post facto* in the course of the proceeding by Guolian. I will turn in more detail to their contents in due course. Mr Moon, on behalf of CP (India), put it to Mr Chen that these reports were not only printed for the first time in 2022, but that as at the dates of the tests recorded, or purportedly recorded, they did not exist in hard copy or electronic form at all; that is, that they are recent inventions (T1025–6). Unsurprisingly, Mr Chen denied this.

41 **41**
On 17 November 2018, there was a further meeting in Kuala Lumpur. This time Mr Bhatkoorse was in attendance. The meeting was held at the Hotel Concorde, and was attended by Mr Wichit and Mr Bhatkoorse on behalf of CP (India), Mr Chang on behalf of CP (Malaysia), Mr Wu representing Aqua Star, and, according to Mr Bhatkoorse, Messrs Yip, Wirat, and Chang. Mr Bhatkoorse said that the meeting was conducted principally in Mandarin. The meeting lasted for 2–2½ hours. Mr Bhatkoorse, not being a Mandarin speaker, could not join in. Mr Chang provided translations of some important passages (T367–9). According to Mr Bhatkoorse:

> «Mr Chang said it's too long time he did not receive the money for India or Malaysia and there is a pending amount for Thailand also. Then how fast we can get this payment. Then Mr Allen [Wu], he said that actually he is facing a lot of financial constraint issues due to rejections and cash flow problems, he said.» (T369, L20–25)

42 **42**
Mr Bhatkoorse said Mr Wu:

> «was asking it is too difficult to sell the product and he needs some kind of a discount too, straight away.» (*Ibid*, L27–29)

43 **43**
Mr Bhatkoorse continued:

> «Mr Chang was telling, 'Okay, we can work out a discount but how fast it can be paid?' So he was telling him it takes some time. So meanwhile, Mr Wichit, he offered a discount from India's side. He said, 'We can give the discount if you make the payment that is $1 per kg for the pending orders'.» (T369, L30–T370, L5)

44 **44**
I asked if the discount or discounts being proposed were conditional on Aqua Star's meeting a payment deadline. Mr Bhatkoorse said:

> «For payment deadline it was something like seven to eight months because in a month he [*viz*, Mr Wu – Aqua Star] can pay three to four containers. That was the whole idea.» (T370, L6–10)

45 **45**
Mr Bhatkoorse said the proposal was that Aqua Star pay for three or four containers per month. He continued:

> «That was the kind of idea so that it will take seven to eight months, because India, 24 container payments were pending; for Malaysia, maybe four or five, I don't remember exact numbers. The discount was offered only for India and Malaysia. Not for Thailand. Specifically in this meeting it was told that first he has to make a payment to Thailand first, Mr Chang told, and then Malaysia and India. Because the least was Thailand, the payment pending. The next was Malaysia. After that it's almost 24 containers for India so that was the thing.» (*Ibid*, L12–22)

46 **46**
Mr Chang's recollection of what transpired at the meeting was as follows:

> «To my best recollection, Mr Wu said he faced a problem, suffered a big loss with a problem with white spot and I said for white spot issue, it has been dealt with from day 1, it shouldn't be an issue, and Mr Mohan said for all the export from India, it goes through the antibiotic test before export so it also shouldn't be an issue. But then we start talking about some discount, because Mr Wu said he suffered losses, so in that sense we offered him a discount of US$1 per kilo for CP (India) products and CP (Malaysia) products.» (T616, L12–22)

47 **47**
Mr Chang said that the CP Group offered a discount of US$1 per kilo for CP (Malaysia) product and CP (India) product (*Ibid*, L23–25). This discount was offered, according to Mr Chang, «[b]ecause he [Mr Wu] is claiming losses, he is claiming there is some white spot issue.» (*Ibid*, L26–27) Mr Chang said that Mr Wu did not identify a particular figure for the losses or alleged losses at the meeting (T617, L7–8). Mr Chang continued:

> «I said, 'We would like to give you a discount of US$1 per kilo for CP (Malaysia) products, CP (India) products but not for CP (Thailand) products' and we requested Mr Wu to make a payment for one container every week. I also said, 'Please make the payment to settle CP (Thailand) and then CP (Malaysia) first and then only India, because CP (Malaysia) and CP (Thailand), the amount is not so big, so let's just clean up these two accounts and just focus – everybody focus on CP (India)'.» (T617, 16–25)

48 **48**
Mr Chang said Mr Wu responded saying he would try his best (*Ibid*, L26). Mr Chang said he stressed to Mr Wu that Aqua Star had to make payment to maintain a good relationship with CP (India) «so that they can continue supplying you» and «you [*viz* Aqua Star] can … make back the profit». He said Mr Wu agreed, responding «Okay» (T617, L28–T618, L13). The discounts described by Mr Wu related to containers already delivered. As to whether there was any discussion as to discounted prices for future container deliveries being discussed, he could not remember one way or the other (T618, L21–25). As at the time of this meeting, CP (Malaysia) was owed for deliveries of approximately 80 metric tonnes of shrimp or prawns; that is, four containers. These liabilities have since been met (T619, L11–20).

49 **49**
In preparation for this second Kuala Lumpur meeting, Aqua Star had submitted calculations of the losses which it alleged it had suffered by reason of defects in the product delivered by CP (India), CP (Malaysia), and CP (Thailand). The first was forwarded under cover of an email dated 2 November 2018 directed to Mr Benedict Tan of CP (Malaysia) and copied to Mr Wu and Mr Chang (CB 281–302). According to the summary at CB 283, Aqua Star's total losses were $5,595,736.90. This figure included an alleged loss of $525,729.58 for «Red appearance stock (100MT)», presumably 100 metric tonnes. This stands in contrast to another email dated 23 October 2019 over Mr Wu's signature which purported to summarise the outcome of the November 2018 meeting in a series of bullet points, one of which stated:

> «Above said purchases from CP group at the point of time have caused a loss of 5,561,120.12 in US dollars, since 2017.» (CB 317)

50 **50**
In explanation of the discrepancy, Mr Wu said that the figures shown at Court Book 283 needed to be adjusted «for Malaysia» (T821, L17–18). Mr Wu said that following the provision of the detailed figures at the meeting, he:

> «… showed them a spreadsheet of numbers and we were in person, talking in person. I walked them through every page and also all the figures on the spreadsheet, and I also explained to them that the number on the email and the number on the spreadsheet, there was a difference of these two numbers.» (T822, L12–15)

51 **51**
Mr Wu had had no response from CP relative to his calculations before the meeting (*Ibid*, L27–28). The meeting took place, according to Mr Wu's recollection, at a coffee table (T824, L19–21). Mr Wu said he was trying to get Mr Bhatkoorse and colleagues «To go to China, to go to a lab in China for everyone to have a discussion for why the test results are different.» (T825, L20–22) Mr Wu said Mr Bhatkoorse agreed to make the laboratory visit, but in the end «due to his schedule, he wasn't able to go» (*Ibid*, L23–25). Mr Wu said he explained that because of the problems with non-acceptance of the prawns in China he was «unable to pay, they have to pay for the compensation to cover my loss of damage, because I didn't cause these problems. They did it.» (T826, L13−16) Mr Wu said the CP partners conducted a private

consultation and «Mr Wichit had a speech to wrap things up.» (*Ibid*, L19–23) According to Mr Wu, Mr Wichit said:

> «They would help with my business by recovering the loss. They would help me recover the loss by helping my business. And also another thing that was mentioned in between was that they were going to have this $1 deduction. Also I made a phone call to China, to the manager of Guolian, Cheng Han.» [*Scil*, the gentleman who gave evidence under the name of Mr Chen] (T826, L29–T827, L3)

52 **52**
According to Mr Wu, he told Mr Chen:

> «that I need him to give the orders to me, so that every month I need him to give me an order of 40 containers.» (T827, L13–15)

53 **53**
He said Mr Chen agreed (*Ibid*, L21–22). Mr Wu said that since this conversation was conducted in Mandarin, Messrs Chang and Yip of the CP Group would have been able to understand it. At least, they would have been able to hear what Mr Wu was saying (T828, L4–6). He said he then passed the phone to these gentlemen, and he heard Mr Chang assuring Mr Cheng of Guolian:

> «Don't worry, don't worry, Mr Wu, we are going to support him to cover his loss of damage so if you can give him the order then we will support you.» (T828, L19–22)

54 **54**
Mr Wu said that at the time of this meeting there were twenty-four containers delivered by CP (India) but not paid for, five for CP (Malaysia), and five for CP (Thailand). (T829, L7–15)

55 **55**
As to Mr Wichit's closing statement, according to Mr Wu he said that relative to CP (Thailand) «they didn't have the right to run the business so they can't give me the discount.» (T830, L5–7) Relative to Malaysia and India, «they can control the whole business so they could give me a discount of $1 per kilogram» (*Ibid*, L9–10). He said he pressed the issue about his «loss of damage» and «[t]hey said that they will support my future business.» (*Ibid*, L11–13) He said [i]If Guolian was able to give me 40 containers of order per month then my profit will be 50 cents, so every month I will be able to make 1.1K–1.2K ...» (*Ibid*, L14–16). This meant, he said, that every month he would be able to pay US$450,000–480,000 against the outstanding debt, «[s]o with Guolian's orders, then annually I will be able to make US$5.7 million.» (*Ibid*, L23–24) Mr Wu said he gave utterance to these calculations at the meeting (*Ibid*, L25–26).

56 **56**
Mr Wu denied that there was any statement that there would be no discount on invoices already paid (T830, L29–T831, L5). On further clarification, however, Mr Wu said that Mr Chang and Mr Wichit said there was no discount on invoices already paid (T831, L8–10). The effect of the promised US$1 discount per kilogram for unpaid containers delivered by

CP (India) and CP (Malaysia) would be $508,000 for India, and $84,000 for Malaysia (*Ibid*, L15–17).

57 **57**
Mr Chang represented CP (Malaysia) at the November meeting in Kuala Lumpur. Mr Chang referred to the email traffic from Aqua Star, in particular the calculation of the alleged losses in excess of $5 million (CB 283 and following), and denied that he had sought any calculations as to the extent of Aqua Star's losses. He said he regarded these communications as unexpected, remarking «I don't clearly expect mail that comes in.» (T651, L25–26) The discount of $US1 per kilo was discussed between Mr Chang and Mr Wichit and was «dictated by» what CP could afford (T652, L19–20).

58 **58**
Mr Chang conceded that some of the products delivered by CP may have been problematic (T654, L22–24). Mr Chang agreed that future business was discussed at the November meeting in Kuala Lumpur «but not talking about compensation.» (T656, L27) Mr Chang said that he had told Mr Wu «I will support you in future business. We will try to give you the best price.» (T656, L30–T657, L1) He said, «[t[he best price to us is if compared to our other customers, he gets the best price compared to others.» (T657, L3–5) Nevertheless, this would be a price which would include a profit margin for CP (*Ibid*, L6–10). He continued «[w]e were giving the best price in the sense we will have a very thin margin or maybe even up to break even.» (*Ibid*, L19–21) Though he conceded that a good price might be a break-even price (*Ibid*, L31).

59 **59**
Mr Chang said he could not recall being handed the phone by Mr Wu to speak directly to Mr Chen of Guolian (T658, L20–22). Mr Chang said, according to his recollection, there were only two or three containers affected by the antibiotic issue (T659, L16–18). He said that Mr Wu had highlighted a lot of things «making losses, price going down, trends going down, China cannot sell to US at that time…» as being part of the reasons for the discount granted (T659, L25–27). Mr Chang agreed that the meeting determined «there would be business going forward so he [Mr Chang and Aqua Star] could make up his losses that way» (T660, L25–26).

60 **60**
The agreement, according to Mr Chang, was that the outstanding monies owing to CP (Malaysia) and CP (Thailand) would be first, with CP (India) to be dealt with third (T664, L11–13). The order was to be Thailand first, Malaysia second, India third (T665, L2–3). There was no specific date for the commencement of payments to CP (India), according to Mr Chang (T666, L15–16), «but we asked them to continue paying for a container a week.» (*Ibid* L16–17) Mr Chang said he was not familiar in detail with the progress of the payment plan. He was however aware that «they are owing those 12 containers, 13 containers for the past few weeks and there's no payment comes in and so that's why I come in and start text messages, 'Please pay one container next week. Please pay'.» (T670, L17–22)

61 **61**
According to Mr Wu, at the meeting Mr Chang told him «[d]on't worry, don't worry, Mr Wu, we are going to support him to cover his loss of damage so if you can give him the order then we will support you.» (T828, L19–22) Mr Wu remembered these words being spoken in Mandarin. He said however the rest of the meeting was conducted «mainly» in English (*Ibid*, L27–28). Mr Wu said that apart from referring to product at a «good price» or a «competitive price», he said there was talk of product being offered at «break even price» (T834, L18–21). Mr Wu took this to mean «I will be able to make 50 cents per kilogram but if they could really give me this break even price, then I would be able to make 80 cents per kilogram, and then in that case, I will be able to make $16,000–$17,000 per container. In that case, then I will be able to make around $640,000 a month.» (*Ibid,* L24–30)

62 **62**
Mr Wu said that far from challenging the figures which he tabled on behalf of Aqua Star as to losses in excess of $5 million, the CP representative said «[y]es, yes, okay, okay, okay.» (T835, L1–4) Mr Wu said that by a combination of payments from Aqua Star and the issue of credit notes, the outstanding invoices for CP (Thailand) and CP (Malaysia) were cleared (T836–7). Of the 24 invoices paid, some nine were paid at a recalculated price based on a discount (T837, L25–T838, L8). Of those nine invoices paid to CP (India), six formed part of 40 containers found by test reports from Guolian to have been contaminated with antibiotics (T839, L1–5). Mr Wu referred to the 40 reports.

63 **63**
Mr Wu complained that his company did not receive the support and assistance which he believed was promised at the November meeting in Kuala Lumpur. First, there was an issue as to the form of letters of credit to be used for further shipment, to which I will turn in due course. Secondly, he said «we ordered 120 it containers [*sic*]. They agreed to ship 80 containers. At the end on the agreed shipping date they only delivered 16 containers.» (T843, L24–30) Mr Wu said:

> «[E]very month they are supposed to supply me with 40 containers and for two, they didn't accept a transferable letter of credit. This is one of the biggest issues. Because my customers, they were able to see the price I purchase from. In that case I won't be able to make profits.» (T844, L10–15)

64 **64**
Mr Wu said, relative to the 16 containers that were delivered:

> «At the beginning we sent a transferable letter of credit to India and then Mohan emailed and said that they didn't accept it. Actually, I can see that this is an urgent problem so I made three to five phone calls to Mr Wichit. I was hoping that Mr Wichit was able to accept a transferable letter of credit, because with transferable LC, this is a very common way for doing business for three parties and so it's a very easy way. However, they insisted on not accepting it. So in that case, that means they are taking me out of the game. In that case, my money will never come back. I was still sparing no efforts to do my best to pay them back.» (T844, L18–30)

65 **65**
The so-called «direct» letter of credit would be one established by Guolian as the ultimate buyer in favour of CP (T844, L31 – T845, L2). This regime meant, according to Mr Wu, that he had to «let Guolian to send the LC to CP» [*sic*] (T845, L5–7). The transfer of the letter of credit which was favoured by Aqua Star and which would have provided a mechanism for it to take its margin, with that margin not being visible to Guolian, would have entailed Guolian establishing a letter of credit in favour of Aqua Star, with Aqua Star transferring the letter of credit ex-margin to CP (T846).

66 **66**
Speaking of these events, Mr Bhatkoorse, in an affidavit, said:

> «During this period, the Plaintiff [CP (India)] also considered resuming supply of its products to the Defendant [Aqua Star]. However, as the Defendant [Aqua Star] could not provide a Letter of Credit on terms satisfactory to the Plaintiff, goods were supplied direct to the Defendant's [Aqua Star's] Chinese processing partner [Guolian] and the Plaintiff [CP (India)] agreed to pay a commission of US$0.20 per kilogram to the Defendant [Aqua Star];» (CB 115, Paragraph (l))

67 **67**
Following the meeting in Kuala Lumpur, 24 out of 40 containers remained unpaid. The further containers delivered after the November Kuala Lumpur meeting were delivered under a letter of credit regime which provided for assured payment, either at or before delivery, and therefore without any further extension of credit by CP (India) (T504, L20–26).

68 **68**
A further effect of this letter of credit arrangement, as insisted upon by CP (India), was to provide it with visibility and control over the «on sale» to Guolian at a 20 cent per kilogram commission (T504, L27 – T505, L8).

69 **69**
Indeed, the effect was to transform an arrangement whereby Aqua Star purchased as principal, and sold to Guolian as principal, to one in which Aqua Star acted as CP (India)'s agent on a sale to Guolian. If the goods in these later containers were not paid for by telegraphic transfer before discharge at the port of destination, CP (India) would be able to block discharge of the goods (T506, L24–27). As I understand it, this would be regarded as the exercise by CP (India) as seller of the right of stoppage *in transitu*.

70 **70**
In 2017, whilst CP (India) had a right of stoppage *in transitu,* in extending credit it did not exercise that remedy (T507). These matters are dealt with in section 50 of the *Goods Act* 1958. It was this liberality of CP (India)'s part in not exercising the right of stoppage *in transitu* that led to the outstanding and unpaid for containers (T508, L15–19).

71 **71**
Mr Bhatkoorse said that «In the [November] Kuala Lumpur meeting we told [Mr Wu and Aqua Star] that in the future we could do business, provided it should be LC basis.» (T509, L30 – T510, L1) Mr Bhatkoorse agreed with me that:

> «The effect of the letter of credit is to have a promise from a party that is presumed to be solvent that payment will be made and you don't part with control of the documents until you have the letter of credit.» (T510, L4–8)

72 **72**
This means there is an assurance of payment from the third party and «credit risk [is] scrubbed» (*Ibid,* L11).

73 **73**
Mr Bhatkoorse said that CP (India)'s insistence through him upon a direct letter of credit, rather than a transferable letter of credit, was the result of advice from CP (India)'s credit control team (T510, L17–21).

74 **74**
Mr Bhatkoorse said that on receipt of an order for 120 containers, CP (India) advised that «the raw material situation [was] not good» and only 80 containers could be delivered in the following three months. He continued:

> «This is what we mentioned and immediately we gave the offer, our best offer, and we concluded 16 containers to Aqua Star and they were supposed to buy in that month another 10 containers. Immediately I got a mail from Kenny Ma saying that this price will not work out and we have to reduce the price.» (T512, L20–28)

75 **75**
Mr Bhatkoorse sent a text message to Mr Wu on 8 June 2020, stating:

> «Hi Allan, transferable LC is an issue. Like last time we pay the commission but it will be maximum 10 cents as per the new policy. We pay normally 5 cents to all but there are exceptions. I will check the stock and get back». (Supplementary Court Book 3135)

76 **76**
Mr Bhatkoorse denied that the adoption of this policy enabled CP (India):

> «to have the whip hand…and squeeze the profit…rather than allow him [Mr Wu and Aqua Star] to recover…profits or loss of profits that he's claimed in that Kuala Lumpur meeting of 5.6 [million US Dollars].» (T513, L19–22)

77 **77**
According to Mr Wu, the planned purchase by Aqua Star of 120 reduced to 80 containers did not proceed. First, because of disputes over letters of credit and, secondly, because CP (India) «shipped out very late» (T851, L1–2). Mr Wu said that Aqua Star did in fact order the 80 containers, referring to purchase orders referenced at Court Book 1513 (*Ibid*, L20–25).

78 **78**
On 14 January 2019, Upendra CP (India) advised Kenny Ma «[w]e want to see the LC draft first before we get the original. Can you send us draft document for verification and confirmation?» (Supplementary Court Book 326–7, T853, L26–30)

79 **79**
Mr Ma responded:

> «It is a transferable LC under processing so we won't be able to see the our [*sic*] draft until the head LC is issued.
>
> At this stage the only draft we can provide is consignee's application, if you want to take a look.» (Supplementary Court Book 326)

80 **80**
The effect then is that the regime advocated by Aqua Star would require not one letter of credit but two letters of credit:

> «from the Chinese bank for the Chinese customer to you [Aqua Star], to your [Aqua Star's] Australian bank, and then a portion of that goes by way of different transfer to India». (T854, L15–22)

With Aqua Star keeping the margin.

81 **81**
Mr Bhatkoorse explained to Mr Ma and Mr Wu why CP (India)'s credit control team did not approve the use of the so-called transferable letter of credit or to a letter of credit regime. He furnished the «credit control team's analysis» of this proposal by email 23 January 2019. The analysis was as follows:

> «In this LC the beneficiary is Aqua Star and as per the discussion with you I was made to understand that this LC being a transferable one, Aquastar will transfer this LC to C.P. Aquaculture.
>
> The process under the transferred LC will be as follows:
>
> 1) Applicant (here in this case it is Guangdong Gourmet Aquatic Products Co., Ltd.) will get the LC Opened in the first beneficiary name (here in this case it is Aquastar)
> 2) The first Beneficiary will get the LC transferred to the second beneficiary (here in this case CP Aquaculture) through his banker called the Transferring Bank
> 3) Transferring Bank will intimate about the Transfer LC to the bank of second beneficiary (CP Aquaculture).
> 4) Goods will be dispatched by CP Aquaculture as per the LC Terms to Guangdong Gourmet and the documents have to be dispatched to the Transferring Bank
> 5) Transferring Bank will in turn dispatch the documents to the Applicant Bank
> 6) Applicant Bank pays to the Transferring Bank

7) Transferring Bank pays to the CP Aquaculture Bank after deducting the margin of the First Beneficiary (Aqua Star)

8) If the **Applicant defaults, CP Aquaculture cannot claim from the Transferring Bank.**

9) CP Aquaculture receives the funds **ONLY AFTER APPLICANT BANK PAYS TO TRANSFERRING BANK.**

Hence, though it is under LC, if defaulted by the Applicant (Guangdong Gourmet) CP Aquaculture cannot claim from the LC Transferring Bank.

RISK UNDER THIS IS AS GOOD AS SENDING THE SHIPMENTS ON TT TERMS.» [*sic*] (CB 108–109)

82 **82**
Mr Bhatkoorse explained the revised mode of doing business between his company and Aqua Star as follows. Since Aqua Star:

> «could not provide a Letter of Credit on terms satisfactory to the Plaintiff, goods were supplied direct to the Defendant's [Aqua Star's] Chinese processing partner [Guolian] and the Plaintiff [CP (India)] agreed to pay a commission of US$0.20 per kilogram to the Defendant [Aqua Star];» (CB 115, Paragraph (l)).

83 **83**
Mr Bhatkoorse sent a letter of demand on CP (India)'s letterhead to Aqua Star dated 16 August 2019. It was headed «BY E-MAIL & COURIER». The letter referred to the delivery of «[f]rozen HOSO & HLSO Vannamei Prawns» by CP (India), continuing:

> «We raised bills of each and every consignment sent for payment, although you have acknowledged the receipt of such bills raised by us, you have not opted to make the payment in blatant violation of the business understanding between us and in absolute breach of trust reposed in you.» (CB 1571)

84 **84**
The letter stated that full details of the goods suppled were appended and continued:

> «In spite of acknowledging the liability of payment of principal balance of $ 2,037,255 [presumably US Dollars] you have failed to make payment of the said amount due to us from you deliberately with malafide [*scil mala fide]* intent, hence you are liable to pay the said principal balance amount along with interest **@ 24% p.a.** from the date of due, till actual realization of the said sum as is generally and customarily prevailing in the trade usages.» (*Ibid*)

85 **85**
The letter continued:

> «We have been requesting you several times through our various messages and personal requests for release of the said outstanding payment, but you have always

> been dilly delaying [*sic*] the same on one pretext or the other and so far have not paid even a portion out of the said outstanding undisputed amount.» (CB 1572)

86 **86**
The letter was signed by Mr Bhatkoorse as «Vice President» and was under the corporate seal of CP (India) (*Ibid*).

87 **87**
The credit given to Aqua Star was based on the discount for unpaid invoices agreed at the November 2018 meeting in Kuala Lumpur (T396–398). This was said to be available only until 31 August 2019.

88 **88**
Mr Bhatkoorse agreed that «[t]he exact [date]» for the «expiry» of this discount was not discussed at the meeting «but it has to be paid within seven to eight months, that was discussed at the KL meeting.» (T398, L9–12)

89 **89**
Mr Bhatkoorse conceded in cross-examination that the 24 per cent interest claimed in the letter of demand was not sought in this proceeding (T401, L4–5). No payment was made.

90 **90**
In 2020, Mr Bhatkoorse, on behalf of CP (India), agreed in cross-examination that he had «pursued Aqua Star relentlessly…to provide [a letter]» which CP (India) would forward to the Reserve Bank of India (T414, L23–30).

91 **91**
Mr Bhatkoorse said that when he obtained this letter from Aqua Star he gave it to CP (India)'s credit control department who passed it on to the Reserve Bank of India (T418, L22–24).

92 **92**
Mr Bhatkoorse said that CP (India):

> «had to submit it to the Reserve Bank of India, otherwise our other businesses would have got affected. That is the reason we wanted to send this letter to the Reserve Bank, saying that there is a timeline, within that time we will get the dollars into our account. We were under pressure.» (T420, L15–21)

93 **93**
The precise nature of the regulatory or control regime to which this process responded was not explained. The matter was the subject of a lengthy email chain commencing 20 February 2020 (CB 325) and concluding 26 May 2020, when the letter was furnished under cover of an email from Kenny Ma on behalf of Aqua Star (CB 323).

94 **94**
The letter on Aqua Star letterhead and addressed to CP (India) stated as follows:

> «Dear Sir,
>
> This letter is to confirm that the outstanding balance USD 2,037,256 of Aqua Star Pty Ltd to C.P. Aquaculture (India) Pvt Ltd is true and correct. On the other hand, C.P. Aquaculture (India) Pvt Ltd is currently holding a commission to Aqua Star Pty Ltd of USD 58,752.
>
> The above outstanding balance is due to quality issues from the products supplied by CP group which caused a huge loss to our company and impacted our cash flow severely. In addition, the outbreak of COVID-19 in Australia has interrupted our payment plan for 2020.
>
> Due to the loss suffered from these products, Aqua star's banker has cancelled most of the bank facilities and funding support. Therefore, the company is currently suffering shortage of cash flow.
>
> We estimate that the outstanding payments can be paid in the next 24 months provided our cash flow meets the budget expected. Meanwhile we hope that CP group can provide support to speed up the progress.» (CB 327)

95 **95**
At this stage of the original 24 outstanding and unpaid containers, nine had been paid, leaving 15 outstanding and not paid for (T414, L6–10). The amount acknowledged to be outstanding in the letter is $2,037,255 (CB 310).

96 **96**
Mr Bhatkoorse said that this figure «was not matching with our understanding…[u]ltimately we had to send this to the bank» (T416, L16–19).

This proceeding

97 **97**
Solicitors acting for C P Aquaculture (India) Pvt Ltd commenced this proceeding by Writ filed 17 May 2021.

Statement of Claim

98 **98**
The plaintiff's Statement of Claim was a relatively straightforward pleading asserting the amount of US$2,350,179 was outstanding for goods in the form of shrimp or prawns, the subject of some 15 purchase orders by the defendant, Aqua Star. The Statement of Claim also sought interest, costs and further or other relief (CB 21–26).

99 **99**
By order made 9 June 2021, Judicial Registrar Burchell (as she then was) gave judgment for the plaintiff in the sum of US$2,364,344.46, including interest in the sum of US$14,165.46, and the plaintiff's claim for goods sold and delivered of US$2,350,179 (CB 61).

100 **100**
By order made 31 August 2021, I set aside the judgment in default of appearance (CB 63).

Defence and Counterclaim

101 **101**
By the time the matter came on for hearing before me in March 2023, the Defence and Counterclaim filed on behalf of Aqua Star had evolved into its Fourth Amended Defence and Counterclaim. During the trial on 20 March, I considered a Summons filed on behalf of Aqua Star seeking to file a Fifth Further Amended Statement of Claim. For reasons which I then gave, I acceded to that application subject, however, to the deletion from the proposed Counterclaim of paragraphs alleging the existence of a duty of care on the part of CP (India) to avoid inflicting pure economic loss on Aqua Star (T79–87).

102 **102**
This last change of front on Aqua Star's part seems to have resulted from a late change of counsel during the lengthy trial and, it would seem, responsibly to a matter raised by me, Mr Clarke KC proposed a further amendment alleging breach of a condition implied by the *Goods Act*.

103 **103**
In the Fifth Amended Defence and Counterclaim filed pursuant to leave which I granted on 20 March 2023, Aqua Star generally admitted the allegations in the Statement of Claim that contended «each of the individual agreements between the parties for the supply of the Goods [contained a term], that the Goods were to be 100% free of any disease and/or antibiotics.» (Paragraph 3)

104 **104**
This agreement was said to be implied on the basis that «[t]here are Australian food safety standards that frozen shrimp meant for human consumption cannot contain any antibiotics.» The particulars referred to the *Biosecurity Act* 2015 (Cth) and a series of regulations made pursuant to that Act.

105 **105**
There was also reference to the *Food Standards Australia New Zealand Act* 1991 (Cth) and other regulatory regimes. Further, it was said that «[i]n or about September 2017» the parties entered into a supply agreement in which the parties agreed that the goods «shall be 100% antibiotic free» and «a deduction of 10% would apply if the products supplied were not 100% antibiotics free».

106 **106**
This agreement was said to be partly in writing and partly to be implied, referring to three documents: one dated 14 July 2017; and two dated 22 September 2017, signed by Mr Bhatkoorse as CP (India)'s Vice President (Paragraph 3A).

107 **107**
Alternatively, it was said that an agreement to this effect was implied in each supply agreement (Paragraph 3B).

108 **108**
Aqua Star admitted receipt of the 15 invoices referred to in the Statement of Claim, but denied that 15 containers, as described in the invoices, were delivered «free from antibiotics» (Paragraph 6). Aqua Star denied liability to pay the amounts invoiced «as the Goods … contained antibiotics» (Paragraph 8).

109 **109**
Aqua Star said that an agreement was reached in around November 2018 pursuant to which CP (India) agreed to allow Aqua Star to repay its existing indebtedness to the plaintiff from the supply of goods from CP (India) (Paragraph 10).

110 **110**
This paragraph continued in its Particulars to allege details as to what was described as the «KL Agreement» reached in November 2018. Then, Aqua Star alleged certain terms of the «KL Agreement», namely that CP (India) would continue to supply product to Aqua Star «subject to payment by transferable Letter of Credit» (Paragraph 10A).

111 **111**
Further, it was said that the «KL Agreement» included a term that, as a compromise for Aqua Star's claimed losses, it «would be compensated by [CP (India)] at the rate of $1 per kilo of the 24 then unpaid invoices, including 21 unpaid invoices of the 40 contaminated containers affected by antibiotics» (*Ibid*).

112 **112**
Further, it was said that the compensation «would be applied against unpaid invoices». Also allegedly a term of the «KL Agreement» was that CP (India) would «in the future [supply Aqua Star with product] at prices lower than it would otherwise charge customers to enable [Aqua Star] to increase profits and thereby recover the balance of the losses it had sustained.» (*Ibid*)

113 **113**
Further, it was said a deduction of $1 per kilogram «would apply to the unpaid invoices from each of CP Malaysia … but not CP Thailand». Aqua Star was to «pay down the discounted invoices» to CP Malaysia and CP Thailand before paying CP (India). Aqua Star committed to doing business with CP (India) but not CP Malaysia and Thailand, and the parties would cooperate in the implementation of the agreement (*Ibid*).

114 **114**
Next, it was said that in or about late 2018 or early 2019, «in accordance with the KL Agreement», Aqua Star placed orders with CP (India) «for the supply of products on a transferable letter of credit», referring to some four orders and «paid down the unpaid invoices from CP Thailand in full and to CP Malaysia after a US$1 deduction was applied» (Paragraph 10B).

115 **115**
Despite this, it was said that CP (India) «refused to supply further products, or further products on a transferable LC.» (Paragraph 10C) Whereby CP (India) «repudiated the KL Agreement which repudiation [Aqua Star] accepted or hereby accepts.» (Paragraph 10D)

116 **116**
Aqua Star said that of the nine containers being «part of the 40 contaminated containers» which it paid in the months January to June 2019, «a deduction of $1 per kilogram was applied by [CP India]», and three further containers were paid «to which a deduction of $1 per kilogram was applied by [CP India].» (Paragraph 11)

117 **117**
Aqua Star said that CP (India) was in breach of the «KL Agreement» in that it «ceased supply of any Goods to [Aqua Star] from January 2019.» (Paragraph 12) It said that any liability on its part to make any payment «was conditional upon the agreement made at Kuala Lumpur in November 2018 and/or subject to [Aqua Star's] complaints regarding the contamination of the Goods.» (Paragraph 14)

118 **118**
Aqua Star was entitled to set off its loss or damage as referred to in the Counterclaim against CP (India)'s claim «in extinction, alternatively diminution» (Paragraph 15).

119 **119**
By way of counterclaim, Aqua Star said, «[i]t was an essential term of the individual agreement between [the parties] … that the supply of all the Goods by [CP (India)] would be 100% free from antibiotics.» (Paragraph 2)

120 **120**
The term was said to be «implied» and reference was made to the same raft of food quality controlled legislation referred to earlier (Paragraph 2).

121 **121**
It was said that in breach of that term, all 40 containers supplied by CP (India) «were infected with antibiotics» (Paragraph 3).

122 **122**
By reason of this breach, it was said that Aqua Star had suffered loss and damage and loss of profits (Paragraph 4).

123 **123**
Alternatively, Aqua Star claimed the sum of $312,924, «in accordance with the KL Agreement based on $1 per kilogram compensation …» (Paragraph 4A).

124 **124**
Next, it was said that CP (India) «breached the condition of the Supply Agreement and/or each of the individual agreements to supply products 100% antibiotics free.» (Paragraph 4B) Alternatively, a 10 per cent discount or deduction was claimed in accordance with the terms of the «Supply Agreement», being $557,871.86 (Paragraph 4C).

125 **125**
Further, it was said that CP (India) was «holding (in possession) of USD$58,752 in monies belonging to [Aqua Star]» (Paragraph 5), which CP (India) it was said had «failed, refused or neglected to pay» to Aqua Star, which it was said was «entitled to them.» (Paragraph 6) CP (India), it was said, had thereby been unjustly enriched (Paragraph 7).

126 **126**
Aqua Star, in its Counterclaim, sought «loss and damages to be assessed» in the sum of US$58,752, interest, costs, further and other relief.

Reply and Defence to Counterclaim

127 **127**
!In reply to Aqua Star's Defence to Counterclaim, CP (India), in its Reply to the Fifth Amended Defence and Counterclaim, filed 21 March 2023, said that the «Goods» as supplied «were tested by independent and accredited laboratories … in conformance with the direction of the Commission of the European Communities 2002/657/EC». It referred to a series of purchase orders and continued «[p]rior to shipping, and upon production of the laboratory test results, [CP (India)] received a health certificate from the Government of India authorising the export of the Goods to Vietnam.» (Paragraph 1)

128 **128**
CP (India) said that the supply agreements were «superseded upon receipt of replacement purchase orders for individual containers from [Aqua Star]», and the reference to 100% antibiotics free was said to be «embarrassing in the absence of stating which testing regime was to apply to the Goods.» (Paragraph 2)

129 **129**
CP (India) admitted that at a meeting in Kuala Lumpur on 17 November 2018, it «agreed to reduce the amount then owing by [Aqua Star] by the amount of US$1.00 per kilogram provided that [Aqua Star] made payment in respect of then outstanding 24 containers within a period of 7 to 8 months». It otherwise denied the matters alleged about the Kuala Lumpur agreement (Paragraph 6).

130 **130**
CP (India) agreed that Aqua Star had forwarded certain purchase orders to it in 2019, but said it «did not agree to supply any Goods to [Aqua Star] or its Chinese processing partner on a transferrable letter of credit basis» (Paragraph 15).

131 **131**
CP (India) admitted that it required a letter of credit to be opened in its name as a precondition to further supply of any Goods to [Aqua Star] or its Chinese processing partners (Paragraph 19).

132 **132**
CP (India) said it did not supply any further Goods to Aqua Star «after April 2018» (Paragraph 22).

133 **133**
Save for certain admissions, CP (India) otherwise joined issue with Aqua Star's Fifth Amended Defence. (Page 4, Paragraph 23)

134 **134**
By way of Defence to the Fifth Amended Counterclaim, it generally denied the allegation (Paragraphs 24–26).

135 **135**
As to «the additional 25 purchase orders the subject of the counterclaim», CP (India) said that the Goods supplied were tested in accordance with the same testing regime referred to in its Reply (Paragraph 27).

136 **136**
Next, it was said that before the commencement of the proceeding, Aqua Star had advised it that:

> «only 3 containers had failed testing carried out by Inspection Center of Guangdong Gourmet Aquatic Products Co., Ltd in Guangdong, China months after the Goods were delivered by [CP (India)] to Haiphong, Vietnam, being the containers the subject of POs 1701278, 1800197 and 1800309.» (Paragraph 28)

137 **137**
It referred to an email from Mr Ma of Aqua Star to Mr Bhatkoorse of CP (India) (CB 1424), and the test reports (CB 1794–96, Paragraph 28).

138 **138**
CP (India) said that the «discount of US$1.00 per kilogram was subject to and conditional upon [Aqua Star] repaying its debt to the plaintiff within 7 to 8 months, alternatively, a reasonable time.» (Paragraph 30)

139 **139**
As to the claim for a deduction of 10 per cent pursuant to the Supply Agreement, CP (India) denied such an entitlement as to purchase orders 1800351 and 1800352. It was said that CP (India) had accepted payment for those containers «less US$21,648 and US$21,864 respectively pursuant to the November 2018 KL agreement», and further that the amount of the discount «should be reduced by US$65,148 on account of the discounts granted by [CP (India)] regarding POs 1800308, 1800331 and 1800333, which are not subject to any allegation of antibiotic contamination» (Paragraph 33).

140 **140**
CP (India) admitted that it was indebted to Aqua Star in the sum of US$58,792 «on account of commission» which it agreed to pay to Aqua Star on sale of goods to Aqua Star's Chinese processing partner. It said that CP (India) was «entitled to set-off» that amount «against the moneys owing to it by [Aqua Star]» (Paragraph 34–5).

Conclusions

Admissibility of reports

141 **141**
Mr Moon on behalf of CP (India) challenged the admissibility of the test reports referred to at paragraph [40] above in his closing submission. In *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 (*Dasreef* case), the High Court dealt with the admissibility of expert reports in a dust diseases damages claim. In the New South Wales Dust Diseases Tribunal, the contentious expert report was objected to at the time of its tender. A *voir dire* was conducted but the presiding judge did not rule on admissibility, stating he would defer a decision on admissibility and give a ruling as part of his final determination. In their joint judgment, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ described this element of the trial and determination at first instance as «a voir dire but no ruling» ((2011) 243 CLR 588, 598–9 [18]–[20]).

142 **142**
Their Honours remarked:

> «It is only for very good reason that a trial judge should defer ruling on the admissibility of evidence until judgment. This was not such a case. Yet the primary judge did defer ruling on the disputed evidence in this matter until judgment.» ((2011) 243 CLR 588, 599 [20])

143 **143**
Heydon J said, «[t]he trial judge erred in not ruling on the objection at the end of the voir dire, or, at the latest, at the end of the respondent's case.» ((2011) 243 CLR 588, 640 [135])

144 **144**
It might be thought that it is essential for the parties to know what evidence is or is not to be regarded as before the court before the evidence is closed. In the present case, Mr Clarke KC

sought to tender these reports initially as business records of Aqua Star. This was resisted by Mr Moon, and Mr Clarke KC sought to tender them as business records of Guolian.

145 **145**
The witness who was to give evidence in support of that tender, remotely for one reason or another, was not called. Another Guolian representative, a Mr Chen, gave evidence relative to the reports. It is fair to say that whilst he was an officer of Guolian, he did not claim any personal knowledge of the production of the reports. At that stage, Mr Moon renewed his objection.

146 **146**
Mr Moon cross-examined Mr Chen with a view to suggesting that these reports did not originate on the dates they purportedly bore but were recent inventions to assist Aqua Star in resisting CP (India's) claim (T1024–1026). Mr Chen gave his evidence via an interpreter. For the sake of clarity, and to exclude the possibility of any misunderstanding, «[w]ell, I think the suggestion is that these documents were backdated and created in 2022 to help Mr Wu's company. They weren't genuine contemporary documents from 2017 or 2018. What do you say?» Mr Chen replied, «It's impossible.» (T1026, L6–9)

147 **147**
Based on what had already transpired in the cross-examination, I stated «I'm prepared to accept, based on what this witness has said already that he has no direct knowledge on that point.» (*Ibid*, L22–24) This cross-examination took place on day 11 of the trial.

148 **148**
Mr Moon did not, at that stage, mount an objection to the admissibility of the report. He made that objection in closing submissions on day 14. In my view, this was as wrong and inappropriate as the trial judge's failure to rule on admissibility of the expert report at the conclusion of the *voir dire* in the *Dasreef* case.

149 **149**
Following the conclusion of the examination of Mr Chen, I regarded the reports as having gone into evidence. The trial operated by reference to Court Books subject to a right of objection. Reference to documents in the course of *viva voce* evidence meant those documents were in evidence subject to a right of objection. In my view, that objection should have been mounted on day 11. Failure to do so means that the documents have been admitted without objection, and it was not appropriate for Mr Moon to seek to reagitate it in closing submissions.

150 **150**
When I taxed Mr Moon with this concerns, he said «there was no other option, because the way the case fell, this was the last witness, was the one who was called to prove the business records.» (T1329, L11–13) The «last witness» to whom he referred was presumably Mr Chen.

151 **151**
Mr Chen was not the last witness. He was followed into the witness box by Kenny Ma who, it may be accepted, could say nothing as to Guolian's business records, but also by Dr Monckton, on behalf of Aqua Star, and Dr Leeder, on behalf of CP (India). These witnesses provided expert

reports and were extensively cross-examined. For the most part, their evidence was devoted to the relative reliability of the antibiotic testing carried out for CP (India) in India in comparison to the results recorded in the contentious reports attributed to Guolian.

152 **152**
Excluding the Guolian reports or, no doubt as Mr Moon would have it, alleged reports from evidence would blot out not only the reports themselves but large chunks of the expert evidence. Once again, this demonstrates how inappropriate it was for Mr Moon to defer his objection to admissibility until final submissions. Mr Moon noted that Mr Chen was available for a strictly limited time and he (Mr Moon) was limited in the time that he was allowed for cross-examination. Nevertheless, Mr Moon might have announced that he deferred mounting his objection to the admissibility of the reports until after the completion of Mr Chen's evidence, and pressed the objection at that time.

153 **153**
Nevertheless, I propose to deal with the substance of the matters which he urged in support of excluding the reports from evidence, or «striking them out» if they were regarded as already in evidence.

154 **154**
The essence of the objection was that evidence had not been adduced to make good the elements required by the *Evidence Act* 2008, to designate a document a «business record» and therefore admissible as an exception to the hearsay rule.

155 **155**
Section 69 of that Act, which is in Division 3 of Part 3.2 dealing with «Hearsay», which division is headed «Other exceptions to the hearsay rule», provides *inter alia*:

> «(1) This section applies to a document that—
>
> (a) either—
>
> (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
>
> (ii) at any time was or formed part of such a record; and
>
> (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
>
> (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made—
>
> (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
>
> (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

(3) Subsection (2) does not apply if the representation—

(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or

(b) was made in connection with an investigation relating or leading to a criminal proceeding.

…».

156 **156**
Plainly, the effect of these provisions, in particular sub-s(3), is that the Guolian reports, if they were prepared solely for the purpose of assisting Aqua Star in this proceeding, could not be regarded as «business records» and would therefore be inadmissible as evidence.

157 **157**
A gravamen of Mr Moon's contentions on this point was that evidence was required to establish that the reports fell without the requirements for admission as business records, and also the requirements of s48 of the *Evidence Act*, which is headed «Proof of contents of documents». He said the effect of s48 required proof that the report formed part of the records of a business, referring to s48(1)(e)(i) (Plaintiff's Closing Submissions, Page 58).

158 **158**
He noted the concession made by Mr Chen as to his lack of knowledge of the technical aspects of Guolian's laboratory, his lack of expertise in analytical chemistry, and his lack of involvement with the production of the documents (*Ibid*, 60, [241]).

159 **159**
Mr Moon relied on a decision of *National Australia Bank Ltd v Rusu & Ors* (1999) 47 NSWLR 309 (*Rusu's* case). In rejecting the tender of a document being part of a transaction history relating to an account, his Honour said:

> «Before a business record or any other document is admitted in evidence it is obviously necessary that there should be an evidentiary basis for finding that it is what it purports to be. Documents are not ordinarily taken to prove themselves or accepted as what they purport to be; there are exceptions under the common law and under statutes for public registers and for many kinds of documents when certified in various ways: and see the method of proof provided in some cases by s 170 and s 171 of the *Evidence Act* 1995. At the simplest, the authenticity of a document may be proved by the evidence of the person who made it or one of the persons who made it, or a person who was present when it was made, or in the case of a business record, a person who participates in the conduct of the business and compiled the document, or found it among the business' records, or can recognise it as one of the records of the business.» ((1999) 47 NSWLR 309, 312 [17])

160 **160**
Plainly, these requirements have not been met in the present instance.

161 **161**
The decision of Bryson J in *Rusu's* case is entirely consistent with the law as it stood before the enactment in Victoria of the 2008 Act. The *Evidence Act* 1958 (now the *Evidence (Miscellaneous Provisions) Act* 1958), established elaborated glosses on the common law of evidence which governed court proceedings in Victoria until the 2008 Act. This statute, as at 2007 (version 153), defined «book of account» the equivalent of the «business record» under the 2008 Act as follows:

> «***book of account*** includes ledger, day book, cash book, account book, and any other document used in the ordinary business of an authorised deposit-taking institution, or in the ordinary course of any other business for recording the financial transactions of the business and also includes any document used in the ordinary course of any business to record goods produced in, or stock in trade held for, the business;» (*Evidence Act* 1958 (Vic) s58A)

162 **162**
The requirements for proof relative to the admissibility of books of account were to be found in s58D. This required relatively elaborate proofs and formalities to meet these requirements. They became almost incantations when used in affidavits in support of summons for final judgment (as they were then known, now known as applications for summary judgment). These sorts of provisions are conspicuously absent from the 2008 Act.

163 **163**
This seems to have led other judges not to take the «hard line» adopted by Bryson J in *Rusu's* case.

164 **164**
Section 183 of the 2008 Act states under the heading «Inferences»:

> «If a question arises about the application of a provision of this Act in relation to a document or thing, the court may—
>
> (a) examine the document or thing; and
>
> (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.»

165 **165**
This provision had no analogue in the old 1958 Act. It would seem to authorise a judge or magistrate to consider the form and nature of a document, and infer from those matters without further evidence by way of affidavit or *viva voce* that the document in question is a business record. Such a conclusion might be reached in association with evidence as to the production of the document from the custody of the organisation whose business transactions it purports to record.

166 **166**
Jack Forrest J, for instance, was prepared to resort to inferences drawn pursuant to s 183 to admit a document as a business record (*Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 35)* [2014] VSC 59 (*SPI* ruling)). His Honour said:

> «Consistent with the decision in *Air New Zealand*, a combination of s 55 and s 58 of the *Evidence Act* enables a court to examine the document itself and then determine whether it is authentic – absent other evidence. So for the purpose of this application it is appropriate to examine each of the documents and the surrounding circumstances of their production and draw appropriate inferences, where applicable, as to:
>
> (a) how the document came to be adduced in evidence;
>
> (b) whether it was a document prepared by one of the companies;
>
> (c) whether it was a document prepared by one of the companies for the purpose of its business;
>
> (d) whether the contents of the document form part of the records of the business;
>
> (e) whether the documents contain statements relevant to the proceeding made in the course of or for the purpose of the business;
>
> (f) whether the representation contained in the document was made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact relied upon; and
>
> (g) whether the representation was made on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.» ([2014] VSC 59, [32])

167 **167**
Mr Moon conceded that Perram J of the Federal Court of Australia in *Australian Competition and Consumer Commission v Air New Zealand Ltd & Anor (No 1)* (2012) 207 FCR 448 at [100], disagreed with the judgment of Bryson J in *Rusu's* case, taking the view that Bryson J did not consider the operation of s183 of the *Evidence Act*, which I have already quoted, or s 58 of the Act which provides:

> «(1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
>
> (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.»

168 **168**
Applying the principles stated by Jack Forrest J in the *SPI* ruling, it will be seen that the documents purporting to be test reports are in the form which one might expect such reports to follow. Mr Clarke KC observed that they follow sequentially in date order and bear dates which are consistent with the dates of the various purchase orders and the likely dates of receipt of the containers to which they relate.

169 **169**
On the face of it, therefore, the reports seem to be properly admissible.

170 **170**
Mr Moon pressed his contention that these documents were recent inventions. He said the evidence of Mr Chen was insufficient to rebut such an allegation. He said the inference of recent invention could be drawn from the late presentation of these reports. It was not suggested that they were in the possession, either in electronic or hard copy form, of Aqua Star at the time the events under review were unfolding in 2008–2019. Rather, they were produced for the first time in the sense of being deployed by Aqua Star during the course of summary judgment applications in this proceeding.

171 **171**
The allegation of recent invention is a serious one. No finding along those lines should be made without proper evidence. Section 140 of the *Evidence Act* provides:

> «(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—
>
> (a) the nature of the cause of action or defence; and
>
> (b) the nature of the subject-matter of the proceeding; and
>
> (c) the gravity of the matters alleged.»

172 **172**
This section might be thought to be a codification of the principles adopted by Dixon J (as he then was) in *Briginshaw v Briginshaw* (1938) 60 CLR 336. The judgment itself continues to be regarded as independently authoritative even after its apparent codification in s 140.

173 **173**
As previously observed, Mr Chen denied the allegation of recent invention, though his knowledge was relatively limited. As a matter of logic, it is difficult to establish a negative.

174 **174**
In all the circumstances, I decline to find that these reports were a recent invention.

175 **175**
Even if Mr Moon's objections had been taken at the proper time, I would still have rejected them.

176 **176**
Mr Moon contended that the ultimate issue of authenticity relative to these reports should be determined as part of the process of determining admissibility. He referred in that respect to a decision of Almond J in *Traffic Calming Australia Pty Ltd v CTS Creative Traffic Solutions*

Pty Ltd & Ors [2015] VSC 741. His Honour was concerned in this case to determine *inter alia* an issue as to the genuineness or otherwise of two alleged invoices.

177 **177**
For reasons which he gave, he concluded that these invoices were bogus. At [112], his Honour said, «I have come to the conclusion that the invoices are not authentic business records.» He explained the reason for that conclusion:

> «If, contrary to my view, the invoices are business records and are in fact admissible for truth of their contents as an exception to the rule against hearsay I would give the evidence very little weight. The invoices are replete with unexplained errors, which are so extensive and fundamental that it is not possible to conclude with confidence that any other part of the information contained in the document is accurate. They are manifestly unreliable.» ([2015] VSC 741, [122])

178 **178**
The precise route which his Honour took to the conclusion that the alleged invoices were bogus does not affect the outcome of the case. In my view, when *prima facie* evidence exists which would render a document admissible, whether as a business record or an admission on the part of one of the litigants, for instance an acknowledgement of debt, such document should be admitted for the very purpose of subjecting it to examination to enable an ultimate finding as to its authenticity to be made. Where a document is received by a judge, scrutinised at length, and made the subject of dispositive findings in the judge's final determination, it is difficult to see how considering the document for the purpose of making these findings does not, in itself, constitute its «admission».

179 **179**
In the case of a jury trial, one would have thought that a disputed document would be admitted into evidence by the judge to enable the jury to make findings as to its authenticity, if that authenticity were key to the outcome of the proceeding.

180 **180**
In the present case, for the foregoing reasons, I admit the Guolian reports into evidence and treat them as authentic, in the sense of there being records created contemporaneously with the dates they bear and recording test results obtained by the laboratory which purports to have issued them.

Proposed amendment

181 **181**
Mr Clarke KC sought leave further to amend his client's Fifth Amended Defence and Counterclaim by adding a further cause of action based on s 19 of the *Goods Act* 1958. The designation of the Defence and Counterclaim indicates that the one for which a further amendment is now sought represents its sixth iteration.

182 **182**
The parties are agreed that the proper law of the contracts between CP (India) and Aqua Star for the sale of shrimp or prawns is Victorian law. According to plaintiff's counsel, this was because India has not adopted the convention on contracts for the international sale of goods (also known as the Vienna Convention) (Plaintiff's Closing Submissions, Page 97, [347]).

183 **183**
According to defendant's counsel, Mr Clarke KC, this is because of failure on the part of either part to allege and prove the terms of any other law as a proper law (Defendant's Closing Submissions, Pages 16–17 [24]–[25]).

184 **184**
The law of non-consumer sale of goods in Victoria is codified by Part 1 of the *Goods Act*.

185 **185**
On day three of the trial, I gave a ruling as to the filing by the defendant of an expert report outside the time limit laid down by the trial directions. In the course of giving that ruling, I remarked:

> «More surprisingly still, perhaps, given that this is a dispute about a sale of goods transaction with Victorian law as its proper law, not being a regulated consumer transaction, the pleadings do not mention the Goods Act 1958 Part I, which is the Code which governs such contracts under Victorian law.» (T226, L27–T227, L1)

186 **186**
This ruling was given on 22 March 2023, being the third day of a 14-day trial. I mentioned the *Goods Act* again a day or so later on 24 March, which was day five of the trial, in connection with the right of an unpaid seller to stoppage in transit. Finally, at transcript page 961, at the outset of day 11, I said:

> «Now, just before we resume, Mr Clarke, I was reflecting on one of the answers that the witness gave yesterday. He said that Mr Bhatkoorse was well aware of the Chinese connection in the work that Mr Wu's company was doing. And that led me to wonder, is there any pleaded reliance on the implied condition as to fitness for purpose provided for in paragraph A of s19 of the Goods Act?» (T961, L1–8)

187 **187**
Mr Clarke KC responded, «I will take it on notice, Your Honour.» (*Ibid*, L9)

188 **188**
Apparently prompted by these remarks, Mr Clarke KC now seeks leave to amend Aqua Star's Defence and Counterclaim by adding reliance on s19 of the *Goods Act* as implying a condition as to fitness of the prawn/shrimp for a particular purpose, namely marketing in Australia.

189 **189**
Section 19 provides *inter alia*:

> «Subject to the provisions of this Part and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—
>
> (a) where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose;
>
> …
>
> (d) an express warranty or condition does not negative a warranty or condition implied by this Part unless inconsistent therewith.»

190 **190**
The proposed amendment presumably sought to be added to the Fifth Amended Counterclaim is as follows:

> «4D. Further, or in the alternative,
>
> (a) the defendant made known to the plaintiff the goods purchased from the plaintiff would be exported to China directly or via Vietnam for the purpose of being processed and thereafter be exported to Australia and needed therefore to be 100% antibiotic free to comply with Australian regulations (the **Purpose**);
>
> **PARTICULARS**
>
> It may be inferred from the following as to export to Australia:
>
> (i) 25/05/2017 – email from Mohan to Kenny Ma (SCB 3417);
>
> (ii) 25/05/2017 – email from Kenny Ma to Mohan (SCB 3417);
>
> (iii) 20/07/2017 – email from Kenny Ma to Mohan (SCB 3418);
>
> (iv) 20/07/2017 – second email from Kenny Ma to Mohan (SCB 3418).
>
> As to being 100% antibiotic free, it is to be inferred from:
>
> (i) 14/04/2017 – email from Kenny Ma to Mohan (SCB 3413);
>
> (ii) 19/04/2017 – email from Mohan to Kenny Ma (CB 2324);
>
> (iii) 02/05/2017 – email from Kenny Ma to Mohan (CB 2323);
>
> (iv) 14/07/2017 – document signed by Allen Wu and Mohan stating the goods are to be 100% free of antibiotics;

(v) 22/09/2017 – two documents signed by Allen Wu and Mohan stating the goods are to be 100% antibiotic free.

Further, the defendant relies upon the evidence given at trial in the table below –

…

(b) it was an implied term of the agreement between the plaintiff and the defendant that the goods purchased would be fit for the Purpose;» (Defendant's Closing Submissions, Pages 73–74)

191 **191**
Mr Moon, in his closing submission, said:

> «you ought to dismiss the application to amend, that extraordinary application made after the amendment, and my learned friend had the opportunity, you ruled on Day 3, you referred to the Goods Act, and my client stayed till the end of Day 9 of the trial. He had plenty of time to bring his claim in respect of the Goods Act, but he failed to do so.» (T1297, L22–28)

192 **192**
Mr Moon said that because his case had closed before the amendment was broached, he lost the opportunity of asking Mr Bhatkoorse whether CP (India) would have contemplated selling on terms that absolutely no antibiotics could be contained in the product, which was the purport of Mr Clarke KC's contention which was said to be the effect of the Australian regulation.

193 **193**
Mr Moon also referred to Mr Wu's evidence in cross-examination as to sale of shrimps/prawns to non-Australian markets. He suggested to Mr Wu that «selling…to Guolian for sale…into other markets» was a substantial part of Aqua Star's business. Mr Wu responded, «[t]hat's not correct.» (T966, L20–22) When asked how many containers of the product were sold into the US market (*Ibid,* L27–28), Mr Wu responded «Fifty to 100» (T967, L6).

194 **194**
Mr Clarke KC noted that express terms to the same general effect were already included in the pleading and had been for a long time. In effect, he said the proposed amendment merely repackaged the defendant Aqua Star's case, which remained based on the same evidence. In those circumstances, it seemed to me that the crucial question was whether CP (India) had, by reason of the lateness of the proposed amendment, lost the opportunity to adduce further evidence.

195 **195**
The only evidence that Mr Moon indicated he might have sought to adduce was the evidence already referred to as to whether Mr Bhatkoorse would have been willing to deal on this basis. The loss of the opportunity to ask this question, or a question or questions along those lines,

initially seemed to me to be significant and to threaten CP (India) with serious injustice were the amendment allowed.

196 **196**
On further reflection, however, since the term would have been implied by law, by definition it would not have been the subject of express conversations between the parties. No document containing the implied term would have prompted Mr Bhatkoorse, or any of his colleagues, to consider the issue which Mr Moon implicitly said would have led them to back off and refuse to deal.

197 **197**
Ultimately, the question will have to be «Had you known that the applicable law would imply such a condition into the dealings, what would you have done?». This would not be an issue material to the outcome of the proceeding. It is not obvious, therefore, that CP (India) has lost an opportunity to adduce probative evidence which it might otherwise have called if this late amendment is allowed.

198 **198**
In my view, this proposed amendment is properly to be categorised as a mere repackaging of Aqua Star's case and, as such, should be allowed. Its allowance, however, raises a difficult issue. According to Mr Clarke KC, the two expert witnesses, Dr Monckton and Dr Leeder, were agreed that Australian standards required an absolute zero content of antibiotic product with no tolerances of levels of detectability. Mr Moon denied that there was such a consensus between the experts.

199 **199**
Aqua Star's Defence and Counterclaim particularises a lengthy set of Commonwealth legislation, regulations and other statutory instruments. Mr Clarke KC did not take me to these provisions to make good the proposition as to the effect of the Australian regulatory regime. Given that I am required by the *Evidence Act* to notice Commonwealth legislation without any separate proof simply by resort to the text of the statute, in theory it would be possible for me to make my own enquiries as to the effect of Australia's regulatory regime. However, one would suppose that the language of these various legislative instruments is technical, and for me to launch without guidance, either of counsel or expert witnesses, into a consideration of this no doubt voluminous material, would be fraught with danger. In the circumstances, I refrain from doing so.

200 **200**
As to what the experts have said, I invited both counsel to refer me to the passages in the expert evidence upon which they relied for their stated positions. Neither was able to give specific references during oral submissions. They promised to provide those references after the court had adjourned for me to consider my decision.

Causes of action

201 **201**
The primary elements of CP (India's) claim for goods sold and delivered have been made out.

The goods were sold. They were delivered, and the price remains unpaid. CP (India's) cause of action is made out save for the matters by way of Defence and Counterclaim pressed by Aqua Star. Aqua Star alleges breaches of contract by CP (India), first as to the quality of the shrimp/prawns delivered (alleging antibiotic contamination) and, secondly, relative to what was said to have been agreed to in the meeting at Kuala Lumpur in November 2018.

202 **202**
The epicentre of disputation in the course of this proceeding, and what might on view be a disproportionate amount of time, was devoted to the first issue, as witness the contention relative to the late addition of an allegation of implied condition as to fitness for purpose and the disputes relative to the admissibility of the Guolian reports.

203 **203**
On analysis, however, the matter which requires primary attention is a consideration of what was, or was not, agreed at Kuala Lumpur and whether, as Aqua Star alleges, an agreement was reached at Kuala Lumpur in November 2018 which was repudiated by CP (India) the following year.

204 **204**
In its Fifth Amended Defence and Counterclaim, Aqua Star alleged that paragraph 10A as one of the terms agreed to at the Kuala Lumpur meeting that:

> «as a compromise of [Aqua Star's] claim of $5M for losses (and in lieu of the entitlement to a 10% deduction), [Aqua Star] would be compensated by [CP (India)] at the rate of $1 per kilo of the 24 then unpaid invoices, including 21 unpaid invoices of the 40 contaminated containers affected by antibiotics;» (Fifth Amended Defendant and Amended Counterclaim, page 7)

205 **205**
The purport of the word «compromise» is that the Kuala Lumpur agreement, including the US$1 per kilogram reduction in price for the unpaid containers, and the other terms, whatever they might be, was accepted in lieu of the claim which Aqua Star says it had against CP (India) for breach of contract relative to quality and fitness for purpose. On that basis, these claims for breach of the original sale contract could be pressed by Aqua Star by way of Defence or Counterclaim if, and only if, what was agreed at Kuala Lumpur was, as Aqua Star alleges, repudiated by CP (India).

206 **206**
The primary and initial focus must therefore be on what, or was not, agreed at Kuala Lumpur and whether, as Aqua Star alleges, an agreement or agreements was made which was or were repudiated by CP (India).

What was agreed at Kuala Lumpur?

207 **207**
Is it common ground that the discussion led to an agreement for reduction of the debt relative to the 24 containers for which the price remained outstanding at the rate of US$1 per

kilogram. The account of what transpired at Kuala Lumpur, as given by the witnesses for CP (India), Mr Bhatkoorse and Mr Chang, appears above at [41]–[48].

208 **208**
Whilst I accept, in a general sense, that those representing the CP Group assumed that payment for the outstanding containers would be completed by the end of August 2019, I am not satisfied that that was distinctly discussed and agreed to. No doubt it would have been a wiser course for those representing the CP Group to offer this discount on a strictly conditional basis, conditional upon all payments being made on or before 31 August 2019 or at a stipulated rate per month until date. That does not appear to have been expressly stipulated. The termination of the discount, unless availed of by 31 August 2019, was not, in my view, part of the «deal».

209 **209**
In closing submission ([328]), Mr Moon on behalf of CP (India) denied the legal effectiveness of the offer by CP (India) to discount the outstanding invoices at the rate of US$1 per kilograms. He referred to the decision of the House of Lords in *Foakes v Beer* (1884) 9 App Cas 605, stating that a promise to pay less than the full-face value of a money debt could not be effective consideration for the discharge of the debt. He referred to *Amos v Citibank Ltd* [1996] QCA 129 and *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

210 **210**
I remarked that at the time this argument did not seem to be open on the pleadings. Paragraph 10 of CP (India's) Statement of Claim alleges the price reduction apparently as a legally effective arrangement. I am unaware of any distinct contention in any later pleading that the arrangement, as alleged, was legally ineffective for lack of consideration. If there had been such a contention, it might have been in breach of the rules as to pleadings as being a «departure». I was unclear as to whether these contentions were ultimately pressed. For the reasons explained, I will regard the discount as having been legally effective.

211 **211**
According to paragraph 10A of the Fifth Amended Defence and Counterclaim, Aqua Star said that the discount «would be applied against unpaid invoices» (Sub-paragraph (c)). This seems implicit in the form of an arrangement which both parties agree was reached at Kuala Lumpur. More contentiously, however, at sub-paragraph (d) of Clause 10A of the Fifth Amended Defence and Counterclaim, Aqua Star said:

> «provided [CP (India]) continued to assist [Aqua Star] recoup the balance of its losses by continuing to supply [Aqua Star] in the future at prices lower than it would otherwise charge customers to enable [Aqua Star] to increase profits and thereby recover the balance of the losses it had sustained, [Aqua Star] would not claim losses as a result of the supply or [*scil* of] products from CP Malaysia and CP Thailand affected by white spot virus;»

212 **212**
In its Reply and Defence to Counterclaim (Paragraph 10), CP (India) denied this allegation.

213 **213**
In his oral closing contentions, Mr Clarke KC on behalf of Aqua Star enlarged on these matters. Immediately prior to the Kuala Lumpur meeting by email dated 2 November 2018, Mr Ma of Aqua Star sent an email to Mr Benedict Tan of CP (Malaysia). He copied the email to Mr Wu of Aqua Star and Mr Chang of CP, with a heading «Total loss on raw material». The email covered a detailed table of what, according to Aqua Star, it had lost by reason of defective product delivered to it by the CP companies. The complaint relative to CP (India's) product was antibiotic contamination relative to the product delivered by CP (Malaysia) and CP (Thailand). The complaint was as to white spot syndrome.

214 **214**
The total losses alleged by Aqua Star by reason of these breaches of contract was $5,595,736.90 (CB 1447). Of that amount, $673,156.14 was said to have been suffered as a result of product delivered by CP (Thailand), and the same amount relative to product delivered by CP (Malaysia). CP (India)'s product was said to have caused losses of $3,041,766.36.

215 **215**
Mr Clarke KC's contention on behalf of Aqua Star was that these losses of close to US$5.6 million, which included other amounts relative to «Australia rejected containers» and «Red appearance stock» (amounts in excess of $1 million) were accepted by the CP Group as being the basis for compensation to be allowed to Aqua Star.

216 **216**
These amounts, assuming they are correct, were far from solely attributable to CP (India). Nevertheless, according to Mr Clarke KC, since compensation was to be derived from «future business, but only with India», CP (India) «was going to wear the brunt of it.» (T1249, L14–15)

217 **217**
The effect then was that, according to Aqua Star, its compilation of losses at almost US$5.6 million was accepted as the basis for an arrangement for a regime whereby those losses would be recouped to Aqua Star by what were described as «break-even price[s]» (T1252, L16 – T1253, L1).

218 **218**
According to Mr Wu, in his evidence-in-chief, Mr Wichit on behalf of the CP Group summed up what had been agreed to in a closing statement (T825, L4). Mr Wu said that he took the CP representative «to every single page» of the calculations showing losses for Aqua Star of $5.5 million «to explain to them what was the problem.» (*Ibid*, L12–13)

219 **219**
Mr Wu was asked what Mr Wichit had said in winding up the meeting (*Ibid*, L5–6). He proceeded to describe what he had said and continued to seek to convey what had transpired «in the middle of the discussion», when he said something was mentioned (T826, L24–27). Eventually, he said:

> «They [the CP Group] would help with my business by recovering the loss. They would help me recover the loss by helping my business. And also another thing that was mentioned in between was that they were going to have this $1 deduction.» (T826, L29 – T827, L2)

220 **220**
He then said he had made a telephone call to Mr Cheng Han of Guolian. Mr Chang, who was part of the CP delegation, repeatedly assured Mr Wu:

> «Don't worry, don't worry, Mr Wu, we are going to support him to cover his loss of damage so if you can give him the order then we will support you». (T828, L19–22)

221 **221**
This statement, according to Mr Wu, was made in Mandarin.

222 **222**
Mr Wu said that after the telephone conversation with Mr Cheng of Guolian, the GP Group talked amongst themselves (T829, L3). Mr Wu said the CP representatives «said that they hope I can pay those outstanding invoices as soon as possible so they can go on and support me.» (*Ibid,* L21–23)

223 **223**
Mr Wu said:

> «So it's 50 cents profit so I will be able to make from every container 1.1–1.2K and then every month – it will be 11–12K per container and then every month I will be able to make US$450,000–480,000 every month. So with Guolian's orders, then annually I will be able to make US$5.7 million.» (T830, L19–24)

224 **224**
This somewhat diffuse account given in chief does not distinctly assert that the CP Group, or CP (India) in particular, admitted liability for the $5.6 million in losses alleged by Aqua Star.

225 **225**
Mr Bhatkoorse was asked in cross-examination by Mr Clarke KC whether the future business and the «support» spoken of «was to recover the losses that Allen Wu [*viz* Aqua Star] had suffered; isn't that correct?» Mr Bhatkoorse replied «[w]e said that we will do the future business, it helps him. This is the way the discussion was.» Mr Clarke KC said, «[t]o recover the losses?», and Mr Bhatkoorse added «[c]ould be», and then «[b]ut specifically it was not discussed like that. We will do the future business, it will support, it will help him. That was the way it was discussed.» (T428, 10–21)

226 **226**
Mr Bhatkoorse agreed in cross-examination, as was put to him by Mr Clarke KC for Aqua Star, that no discount could be offered relative to amounts outstanding to CP (Thailand). Mr Bhatkoorse said, «we don't speak about the discount thing because nobody was there from Thailand's side so nobody was commenting anything.» (T428, L25 – T429, L1)

227 **227**
Mr Bhatkoorse agreed that clearing Aqua Star's indebtedness in nine months was assumed by the CP Group, but «[w]e have not discussed anything about the exact date in that meeting.» (T429, L20–24)

228 **228**
This reinforced the finding that I have already made to the effect that no expiry date was laid down for the $1 per kilogram discount.

229 **229**
Aqua Star's case relative to the $5.6 million losses was that the CP Group admitted liability. This is fundamentally implausible. It is as if parties met to settle a piece of commercial litigation and, with apparently little or no debate, one side simply accepted the claim made by the other.

230 **230**
In this situation, as the cross-examination of Mr Wu disclosed, Aqua Star was in a parlous financial situation. Mr Wu was attending a meeting with Aqua Star's creditors, who might be expected to display a measure of hostility at not having their invoices paid. A 1940s song urged us to «Accentuate the positive – eliminate the negative – latch on to the affirmative …». In a situation such as Mr Wu faced, it was in his company's interest to assert as large a total loss as possible to parry the demands of the CP Group for payment. His incentive was to «accentuate the negative – eliminate the positive». It is fundamentally implausible to suggest that CP (India) accepted these asserted losses «to the max», as Aqua Star's case necessarily entails.

231 **231**
Again, it is striking, though perhaps not conclusive, that no follow-up email mentions acceptance of the $5.6 million losses as a basis for future dealings, or as being accepted by the CP companies for any purpose at all.

232 **232**
Further, the concept of recoupment of losses contained in the agreement as alleged, would be most difficult to implement in practice. The argument seems to be that Aqua Star was entitled to have further dealings with CP (India) until the debit for the $5.6 million losses claimed by Aqua Star was wiped out by the total of the discounts which Aqua Star was, from November 2018, to be offered on CP (India) stock.

233 **233**
The expressions used varied between «best prices», «competitive prices» and «break-even prices», that is prices for product which offered CP (India) no profit margin at all but merely covered its costs.

234 **234**
In his submissions in reply, Mr Clarke KC quoted passages from Mr Bhatkoorse's evidence in cross-examination at T427–8, 453–4, 536, 537, 538 and 539 covering these issues, where Mr Bhatkoorse gave varying and inconsistent accounts of the price regime which was to rule

after November 2018. The total effect is almost ludicrous with inconsistent terminologies, different formulae and so forth.

235 **235**
If the agreement were as alleged by Aqua Star, there would be fundamental difficulties in its implementation. How, for instance, could one judge if the prices met the relevant criterion, assuming a particular formulation of the price regime was adopted. Is a «break even» price to be calculated by reference to a direct cost for CP (India) or based on a concept of total absorption, which would allocate a share of overhead costs, as well as direct costs, to the price of an individual container of crustaceans?

236 **236**
If the criterion for price was that it was more favourable than what was charged to other customers, were there other customers in 2018 who could realistically be regarded as comparable to Aqua Star? This was not really explored in evidence. Commercial parties may make agreements which entail unworkable mechanisms and formulae. Nevertheless, it is unlikely that commercial parties should make such agreements. On the balance of probabilities, I reject the contention that there was an agreement at the November 2018 Kuala Lumpur meeting which entailed:

(a) an acceptance by the CP Group that they were responsible for US$5.6 million in losses sustained by Aqua Star;

(b) that Aqua Star had an entitlement to be offered a special price regime into the future until the total discounts which it received equalled US$5.6 million.

237 **237**
There were copious references to CP (India) «supporting» Aqua Star contained in the accounts given in evidence of the Kuala Lumpur meeting. It is far more likely that these were mere bromines or the sort of «puffery» which commercial parties utter in the course of negotiating dealings between one another, asserting mutual commitments to share in building the profitability of both and so forth.

238 **238**
Again, CP (India) offered a distinct discount which, all parties accept, was offered and agreed to at the Kuala Lumpur meeting. The most likely interpretation is that this was the sole concession which CP (India) was prepared to make, and that it simply did not enter into a debate as to the alleged $5.6 million, and agreed that it was responsible for it, or that it accepted responsibility for the «brunt» of those losses on behalf of CP (India) or CP (Thailand).

239 **239**
Another term of the agreement which, according to Aqua Star's Counterclaim, and agreed at Kuala Lumpur, was that «CP (India) would continue to supply product to [Aqua Star] subject to payment by transferable letter of credit». In cross-examination on this subject, Mr Bhatkoorse said «In the Kuala Lumpur meeting we told [Mr Wu and Aqua Star] that in the future we could do business, provided it should be LC basis.» (T509, 30 – T510, L1)

240 **240**
Mr Bhatkoorse agreed with my characterisation of this stipulation:

> «The effect of the letter of credit is to have a promise from a party that is presumed to be solvent that payment will be made and you don't part with control of the documents until you have the letter of credit. Is that the way it works?» (T510, L4–8)

241 **241**
He agreed that this entailed CP (India) receiving «an assurance of payment from a third party» which «scrubbed» the credit risk (*Ibid*, 9–11).

242 **242**
It is unsurprising that CP (India) would insist on such an arrangement given that the Kuala Lumpur meeting was being held to deal with a multimillion-dollar arrears in payments by Aqua Star for CP (India's) product.

243 **243**
Mr Clarke KC put to Mr Bhatkoorse:

> «The upshot…of the difference between a transferrable letter of credit and a direct letter of credit is that under a direct letter of credit you find out what the purchase price is, or the sale price as well as the purchase price?» *(Ibid*, L12–16)

244 **244**
Mr Bhatkoorse responded that he had received advice from CP (India's) credit control team and the transferable letter of credit, which had been proffered by Mr Kenny Ma on behalf of Aqua Star, was refused. The analysis by CP (India's) credit control «team» is set out at [81] above. Were there any flaw in the team's reasoning, I would have expected Mr Clarke KC to have pointed it out. CP (India) would not have agreed to an arrangement which did not «scrub» its credit risk. The refusal of the transferable letter of credit regime, as proposed by Aqua Star, had the result that the further sale transactions after the Kuala Lumpur meeting went forward with Aqua Star as a mere commission agent with no ability to derive any credit margin beyond the commission which CP (India) was prepared to grant it. This could be regarded as radically at odds with the regime of CP (India) offering «low», «competitive», «market», «break-even» price, leaving Aqua Star with scope to derive substantial profit.

245 **245**
To that extent, the hopes which might have been entertained at Kuala Lumpur were not realised. I have already explained why I do not accept that CP (India) committed itself contractually to offer low prices as part of a regime ultimately to recoup for Aqua Star losses of $5.6 million. Aqua Star's case is that this outcome occurred because CP (India), being obliged contractually to accept transferable letters of credit in breach of contract, declined to provide product on a transferable letter of credit basis «in or about January 2019» (Fifth Amended Defence and Counterclaim, Paragraph 10C), and thereby repudiated the Kuala Lumpur agreement (*Ibid*, Paragraph 10D).

246 **246**
The finding of repudiation can only be made against CP (India) if it was in breach of the Kuala Lumpur agreement by declining to accept transferable letters of credit.

247 **247**
Mr Bhatkoorse, in the passages quoted, did not accept that it was agreed at Kuala Lumpur that CP (India) would accept transferable letters of credit.

248 **248**
In evidence-in-chief, Mr Wu described the discussion as to letters of credit at Kuala Lumpur as follows. He said Mr Wichit stated, «Because your company is owing too much money so for future businesses you won't be able to pay with TT» (T831, L26–29). Mr Wu continued «At the time they only mentioned it has to be used by letter of credit but it was not specified that we cannot use transferrable letter of credit.» (T832, L6–9)

249 **249**
Mr Wu said that after Mr Bhatkoorse had rejected the transferable letter of credit, he had a number of telephone conversations with Mr Wichit, seeking to persuade him otherwise. He said:

> «I was hoping that Mr Wichit was able to accept a transferrable letter of credit, because with transferrable LC, this is a very common way for doing business for three parties and so it's a very easy way. However, they insisted on not accepting it.» (T844, L22–27)

250 **250**
The upshot seems to be that there was no distinct agreement as to the use of a transferable letter of credit which would entail, as the explanation from the «credit team» explained, in effect two letters of credit and on their reasoning, no diminution of CP (India)'s credit risk.

251 **251**
What is the normal meaning of an agreement that goods will be supplied on a «LC basis»? I would have thought that in a straightforward international sale transaction the normal and ordinary meaning of that phrase would be that the buyer would establish an irrevocable letter of credit issued by the buyer's bank, which might or might not be confirmed by a bank in the exporter's country.

252 **252**
In cross-examination by Mr Moon, asked why Aqua Star did not use such a letter of credit, Mr Wu replied «because we didn't have any quota from the bank for carrying out the LC. We have never done that before.» (T1200, L28–30) This meant there was no security or funds to be lodged with the issuing bank to secure it for the liabilities it would have undertaken in establishing the letter of credit (T1200, L31 – T1201, L2).

253 **253**
Given that it is not alleged or proven that CP (India) agreed to a transferable letter of credit to secure its rights as seller in future transactions, as distinct from an orthodox letter of credit as just described, there was no repudiation.

254 **254**
The «compromise» at Kuala Lumpur which, for reasons I have already given, did not include an expiry date for the US$1 per kilogram discount, did require the use of orthodox letters of credit for future transactions but did not authorise the use of transferable letters of credit and did not include a contractual promise that future sale transactions would be at some specific low price. The evidence shows no breach of this Kuala Lumpur agreement by CP (India).

255 **255**
Given that part of the deal was that, as Aqua Star said, it refrained from pressing a cross-claim based on antibiotic contamination of the CP (India) product and white spot contamination of the product supplied by CP (Thailand) and CP (Malaysia), such a compromise agreement would, on any view, be supported by good consideration. The finding that CP (India) did not repudiate the Kuala Lumpur agreement would lead to the result that whether CP (India's) product was antibiotic contaminated or not, any claim in that regard was «bargained away» at Kuala Lumpur.

256 **256**
Should I be wrong in that conclusion, I will proceed to consider whether, assuming Aqua Star did not «bargain away» its rights to complain about antibiotic contamination at the Kuala Lumpur meeting, it has a good cause of action in that regard.

257 **257**
There was an express contractual stipulation that the product supplied to Aqua Star would be «100% antibiotic free». As a result of the late amendment, for which I granted leave earlier in these reasons, the product might also have to be judged as to its fitness for purpose by reference to «Australian standards» – whatever they may be.

258 **258**
Aqua Star's case was that, as to the express contractual obligation to provide product which was 100 per cent antibiotic free, the Guolian and Guangdong reports demonstrate that CP (India) was in breach of that express contractual obligation as to each container found in those reports to contain contamination. Crucially, this contention depends upon the reliability of the Guolian and Guangdong reports.

259 **259**
CP (India) relied on the evidence of Dr Leeder, an analytical chemist, who said that he had:

> «run analytical laboratories specifically designed to test for trace chemical residues for over 30 years…[His] area of expertise is not in microbiology or it's not in a biological field, it is solely in analytical chemistry.» (T1103, L7–11)

260 **260**
He said that he was an auditor for the National Association of Testing Authorities – NATA, testing for chemical residues (T1102, L31 – T1103, L12–13) He said the international recognised standard for accreditation of laboratories to carry out food testing, according to various international standards, was ISO 17025. His laboratory was accredited in that regard (T1103).

261 **261**
In his report dated 18 June 2023, Dr Leeder responded to the question «Is it possible for shrimp to be supplied 100% antibiotics free?» as follows:

> «The statement is scientifically very ambiguous. Unless you specify a reporting limit (LOR) for the antibiotic or any chemical residue, the answer would be no.
>
> Every five to ten years, the detection limit (DL) and reporting limits (RL) on scientific instrumentation, used for this analysis, decreases by an order of magnitude. We are now at a point where laboratories using the most sophisticated analytical instruments are able to detect ultra-trace levels of antibiotics in a wide range of samples. This can be found globally where samples collected from the Arctic to the Antarctica have been found to be positive down to the lowest reporting limits achievable. Our laboratory is currently detecting chemicals of concern in potable drinking water sample down to part per quadrillion (ppq), 1 part in 10 parts.» (CB 2188)

262 **262**
The effect of this answer would seem to be that product can only be judged antibiotic free by reference to some detection limit or reporting limit.

263 **263**
When asked about the testing regime in India, which found CP (India's) product to be antibiotic free, he noted the adoption in India of the European Union's Codex test methodology by Indian laboratories, which he said use «High Performance Liquid Chromatography-Tandem Mass Spectroscopy (HPLC-MS/MS)» (*Ibid*) which he said followed «the EU regulation for analysis and quality». He continued:

> «The Indian analysis reports indicate they have adhered to quality standards by identifying items such as standard operating procedures (SOP), validation protocol and method performance limits. The Indian analytical reports also list the limits of quantitation (LOQ) for the method as well as the levels obtained from spiked recovery tests. The level obtained for the recoveries is an important factor, as it measures the effectiveness of the extraction and analytical method used.» (*Ibid*)

264 **264**
As to the standards used by Chinese laboratories, Dr Leeder said that they were:

> «similar in framework from an analysis point of view to the European standard. However, they do not contain the detail the EU prescribes in the assessment and the acceptance or rejection criteria of the analytical (test) data as well as reporting

> requirements. The Guolian report doesn't not [*sic*] contain the same level of validation and quality information that the EU prescribes.» (CB 2189)

265 **265**
As to antibiotic residues described as AOZ, AMOZ and SEM, Dr Leeder said the Chinese methodology was:

> «a suitable test method for the detection of Nitrofuran residues. The Chinese method however, does not list any QC requirements, data assessment criteria for the acceptance or rejection of data nor does it list the reporting requirements.» (CB 2190)

266 **266**
Dr Leeder, comparing the reports from Guolian and Guangdong, noted a differential LOD *viz* limit of detection. He said:

> «The LOD can be a reflection on the age of the LC-MS technology, as the more modern instruments tend to have a lower limit of detection (higher sensitivity). The Guangdong LOD's [*sic*] are higher than those for Guolian suggesting their laboratory technology is older and less sensitive. Given the limits of detection from both laboratories is lower than the MRL for each antibiotic it should have no specific impact on the final results» (CB 2199)

267 **267**
Dr Leeder detected what he said were inconsistencies between the Guolian and Guangdong reports which, as I understood his report and evidence in cross-examination, led him to regard both sets of reports as being unreliable (CB 2200–2202). He noted inconsistencies in the reports and said:

> «I would expect that if a residue was detected by a competent testing laboratory in prawns harvested from a specific aquaculture farm that the residue would also be detected in the following months.
>
> … The different compounds being reported from the same farms in similar time periods is not possible. This data review, in addition to the three laboratory comparisons, strongly suggests that the data is not accurate or precise, that the test method appear to be out of control and that they are generating random numbers.» (CB 2200)

268 **268**
Aqua Star relied on evidence from Dr Robert Monckton, a retired gentleman acting as a consultant; the holder of the Degrees of Bachelor of Science, Doctor of Philosophy and a Graduate Diploma in Management (T1038, L13–17). He said that for some 11 years he was the proprietor of an enterprise in the business «of testing for food and environmental samples». He said he had «a microbiological point of view of understanding the use of antibiotics» (*Ibid*, L26–31).

269 **269**
His expertise is in molecular biology rather than analytical chemistry, which are different fields (T1045, L2–6). He agreed that whilst he was «running an analytical chemistry laboratory» he did not operate the mass spectrometer himself but, nevertheless, had an intimate knowledge and worked with the staff every day in that respect (T1045, L10–17). He said his consultancy was «strictly and specifically on the basis of quality management» (*Ibid*, L19–20).

270 **270**
He has and continues to provide consultancy services to an organisation known as «AgriGen Pty Ltd» (*Ibid,* L21–24). He continues to consult for AgriGen about one or two days per month (T1046, L6–10). He agreed that AgriGen provides services to the defendant, Aqua Star (*Ibid*, L23–25).

271 **271**
Dr Monckton said he met the principal of Aqua Star, Mr Allen Wu, in 2016 or 2017, «when there were issues to do with the Departure of Agriculture» (T1046, L28–29) and he wanted specific advice with regard to the Department of Agriculture in the testing of prawns where they were being rejected on the basis of containing white spot virus. He said he was present and met Mr Wu at the department and specifically talked to the Department to clarify matters regarding white spot. He was in company with Mr Wu during these talks (*Ibid*, L26 – T1047, L8).

272 **272**
Dr Monckton said that he worked «as the director of research at the National Measurement Institute», and in that regard was «in charge of all the chemical and all of the development and research chemistry» (T1042, L2–6). At the time the body of which he was director was called «AGAL, the Australian Government Analytical Laboratory» (*Ibid,* L9–11).

273 **273**
In his report, Dr Monckton noted:

> «The use of antibiotics in particular have seen increasing usage in Asian aquaculture in the last few years. However the World Health Organisation (WHO) and the Food and Agricultural Organisation (FAO) have become increasingly involved to specifically limit or eliminate where possible the use of antibiotics in aquaculture for reason of significant increased risks of multiply resistant bacterial microrganisms [*sic*] entering the food chain and being significantly detrimental to human health with this increased bacterial antibiotic resistance.» (CB 2305–6)

274 **274**
Referring to the Guolian report, Dr Monckton said:

> «These reports on my examination of the copies supplied would all appear to be genuine and accurate to the level of information that they supply with regard to the determination of chemicals, antibiotics and their residues in the prawn samples as supplied and identified.» (CB 2314)

275 **275**
He continued:

> «A short summary of the results compiled from the from [*sic*] these original reports of only the antibiotics chemicals or residues which were detected and exceeded the permitted levels of the residues permitted for sale in the Australian market under the specific MRLs [Maximum Residue Levels] … and refused by the processor in China on account of these residues being detected in the specific samples ...» (*Ibid*)

276 **276**
He said that having examined the report:

> «as representative samples of the individual batches ordered, I would conclude that three of the four Nitrofuran antibiotics, the Sulphonamide antibiotics and the antibiotic Chloramphenicol were each used at some point in the prawn growing aquaculture conducted during this whole period to attempt to suppress potential microbiological diseases.» (CB 2316)

277 **277**
Dr Monckton furnished a supplementary report which is Exhibit CHT-4 to the affidavit of Mr Chong Hao Toh sworn 20 September this year. The purpose of this supplementary report was to respond to the report of Dr Leeder. According to Dr Monckton:

> «… the actual raw data of the analysis will have been retained by the laboratory but is proprietary to that laboratory and is not provided to clients. It is an entirely unrealistic and an unnecessary process of trying to impose some uniform higher level of testing standards on a private commercial Chinese laboratory or to suggest that it didn't meet proper testing standards fit for purpose to meet those Chinese standards. The results simply have to be fit for purpose for the client and able to identify the chemical signal of the antibiotic residue being looked for is present or not.»

278 **278**
He said:

> «There is no specific international requirement to follow any specific European or other method except where a fully accredited lab to the highest international ISO 17025 standards may chose to provide any analysis by that method if they have adopted it as the basis of their testing method. The Chinese laboratories have chosen specific methods based on published methods and adopted in house and tested using control positive and negative materials to be fit for purpose and reproduceable in the hands of their technicians and equipment to provide a test report that is accurate and fit for purpose for identifying the residues for which they are testing on a regular basis.»

279 **279**
Dr Monckton said:

> «The importer would not be expected to have sufficient knowledge to question whether the additional quality data set should be requested or any raw data to be examined by a further technical party. Neither would the importer be able to judge or need to establish a requirement to repeat any sample or to refer to any other external laboratory to referee any result obtained. This is not usually done by a private consultative laboratory confident in their own results and providing them. Private individual laboratories are not normally refereed.»

280 **280**
As to the mode of testing adopted in China, and relied on in this proceeding by Aqua Star, its then solicitor, Jacky Cheung, made an affidavit on 25 March 2022 describing the testing process.

> «26. I am informed principally by Mr Liang and believe that the testing process is as follows:
>
> 27. For each consignment sent to Guangdong Gourmet, testing is performed by ZGAP according to the instructions provided by Guangdong Gourmet.
>
> 28. The samples are taken from the consignments at random by the ZGAP quality control team. The Head of Department of the quality control team at ZGAP is Mr Hong Ye Zhang. Usually, 15 samples are taken.
>
> 29. The samples are then sent to the ZGAP laboratory for testing. The Head of Department of the testing laboratory is Dr Daoshi Zhou. The person responsible for the testing of samples is Mr Wei Min Liang.
>
> 30. The testing process occurs by Mr Liang receiving the 15 samples. Each sample is one prawn cut into small pieces. The samples are then given a batch number in the form of 'Batch No – Sample No.' Each sample with the batch number then has a number of chemicals added, then the product is dried, another solution applied, and then the sample is inserted into the testing machine, a Sciex Triple Quad 4500. The type of test to be performed can be selected on the machine. The result is displayed on a monitor and is recorded manually in a log book.
>
> 31. Once all the samples for the consignment are tested and recorded in the log book, the highest value for the relevant 'testing item' from the 15 samples is then inputted into a software program that allows a report to be generated called the 'Test Report.'
>
> 32. The Test Report includes the 'PO#' (Purchase Order Number) which number relates to the consignment so as to know from which container the batch of samples originated. It also includes the received date and the inspection (testing) date.
>
> 33. The log book records and the Test Reports are sent to Mr Ming Mei Chen for record keeping purposes.» (CB 354–355)

281 **281**
Dr Leeder regarded the European Union standards, which he said were applied by the Indian laboratory, as being a more reliable approach to testing. He said:

> «The samples being collected from the container – whether it's a 40 foot reefer or a 20 foot reefer – the samples should be collected in an appropriate statistical manner. They should be homogenised, they should be representative of what the commodity is or what that container – that is the whole foundation of international trade of food.» (T1124, L19–25)

282 **282**
Dr Leeder, it will be recalled, described the Guolian and Guangdong testing regime as «out of control». He said he noted inconsistencies between the two reports. He referred to an analogy:

> «… a split blood sample for exceeding 0.5. Now, one sample of blood is analysed and it's found to have 0.12 blood alcohol, that second sample goes off to a second laboratory. That blood sample is analysed by that second laboratory. That second laboratory doesn't identify any alcohol, but they detect heroin. That's what we are talking about here – a totally different residue being reported.» (T1112, L21–28)

283 **283**
Dr Leeder's observations about the importance of the international regime are significant. The situation such as the one confronting here, where one laboratory «clears» containers of food product and the other condemns it as contaminated is inconvenient to say the least. More than five years after the event, with the product in question long since sold and consumed, we are still involved with what looks an increasingly sterile debate.

284 **284**
Cross-examination of the experts canvassed many possibilities as to why different farms might or might not be contaminated; different pools in the same farm might or might not be contaminated; or different parts of the product in a particular container might or might not be contaminated. A regime which seeks to minimise or ideally eliminate that sort of uncertainty is plainly desirable. One may think reasonable business people in the international food trade, in stipulating for product to be «100% free» of the particular substance or substances, would have such a regime in mind in the interests of certainty.

285 **285**
The regime described by Dr Leeder, which includes *inter alia* split samples to enable second tests to be carried out to resolve disputes, is best calculated to achieve certainty and produce reliable results. Dr Leeder repeatedly described this sort of regime as the basis of international food testing and trade. He was not challenged on this proposition, though he was challenged on many others.

286 **286**
Dr Leeder's proposition that inconsistencies between the Guolian reports and the Guangdong reports indicates that the one, the other, or both laboratories as «out of control» raises more

difficult issues. The premise of his conclusion appears to be that the two laboratories, in effect, tested the same thing and came to different results.

287 **287**
I asked Dr Leeder «So … the key to the validity of the comparison. As far as you're concerned, it's from the same farm? (T1123, L27–29) Dr Leeder said, «That's correct» (*Ibid,* L29).

288 **288**
I have previously observed:

> «in my understanding, the sampling that takes place is a sample from the container as a whole – and each container, according to the evidence that we heard earlier, would contain material from four different ponds.» (*Ibid*, L17–21)

289 **289**
Dr Leeder said «I'm not concerned if the prawns come from pond one, two, three, four or five or six. If the prawns are coming from the same licence holder…» (*Ibid*, L23–26) – *viz* the same farm.

290 **290**
Dr Leeder agreed that the samples tested in the Indian laboratory were not the same as the samples tested in the Chinese laboratory. This was not a case where the samples had been split (T1125, L6–9).

291 **291**
Whilst Dr Leeder agreed that there might be differential levels of contamination in prawns, even taken from the same pond at the same time, the representative sampling «should iron out [this] sort of anomaly» (T1137, L4–18).

292 **292**
As an example of the inconsistencies in the results of which he spoke, Dr Leeder was taken in cross-examination to a table at Court Book 2300, and the results referred to for three purchase orders: 1690, 0458 and 0460. In the final column of the table headed «Date of validity», Dr Leeder made the comment «not possible».

293 **293**
Mr Clarke KC put to Dr Leeder that, according to Dr Leeder's reasoning, «It's not possible to have different results because they came from the same one pond at one farm» (T1139, L13–15). Dr Leeder gave a lengthy and somewhat discursive answer which indicated that he proceeded on the basis that the samples would all have come from «the same aquaculture property» (*Ibid*, L9–11, 18–31). He added his opinion that the results were «not possible» was «based on [the sample or samples] coming from actually the same aquaculture farm, 3315.» (T1140, L2–6)

294 **294**
Mr Clarke KC then proceeded to a lengthy analysis of a number of different documents, including Dr Leeder's table. Following an analysis of these documents, Dr Leeder conceded

that the composite sample, which was tested by the Indian laboratory relative to purchase order 1701690, came from two different farms (T1142, L3–5, L25–31).

295 **295**
Dr Leeder agreed that the documents available to him should have enabled him to determine that the sample in question came from two different farms (T1143, L28–31). Dr Leeder therefore «step[ped] back» from his confident conclusion of «not possible», «If the shipments are from multiple farms» (T1149, L17–19).

296 **296**
Mr Clarke KC took Dr Leeder to a series of other purchase orders comparing them to the table at Court Book 2300, to reinforce his critique. As a result of the cross-examination, when re-examined by Mr Moon, Dr Leeder said he withdrew his conclusion that certain results were not possible, but he was of the view that they were dubious (T1157, L11–18).

297 **297**
Dr Leeder said that the result of antibiotic testing would be «relatively homogenous» across a particular farm, continuing:

> «they wouldn't choose antibiotic A for pond 1, antibiotic X for pond 8. They would acquire a product, if they were to use it, and they would be using the … same product across the property.» (T1158, L15–19)

298 **298**
Dr Leeder said he regarded the homogenising process as important to obtain a representative sample. The affidavit material quoted above appeared to indicate that whilst that was part of the Chinese government approved methodology, it had not been applied here (T1160).

299 **299**
Dr Leeder said methodologically he regarded the Indian tests as more reliable. As to the Chinese tests, as described in the affidavit material:

> «We're looking at smaller and smaller sample size that is not statistically representative so that should give us a lower and lower chance of detecting a positive. But what we see in all the Chinese reports is every shipment is positive for different chemical residues.» (T1162, L17–22)

300 **300**
What are we to make of all this?

301 **301**
First, I accept Dr Leeder's evidence that antibiotics may be found anywhere in the environment for a variety of reasons. The concept of absolute zero is unrealistic and, contractually, commercial parties who agree on «100% antibiotic free» product must be regarded as stipulating for test results of «not detected» according to recognised international standards. This allows for the possibility that antibiotic is present but is not capable of being detected by the instruments used in the testing. It may also allow for certain tolerances.

302 **302**
Both Drs Leeder and Monckton are experts in this area. However, Dr Leeder's expertise is more directly relevant to the issues before us than Dr Monckton's expertise in microbiology.

303 **303**
Insofar as Dr Monckton has commented that laboratories are entitled to adopt their own methodologies and cannot have them imposed externally, no doubt this is correct. Nevertheless, in an international context, internationally recognised standards, such as the ones described by Dr Leeder and apparently applied by the Indian testing laboratories, have greater credibility. In particular, the sampling processes described by Dr Leeder and, according to him, part of the Chinese methodology, were not, according to the affidavit material, applied by the Chinese laboratories. The Indian results are likely to be more reliable for that reason.

304 **304**
Even although the premise of Dr Leeder's downright condemnations of the Chinese results were disposed of in cross-examination, I nevertheless accept his conclusion that the variety of different findings as to different antibiotic chemicals in the Chinese test results marks them as somewhat dubious. For these reasons, I am not persuaded that the express contractual obligation to provide 100 per cent antibiotic free product is shown to have been breached in this case.

305 **305**
I turn next to the issue of the Australian standards which would be invoked if it is found that the condition implied by s19(a) of the *Goods Act* as to fitness for purpose (though, in these circumstances, enforceable only as a warranty) formed part of this contract and whether, if so, it was breached.

306 **306**
The first question was whether, in the circumstances, the *Goods Act* would imply the term as to fitness for purpose.

307 **307**
Mr Moon correctly contended that the relevant purpose must be made known before or at the time the contract is entered into. He said further that it must be stated with a sufficient degree of precision to indicate the specific quality or use which the buyer has in mind. He referred to Sutton *Sales and Consumer Law*, 4th edition [9.20]. He said further that a review of the email traffic showed that there was:

> «simply no mention of Australia in any of the emails passing between Mr Bhatkoorse and Messrs Wu and Ma at any time before or when the Goods were ordered.» (Plaintiff's Closing Submissions, [371])

308 **308**
He said further, in any event, there was an express stipulation limiting any liability which CP (India) might have to a 10 per cent price reduction. Such a limitation of liability, he said, was authorised by s 61 of the *Goods Act*.

309 **309**
In reply submissions, Mr Clarke KC made no direct response to Mr Moon's contentions on this point.

310 **310**
As to these matters, Aqua Star relied upon a number of documents set out in the particulars to the proposed amendment. See [190] above.

311 **311**
Amongst the documents referred to was an email from Mr Bhatkoorse dated 25 May 2017 under the heading «News: Australia relaxes disease declaration on import shrimps». Mr Bhatkoorse enquired of Mr Ma «Did the Australian Govt. relax the import regulation of Shrimps?» Mr Ma responded saying that an «announcement from Dept of Agriculture is expected later June or July» (Supplementary Court Book 3417).

312 **312**
The next email referred to is dated 20 July 2017 from Mr Ma to Mr Bhatkoorse under the heading «Plan for processing prawn in India export to Australia». Mr Ma said:

> «Recently a lot things going on, especially the releasing of new import condition of uncooked prawns. We just got another update that India authority has confirmed to meet with the new conditions.

This is a good sign for getting processed prawn from India into the country. (Supplementary Court Book 3418)

313 **313**
Mr Ma had sent an earlier email dated 20 June 2017, also under the heading «Plan for processing prawn in India export to Australia» (*Ibid*).

314 **314**
In an email of 14 April 2017 from Mr Ma to Mr Bhatkoorse, once again stressed «All our consignments MUST BE antibiotic free» (Supplementary Court Book 3413).

315 **315**
The particulars refer to other email correspondence to similar effect. The particulars also included reference to a series of transcript passages said to be supportive of Aqua Star having made known to CP (India) its purpose in acquiring the prawns/shrimp via sale into Australia. The table of references is as follows:

Trial Day	Witness	Topic	Transcript No. [paragraph no]
4	Mohan	Visit to CP India Factory	325[26]
		Visit to CP India Factory	326[1] [12]

		Visit to CP India Factory & Chen Han & Guolian	327[9]
		Visit to CP India Factory	330[25]
		Australia	331[2]
		Australia	332[3]
5	Mohan	Guolian	437[30]
		Australia	438[14]
		Guolian	438[19]
		Guolian	439[2]
		Australia	439[7] [22]
		Australia	440[10]
		Australia	441[2]
		Guolian	450[1] [7] [30]
6	Mohan	Guolian	519[6]
		Australia	555[11] [26]
		Guolian	556[3]
		Guolian	592[16]
8	Allen Wu	Visit to CP India Factory	758[2]
		Australia	758[24]
		Australia	759[15]
		Guolian	780[2]
		Guolian	781[26]
		Guolian	782[3]
		Australia	794[22]
		Australia	796[21]

		Australia	797 [1] [7]
9	Allen Wu	Guolian & Chen Han	827[3] [16]
		Chen Han	828[4]

316 **316**
The first reference is to the evidence of Mr Bhatkoorse in chief, where he describes Mr Chang of CP (Malaysia) hosting Mr Allen Wu «with his partner» in India in January 2016. It would seem «the partner» was Mr Chen of Guolian. Other references to the visit at T326, L1–12 refer to the visit to India but do not mention Australia. Likewise, T327, L9. T330, L25 refers to a third visit to India, but again does not mention Australia. At T331, L2, there is reference to Mr Wu's visit «with another one more party called Agri-Gen also from Australia.»

317 **317**
Mr Bhatkoorse said «AgriGen also taught our technical team how the sampling is done in Australia, the sample methodology and all the other things they were explaining.» (*Ibid,* L8–11)

318 **318**
At T331, L31 to T332, L2 referred to a «six-month ban on importation of prawn into Australia.»

319 **319**
At T438, L13–15, Mr Bhatkoorse said the shells were taken off the raw shrimps because it was «not clear to us» *viz* CP (India) «That it is going to Australia or the US…Which market it was meant for, we were not clear about it.» (T438, L12–17)

320 **320**
At T439, Mr Bhatkoorse described a visit he paid to Mr Wu in Melbourne. When asked «The purpose of coming to Melbourne was to find out about the process of delivery of raw prawns into Australia? », he replied «There is a possibility of that we can do the cooked shrimp to Australia. That was it.» (*Ibid*, L20–23)

321 **321**
Mr Bhatkoorse added «but we didn't have the facility of cooking. We didn't have the facility in our factory.» (*Ibid*, L29–31) The reason for importing cooked shrimp to Australia was apparently because there was a ban on the import of raw shrimp to Australia from 6 January 2017 to 30 June 2017 (*Ibid*, L24–26).

322 **322**
Mr Bhatkoorse said the visit to Melbourne was made because «we wanted to see his [*viz* Aqua Star's] facility» (T440, L2–3).

323 **323**
I referred to Dr Monckton's report to the effect that Australia did not have its own shrimp processing factory and therefore processing shrimp for the Australia market took place with production in India, processing in China or Vietnam, and export to Australia, and this was «a familiar pattern of moving shrimp around: export it to China for processing and then into Australia?» Mr Bhatkoorse replied, «That could be possible, sir» (*Ibid*, L12–24). Mr Bhatkoorse agreed that from January 2017 onwards he had been dealing, on behalf of CP (India), with Aqua Star, with weekly discussions with Mr Wu.

324 **324**
Mr Moon objected based on relevance. At that time, the amendment to the Fifth Amended Defence and Counterclaim had not been approved (T441–2).

325 **325**
In his evidence-in-chief, Mr Wu described a visit that he paid to CP (India) in January 2016, at which he met Mr Bhatkoorse. He said he told Mr Bhatkoorse «If there's no white spot [on the shrimp], if they detect it with no white spot, then we will be able to take raw shrimps to Australia.» (T758, L22–24) Mr Wu referred in his evidence-in-chief to email correspondence following the meeting at Kuala Lumpur in September 2018, which refers to the Australian market (T794, L22, to similar effect T796, L20–22).

326 **326**
In a passage not referred to in Mr Clarke KC's table, in re-examination Mr Wu described part of what transpired when he and Mr Chen of Guolian visited CP (India) in 2016. He said:

> «That was a discussion with Mr Mohan [Bhatkoorse] about the assurance for having product that's free from antibiotics and that the products would be processed in China and then sold to Australia fully.» (T1216, L29 – T1217, L2)

327 **327**
Despite Mr Moon's contention to the contrary, these references, both to the *viva voce* evidence and to documents, provide ample support for the view that Aqua Star did make known its purpose of importing shrimp to Australia. In the circumstances, the condition (able to be availed of only as a warranty) implied by s19(a) of the *Goods Act* formed part of this contract, the implied term being that the goods in question would be fit for the purpose of sale in Australia.

328 **328**
The next question is what quality did the shrimp or prawn require to demonstrate to be fit for the purpose of sale in Australia?

329 **329**
Regrettably, since this amendment comes so late, the Australian regulatory regime, which is key to determining whether the product in question was fit for the purpose of sale into the Australian market, was not dealt with in any detail and, perhaps, only in passing in the course of the trial because the amendment was only proposed and permitted at such a late stage.

330 **330**
Mr Clarke KC's contention was that both the expert witnesses, Dr Leeder and Dr Monckton, concurred in the view that the Australian regime tolerated no antibiotic infection at any level and contained no tolerances. Mr Moon did not accept this contention. I invited both counsel, immediately following the close of oral submissions, to provide me with references to the expert evidence, either in support or opposition to Mr Clarke KC's proposition.

331 **331**
Mr Clarke KC provided certain references. He directed me to Dr Monckton's first report (CB 2314–5), which stated that the antibiotic chemicals or residues detected in the Chinese test:

> «exceeded the permitted levels of the residues permitted for sale in the Australian market under the specific MRLs (Zero µg per kg tolerance) of the schedule 20 promulgated by FSANZ and DAFF on their websites.» (CB 2314, [20])

332 **332**
He referred to a lengthy list of residue. He noted that at paragraph 3 of Dr Monckton's supplementary report, Dr Monckton stated «In this case, being an effective zero MRL for antibiotic residues in Australia».

333 **333**
Mr Clarke KC also referred to paragraph 10 of the supplementary report, where Dr Monckton referred to «zero MRL (Maximum Residue Limit) limit for that antibiotic residue for import into Australia».

334 **334**
Mr Clarke KC drew attention to Dr Leeder's evidence in cross-examination where, at T1120, L21–25, Dr Leeder agreed that south-eastern Asian countries such as Vietnam and Malaysia have a greater tolerance or laxer standard than those in Australia, with the United States «in between those two extremes». Dr Leeder also said at T1121, L3–7 that he was unaware of any country with a lower threshold for antibiotics in food than Australia.

335 **335**
Finally, Mr Clarke KC referred to evidence in cross-examination by Dr Leeder at T1152, L31 – T1153, L30, where he was asked as to anything he disagreed with in Dr Monckton's supplementary report. He identified a number of matters not including the statements about Australia's zero tolerance.

336 **336**
If the Chinese reports from Guolian and Guangdong are accepted, there was a clear breach of the relevant implied condition. On the other hand, if those test results are regarded, as Dr Leeder said, as being «out of control» and therefore unreliable, the only evidence as to antibiotic contamination would be the Indian reports. They do not purport to test to absolute zero. On the other hand, given that no doubt all scientific instruments have a limit of detection as to how minute a trace of a particular chemical can be detected, if they are regarded as the more reliable evidence, the allegation of breach of the implied condition would have to fail.

10 per cent discount

337 **337**
As an alternative to a claim for breach of the express or implied terms as to fitness or freedom from antibiotics, Aqua Star relied on an entitlement to a 10 per cent price reduction (Paragraph 4C of the Fifth Amended Defence and Counterclaim). Given that I have not accepted the reliability of the Chinese reports, this discount would not seem to be available.

Disposition

338 **338**
CP (India's) claim therefore succeeds, there being no other Defence or Counterclaim standing against it save for the ones already dealt with. The amount should be reduced by the reinstatement of the discount agreed at the Kuala Lumpur meeting in November 2018. The Counterclaim should be dismissed.

Costs

339 **339**
I have heard no submissions on the question of costs and so they should be reserved.

340 **340**
I direct the parties within 14 days to bring in short Minutes to give effect to these reasons.