IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 101

Suit No 200 of 2016 (Assessment of Damages No 6 of 2019)

Between

(1) Sun Electric Pte Ltd
(2) Sun Electric Power Pte Ltd

… *Plaintiffs*

And

(1) Menrva Solutions Pte Ltd
(2) Chan Lap Fung Bernard

… *Defendants*

And Between

Menrva Solutions Pte Ltd

… *Plaintiff in Counterclaim*

And

Sun Electric Pte Ltd

… *Defendant in Counterclaim*

JUDGMENT

[Contract] — [Contractual terms] — [Rules of construction]
[Contract] — [Contractual terms] — [Common law rectification]
[Contract] — [Remedies] — [Damages]
[Equity] — [Remedies] — [Rectification]

TABLE OF CONTENTS

Sun Electric Pte Ltd and another
v
Menrva Solutions Pte Ltd and another

[2021] SGHC 101

General Division of the High Court — Suit No 200 of 2016 (Assessment of Damages No 6 of 2019)
Vinodh Coomaraswamy J
29 May, 30 September 2019, 30 June, 2 July 2020

7 May 2021 Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

1 The plaintiffs brought this action against the defendants seeking damages for the first defendant's breach of a Consultancy Agreement ("the Agreement") and for both defendants' negligence. The first defendant in turn brought a counterclaim against the first plaintiff seeking damages for the first plaintiff's breach of the Agreement.

2 At the trial of this action: (a) I dismissed the plaintiffs' claims against the defendants, save only for an award of nominal damages for a technical breach of contract; (b) I allowed the first defendant's counterclaim against the first plaintiff; and (c) I accepted the first plaintiff's submission that the first defendant's damages for breach of contract should be assessed separately rather than quantified on the evidence and submissions thus far presented: *Sun Electric*

Pte Ltd and another v Menrva Solutions Pte Ltd and another [2018] SGHC 264 ("the Liability Judgment"). The plaintiffs' appeal against my judgment was dismissed: *Sun Electric Pte Ltd and another v Menrva Solutions Pte Ltd and another* [2019] SGCA 51.

3 My task now is to assess the damages which the first plaintiff must pay to the first defendant for breach of contract.

Background

The earlier proceedings

4 The Liability Judgment sets out in detail the relationship between the parties and the background to their dispute. It should be read together with this judgment. I set out again only those facts which are relevant to the assessment.

5 In 2015, the first plaintiff engaged the first defendant for advice on participating as a market maker in Singapore's electricity futures market. The first plaintiff intended to carry out those market-making activities through its subsidiary, Sun Electric Power Pte Ltd ("SEP"). SEP was a participant in the Enhanced Forward Sales Contract Scheme ("the Scheme") which the Energy Market Authority of Singapore ("EMA") established in 2015. SEP was the second plaintiff in the main action but is not a party to the counterclaim. It is therefore not a party to this assessment.

6 The chief executive officer and director of both the first plaintiff and SEP is Dr Matthew Peloso. The director and shareholder of the first defendant is Mr Bernard Chan. Mr Chan was the second defendant in the main action but is not a party to the counterclaim. He too is not a party to this assessment.

The parties' agreement

7 The parties negotiated and entered into the Agreement in April 2015.[1] The recitals to the Agreement identify the contractual counterparties:[2]

> This consulting agreement (the "*Agreement*") is made on this 3nd [*sic*] day of April of the year 2015 between
>
> 1. Sun Electric Pte Ltd, a company incorporated under the laws of Singapore … ("**SE**"); and
>
> 2. Menrva Solutions Pte Ltd, a company incorporated under the laws of Singapore … (the "**Consultant**").
>
> WHEREAS, SE wishes to appoint the Consultant ….
>
> [emphasis in original]

8 It is an important point that the Agreement expressly defines "SE" in the first recital to mean "Sun Electric Pte Ltd", *ie,* the first plaintiff. The Agreement gives "SE" no wider definition and no other definition anywhere else.

9 In this judgment, I use "SE" (*ie*, set off by quotation marks) to refer specifically and only to the defined term "SE" as it is used in the Agreement. Further, for reasons which will become apparent, in all quotations from the documents in this matter, I will not replace the parties' names or expand any defined terms which appear in the original text.

Clause 3 of the Agreement

10 Clause 3 of the Agreement prescribes the fees that the first plaintiff was to pay the first defendant under the Agreement. The fees were to be calculated

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1 Agreed Bundle ("AB") vol 2 at 883, 1062; Notes of Evidence ("NEs"), 30 June 2020, at p 34, lines 18–23.

2 AB vol 2 at 908.

on a sliding scale as a percentage of the "Total Annual Receipt", a term defined in the Agreement:[3]

> **3. Fees**
>
> a. Upon SE successfully concluding a Definitive Agreement with the [market-making partner] ("MM Partner"), SE will receive a net positive payment from the [EMA] and the MM Partner under the [Scheme] over the 12 quarters of the Market Making Obligations Period.
>
> b. The "Total Annual Receipt" will consist of net positive payment as fixed annual payment and 4 quarterly payments. There are 3 Total Annual Receipts over the Market Making Obligation Period. For each Total Annual Receipt the Consultant shall receive fee [*sic*] from SE based on the following Schedule:

Total Annual Receipt from MM Partner and EMA/SPS	Net Positive Payment %	Investment Percentage
First SG$1,000,000	15%	30%
Next SG$1,000,000	10%	25%
Next SG$1,000,000	8%	20%
Next SG$1,000,000 and above	7%	15%

> c. If SE receives a minimal fixed annual payment, the Consultant shall get the Schedule 10 business days after SE receives such payment.
>
> d. If SE receives a quarterly payment, the Consultant shall receive the Schedule 10 working days after the quarterly settlement on a pro-rata basis, with the payment in the fourth quarter of the year making adjustment to comply with the Total Annual Receipts as per above table [*sic*].
>
> e. In the event a part of the Total Annual Receipt is deferred and then released, such payment is considered as a part of the Schedule of the original year. The payment to the Consultant is to be settled 10 working days after SE receives such payment.

[3] AB vol 2 at 908.

> f. All fees or other payments due to Consultant under this Agreement will be made by check or bank transfer. No payments will be made in cash or bearer instruments. No payments due to Consultant hereunder will be made to any third party.

11 The subject matter of cl 4 of the Agreement is an investment which the parties envisaged the first defendant would make in one of the first plaintiff's infrastructure projects or in the first plaintiff itself:[4]

> **4. Investment of Consultant**
>
> a. The consultant [*sic*] will invest a minimum of Investment Percentage corresponding to Total Annual Receipt of any fees received from Sun Electric into either an infrastructure project of SE or the equity of Sun Electric Pte Ltd at the prevalent price at the time of receipt of fees, or prevalent price at the time of Investment, at the discretion of the Consultant.
>
> b. Such investments shall be subscribed under the ordinary terms of a Private Equity subscription as determined by Sun Electric Pte Ltd, the stamp duty of which shall be borne by Consultant.

12 After entering into the Agreement, on the advice of the first defendant, SEP entered into seven contracts for differences ("CFDs") between June and December 2015 as a hedge against the risks of participating in the Scheme.[5] SEP made a gain on the first CFD of $353,280[6] but suffered losses of just under $1.46m[7] on the remaining six CFDs: Liability Judgment at [22].

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4 AB vol 2 at 908.

5 AB vol 4 at 2177, 2241, 2465 and 2645; AB vol 5 at 2796 and 2836; AB vol 6 at 3637.

6 AB vol 4 at 2516.

7 Statement of Claim at para 18.

The issues

13 It is common ground that the measure of the first defendant's damages is the amount of fees which the first defendant would have received under the Agreement in accordance with cl 3(b) if the first plaintiff had not breached the Agreement. It is also common ground[8] that, on its best case, the fees which the first defendant would have received under the Agreement amount to just under $1.5m.[9]

14 The first plaintiff submits, however, that the first defendant is entitled only to nominal damages or to substantially less than its best case on damages on the following three grounds:

(a) First, the first plaintiff submits that the first defendant's entitlement under the Agreement was to receive fees on payments which the EMA made under the Scheme to *the first plaintiff*. In fact, the EMA made no payments at all under the Scheme to the first plaintiff. The EMA made all the payments under the Scheme to *SEP*.[10] The first defendant would have received no fees under the Agreement and is therefore entitled only to nominal damages. I shall refer to this ground as "the entity ground".

(b) Second, and in any event, the first plaintiff submits that the first defendant is obliged to deduct SEP's gains and losses on the CFDs from the Total Annual Receipt (as defined in the Agreement) *before*

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8 First Defendant's Opening Statement ("D1OS") at [13]–[14]; First Plaintiff's Opening Statement ("P1OS") at A-1–A-3.

9 D1OS at [13]–[14].

10 P1OS at [2].

calculating its fees by applying the percentages on the sliding scale set out in cl 3(b). I shall refer to this ground as "the CFD ground".

(c) Finally, the plaintiff submits that the quantum of the first defendant's damages must take into account the likely current value of the investments envisaged by cl 4 of the Agreement.[11] I shall refer to this ground as "the Clause 4 ground".

15 The parties' respective cases are best illustrated by the formulas which they have come up with for calculating the first defendant's damages. In these formulas, the "August Payment" refers to the first plaintiff's payment of $52,992 to the first defendant in August 2015 arising from SEP's gain on the first CFD.[12]

16 The first defendant advances only one following formula, its best case, which disregards both the CFD ground and the Clause 4 ground:[13]

> Damages = FSC payments × Applicable percentages – August Payment

17 The first plaintiff advances three formulas, each in the alternative.[14]

(a) The first formula takes into account both the CFD ground and the Clause 4 ground:

> Damages = (FSC payments + CFD payment gains – CFD payment losses) × Applicable percentages – Investment sums – August Payment

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11 P1OS at [3].

12 D1OS at [14]; P1CS at [25].

13 D1OS at [13]–[14].

14 See P1OS at A-1–A-3.

(b) The second formula takes into account the CFD ground but not the Clause 4 ground:

Damages = (FSC payments + CFD payment gains – CFD payment losses) × Applicable percentages – August Payment

(c) The last formula takes into account the Clause 4 ground but not the CFD ground:

Damages = FSC payments × Applicable percentages – Investment sums

Preliminary issue on pleadings

18 Before addressing the substance of the first plaintiff's case, I must first address two preliminary issues which the first defendant raises on the entity ground and the Clause 4 ground.

The entity ground

19 The first defendant submits that the first plaintiff is precluded from relying on the entity ground.[15] There are four strands to this submission: (a) the entity ground goes towards liability and therefore should have been raised at the liability stage;[16] (b) the entity ground contradicts a position taken by the first plaintiff at the liability stage;[17] (c) the first plaintiff did not rely on the entity ground when it asked me at the liability stage to order the first defendant's damages to be assessed; and (d) the first plaintiff has failed to plead the entity ground. I analyse these four strands in turn.

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15 D1OS at [33] and [36]; First Defendant's Closing Submissions ("MCS") at [47]; NEs, 30 September 2019, at p 9, lines 12–20.

16 NEs, 30 September 2019, at p 3, lines 20–22.

17 NEs, 30 September 2019, at p 9, lines 21–27; p 11, lines 6–15.

Liability or quantum

20 On the first strand, the first defendant draws an analogy between this case and *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd (Direct Services (HK) Ltd, third party)* [2006] 2 SLR(R) 268 ("*Emjay Enterprises*"). In *Emjay Enterprises*, the defendant was refused leave at the assessment stage to adduce new evidence necessary to rely on a limitation of liability clause. Phang J (as he then was) held that the limitation of liability clause went to liability and not to quantum: *Emjay Enterprises* at [12], [25] and [27]. It was therefore too late for the defendant to raise it at the assessment stage.

21 The entity ground is quite different from the limitation of liability clause in *Emjay Enterprises*. It is indisputable that the parties to the Agreement are the first plaintiff and the first defendant. The entity ground therefore cannot possibly have been relevant to my holding at the liability stage. The entity ground can affect only the quantum of damages that the first defendant can recover for the first plaintiff's breach. If I accept the entity ground and find that the first defendant would have received no fees under the Agreement, the first defendant will recover only nominal damages. On the other hand, if I reject the entity ground, the first defendant will recover substantial damages.

22 The entity ground therefore goes only to quantum and not at all to liability. I reject the first strand of the first defendant's preliminary issue on the entity ground.

Res judicata

23 As for the second strand, the first plaintiff accepts that it is taking a position now which is contrary to the position it took at the liability stage.[18] The first plaintiff's position at the liability stage, including on appeal, was that the parties intended to draw no distinction between the first plaintiff and SEP for the purposes of the Agreement.[19] In the Liability Judgment (at [85]), I rejected this argument and held that *only* the first plaintiff – and *not* SEP – had any rights against the first defendant under the Agreement. That holding was affirmed on appeal. That the parties did indeed intend to draw a distinction in the Agreement between the first plaintiff and SEP is now *res judicata*.

24 The case which the first plaintiff now runs on the entity ground adopts that *res judicata*. The first plaintiff's case now is that the parties intended to draw a sharp distinction between the first plaintiff and SEP for the purposes of the Agreement. A party is entitled to take a position adopting a *res judicata* even if doing so contradicts an earlier position that the same party took leading up to the *res judicata*. To hold otherwise would mean that a party who loses on an issue which becomes *res judicata* is thereafter precluded from taking a position on that issue: (a) which reasserts the losing position on the *res judicata*; and (b) which adopts the *res judicata*. That cannot be the case.

Failure to raise entity ground when seeking assessment

25 On the third strand, the first defendant submits[20] that the first plaintiff cannot raise the entity ground in this assessment because it did not raise it, at

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18 P1OS at [16].

19 Appellants' Reply in CA/CA 1/2019 at [15] and [20].

20 D1OS at [37]; MCS at [48].

the liability stage, as one of the grounds on which it sought an assessment of the first defendant's damages.

26 I ordered this assessment because I accepted the first plaintiff's submission[21] then that an assessment was necessary to ascertain the quantum of damages to be awarded to the first defendant: Liability Judgment at [153]. It is true that the first plaintiff did not rely on the entity ground when it sought the order that damages be assessed. And it is true that the entity ground is not why I ordered damages to be assessed. But the entity ground does go directly to quantum. It is therefore relevant to the matters in question in this assessment.

Failure to plead entity ground

27 On the fourth strand, the first defendant points out that the first plaintiff has failed to plead the entity ground. That is true. But, even though parties are generally bound by their pleadings, the court may allow an unpleaded point to be raised where no injustice or irreparable prejudice (that cannot be compensated by costs) will be caused to the other party: *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*Nithia*") at [38] and [40]. Further, it is also the case that an assessment of damages does not have a separate pleadings phase in which each party is required to plead its case on damages with the same degree of specificity and detail as it is required to set out its case on liability. Bearing these points in mind, it appears to me that the first defendant has had reasonable notice of the case it has to meet on the entity ground, even though it is unpleaded, and a reasonable opportunity to prepare and present a case to meet it.

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[21] Plaintiff's Closing Submissions at [308].

28 The first defendant raised the failure to plead the entity ground in its written closing submissions. The first defendant then applied for leave to amend its counterclaim to include a claim for rectification of cl 3(a) and cll 3(c) to 3(e) by replacing "SE" with "Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies".[22] I granted the first defendant leave to make the amendment.

29 The amendment means that the first defendant is now prepared to meet the first plaintiff's case on the entity ground. The amendment advances an alternative case specifically to meet the entity ground. If the first plaintiff succeeds on the entity ground, the first defendant will seek rectification of the Agreement. If the first defendant succeeds on rectification, it will be entitled to receive fees under cl 3(b) even though it was SEP and not the first plaintiff who received the payments under the Scheme. The failure to plead the entity ground has caused no prejudice to the first defendant.

30 For all these reasons, I therefore consider that there is nothing to prevent the first plaintiff from relying on the entity ground in this assessment.

The Clause 4 ground

31 On the Clause 4 ground, the first defendant takes issue with the first plaintiff's failure to plead its argument that the quantum of the first defendant's damages must take into account the likely current value of the first defendant's investments envisaged by cl 4 of the Agreement.

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22 HC/SUM 5003/2019.

32 The first plaintiff raised the Clause 4 ground for the first time in its closing submissions in the trial on liability.[23] I bear in mind again both the principle in *Nithia* and the fact that there is no separate pleadings phase on quantum in an assessment of damages (see [27] above). The first plaintiff's failure to plead the Clause 4 ground has caused the first defendant no prejudice. The first defendant has had the opportunity, between the end of the liability stage and the commencement of the assessment, to prepare and present its case on the Clause 4 ground.

33 That is why the first defendant did not, in its opening statement in this assessment, object to the first plaintiff's failure to plead the Clause 4 ground and instead addressed it on the merits.[24] By contrast, the first defendant did object in its opening statement to the first plaintiff's failure to plead the entity ground. This supports my finding that the first defendant has suffered no prejudice by the first plaintiff's failure to plead the Clause 4 ground.

34 I therefore consider that there is nothing to prevent the first plaintiff from relying on the Clause 4 ground in this assessment. I now turn to consider the merits of the first plaintiff's three grounds in turn.

The entity ground

The parties' cases

35 The first defendant interprets cl 3(b) of the Agreement as giving it a right to receive fees from SE even if it is *SEP* who receives the payments from the EMA under the Scheme.

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23 Plaintiff's Closing Submissions at [308].

24 D1OS at [20]–[28].

36 The first plaintiff interprets cl 3(b) differently in two respects. Its first point is that the first defendant had a right to receive fees under that clause only if "SE" received payments under the Scheme.[25] Its second point is that "SE" means, and means only, *the first plaintiff* and cannot be interpreted to mean or include *SEP*.[26]

37 The first defendant rejects both points which the first plaintiff advances.[27] In the alternative, on the second point, the first defendant asks that "SE" in cl 3(a) and cll 3(c)–(e) (but not in cl 3(b)) should be rectified to read "Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies".

38 For the reasons which follow: (a) I accept the first plaintiff's submission that the first defendant was to receive fees only if *the first plaintiff* received payments under the Scheme; (b) I accept the first plaintiff's submission that "SE" cannot be interpreted to mean or include SEP; but (c) I accept the first defendant's submission that cl 3 should be rectified for common mistake in the manner that it seeks. The result is that the first defendant is not entitled to receive any fees under cl 3(b) of the Agreement as it stands (see [10] above) but is entitled to receive fees under cl 3(b) of the Agreement as rectified (see [95] below).

Interpretation of cl 3(b)

39 Clause 3(b) (see [10] above) leaves it unclear what precisely is the contractual trigger for the first defendant's right to receive fees. The critical

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25 First Plaintiff's Closing Submissions ("P1CS") at [13].

26 P1CS at [14].

27 First Defendant's Supplemental Submissions ("D1SS") at [42].

words in cl 3(b) are: "[f]or each Total Annual Receipt, the Consultant shall receive fee from SE". Clause 3(b) thus refers to "SE" expressly only to oblige "SE" to pay fees to the first defendant, and not to specify that "SE" is the entity who must receive the payments under the Scheme in order to trigger that obligation. Nothing in cl 3(b) provides expressly that the first defendant is to receive fees only if the first plaintiff *itself* receives the Total Annual Receipt under the Scheme. In other words, as the first defendant points out,[28] a purely textual interpretation of cl 3(b) entitles the first plaintiff to receive fees even if it is *another* entity which receives payments under the Scheme.

40 But contracts are to be interpreted using the contextual approach, not the textual approach. The Court of Appeal summarised the contextual approach in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") at [30] as follows:

> … the purpose of interpretation is to give effect to the objectively ascertained expressed intentions of the contracting parties as it emerges from the contextual meaning of the relevant contractual language. Embedded within this statement are certain key principles: (a) first, in general both the text and context must be considered; (b) second, it is the *objectively ascertained intentions of the parties* that is relevant, not their subjective intentions; and (c) third, the object of interpretation is the verbal expressions used by the parties and so, *the text of their agreement is of first importance* ….
>
> [citations omitted]

41 The Agreement was drafted by two lay persons. With the exception of one clause, Mr Chan drafted the Agreement, albeit with input and comments

[28] D1SS at [42].

from Dr Peloso.[29] The one exception is cl 4, which Dr Peloso drafted.[30] Neither Dr Peloso nor Mr Chan is legally trained. As such, they cannot be expected to express their intent "with the exactitude that might be expected of experienced legal draftsmen" (see *Yap Son On* at [74]). In these circumstances, it is appropriate to adopt a "common sense approach" to interpreting their agreement rather than a technical or legalistic approach that unduly focuses on its structure and language: *Yap Son On* at [74].

42 Interpreting cl 3(b) contextually shows that the first defendant was to receive fees only if "SE" received payments under the Scheme. The interrelated commercial and contractual concepts in cl 3 taken as a whole and in context establish that that was the contractual trigger for the first defendant's right to receive fees. I say that for three reasons. First, the first sentence of cl 3(b) provides that the "Total Annual Receipt" is a "net positive payment" comprising a fixed annual payment and quarterly payments. Admittedly, cl 3(b) does not expressly provide that it must be "SE" who receives the "net positive payment" and the "quarterly payments" under the Scheme. But cl 3(a) is the only other provision which uses the concept of a "net positive payment". Clause 3(a) expressly provides that it is "SE" who receives the "net positive payment" under the Scheme. Second, this is reinforced by cll 3(c) and 3(d), which refer to "SE" receiving the annual and quarterly payments. Finally, cl 3(e) also contemplates that any deferred part of the Total Annual Receipt will be received by "SE".

43 The issue therefore is whether "SE" in any part of cl 3 can be interpreted to mean or include SEP, rather than meaning only the first plaintiff.

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[29] Notes of Argument ("NAs"), 29 May 2019, at p 5, lines 24–26; NEs, 30 June 2020, at p 18, line 26 to p 19, line 11; AB vol 2 at 927–928.

[30] Chan's 5th Affidavit of Evidence in Chief ("AEIC") at 82–84 and 92–95.

Interpretation of "SE"

44 As I have mentioned (see [7] above), the Agreement defines "SE" to mean "Sun Electric Pte Ltd" and nothing else. Despite this, the first defendant submits that "SE" in cl 3 (other than in cl 3(b)) is capable of being interpreted in context as meaning any entity in the Sun Electric group and not as meaning the first plaintiff alone.[31]

45 In applying the contextual approach to contractual interpretation, the court will first consider the plain language of the contract and the admissible extrinsic material that is objective evidence of its context: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") at [130]. If the plain language of the contract leads to an absurd result based on the objective evidence available, this indicates that the text is probably inconsistent with the context. The question then arises as to whether, having had regard to the context, the text on a re-examination is in fact as plain and unambiguous as it was originally thought to be: *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*Soup Restaurant*") at [31]. If the meaning of the text remains plain and unambiguous even upon a re-examination and even though it leads to an absurd result, the court must give effect to that meaning if the objective evidence shows that the parties knew of the possibility that the contract might lead to an absurd result yet chose to enter into the contract regardless: *Soup Restaurant* at [32]. This is because the court is not free to disregard the parties' intention as ascertained from the objective evidence and to rewrite the contract for them based on the court's subjective view of what is just and fair: *Soup Restaurant* at [32].

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[31] D1SS at [32]; NEs, 2 July 2020, at p 12, lines 11–31.

46 When the parties entered into the Agreement in April 2015, they already knew that it was SEP, not the first plaintiff, that would enter into a Definitive Agreement with the MM Partner and receive payments under the Scheme. They therefore knew that it was SEP, and not the first plaintiff, who would be the entity receiving the payments under the Scheme.

47 In emails to the EMA and to Mr Chan on 7 March 2015, Dr Peloso stated that SEP was the entity holding the necessary license and therefore would be the entity to apply to participate in the Scheme.[32] Dr Peloso accepted in cross-examination that, by 7 March 2015, the plan was also for SEP to enter into the Definitive Agreement with the MM Partner.[33] On 10 March 2015, Dr Peloso signed and Mr Chan witnessed forms which the EMA required applicants who wanted to participate in the Scheme to complete and submit. In these forms, the participating entity was identified as SEP, not the first plaintiff.[34] On 23 March 2015, the EMA accepted SEP's application to participate in the Scheme.[35] Mr Chan's evidence is that, by that date, he and Dr Peloso knew that SEP would likely be the entity entering into the Definitive Agreement with the MM Partner and receiving payments under the Scheme.[36] And on Dr Peloso's own evidence, he knew when he reviewed the drafts of the Agreement that SEP would be the entity entering into the Definitive Agreement and receiving payments under the Scheme.[37] Further, in his affidavit of evidence in chief in the liability stage, Dr Peloso said that the first defendant and Mr Chan were "well aware that the

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32 AB vol 1 at 690.

33 NEs, 30 June 2020, at p 50, lines 22–28.

34 AB vol 1 at 473–486.

35 AB vol 2 at 853–854.

36 Chan's 5th AEIC at [25(b)] and [26].

37 NEs, 30 June 2020, at p 63, lines 21–29.

Consulting Agreement was with respect to the FSC Scheme which the 2nd Plaintiff (i.e. Sun Electric's power company) was the proper participant of".[38] The second plaintiff in this action is SEP, not SE.

48 The context establishes that it would be absurd to interpret "SE" to mean the first plaintiff. On this interpretation, "SE" would *never* receive any payments under the Scheme. This in turn means that the parties agreed and intended that the first defendant would *never* be entitled to be paid *any* fees for its services under the Agreement. The parties could not have intended such an uncommercial result. Their intent, ascertained objectively from the pains which they took to negotiate and record the sliding scale of percentages in cl 3(b), was that the first defendant would receive *some* fees under the Agreement (see [90] below).

49 However absurd and uncommercial the result, it remains the case that "the context cannot be used as a pretext to rewrite the text": *Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd* [2020] SGHC 235 at [43]. This is so even when the text is drafted by lay persons who may not draft the text with the exactitude of a lawyer. The text of the Agreement provides no basis whatsoever to read "SE" as meaning anything other than the first plaintiff. First of all, the first recital specifies unambiguously and exclusively that "SE" means "Sun Electric Pte Ltd".[39] There is no basis in the text of the Agreement to read "SE" any more broadly than that. Second, the Agreement makes no mention whatsoever of SEP or indeed of any entity in the Sun Electric group other than the first plaintiff.[40]

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38 Peloso's 1st AEIC at [19].

39 AB vol 2 at 908.

40 AB vol 2 at 908–909.

50 The first defendant submits that there is no basis for the submission that "SE" *must* be interpreted as meaning *only* the first plaintiff *throughout* the Agreement. It points to the fact that cl 4(a) (see [11] above) uses three different terms: "SE", "Sun Electric" and "Sun Electric Pte Ltd" as evidence that the parties intended "SE" to be more than a contractual synonym for the first plaintiff. That, it submits, is a sufficient opening to allow the Agreement's context to extend the meaning of the Agreement's text such that "SE" can be contextually interpreted to mean or include SEP.[41]

51 I do not accept this submission. Clause 4 certainly does demonstrate that the parties did not use terms with the consistency that might be expected of lawyers. But I do not accept that the use of three different terms in cl 4(a) allows me to use the Agreement's context to interpret "SE" as being anything other than a contractual synonym for the first plaintiff.

52 Of the three different terms in cl 4(a), "Sun Electric Pte Ltd" is the full name of the first plaintiff. The parties cannot have intended it to mean anything other than the first plaintiff. "Sun Electric" is admittedly the first two words of both the first plaintiff's name and of SEP's name. It could arguably also be interpreted as a reference to the Sun Electric group. But "Sun Electric" too cannot be intended to mean anything other than the first plaintiff. That is because cl 4(a) refers to the "fees received from Sun Electric" by the first defendant. It is common ground that the only entity obliged to *pay* fees to the first defendant under cl 3(b) is the first plaintiff. So "Sun Electric" must mean the first plaintiff as well. The result is that the parties intended both "Sun

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41 NEs, 2 July 2020, at p 11, lines 6–15.

Electric Pte Ltd" and "Sun Electric" in cl 4(a) to mean the first plaintiff, and only the first plaintiff.

53 The parties therefore did not intend to draw any distinction between the meaning of "Sun Electric Pte Ltd" and the meaning of "Sun Electric". The fact that they also used the defined term "SE" in cl 4(a) does not show that they intended "SE" to be something other than a contractual synonym for the first plaintiff for the purposes of cl 4, let alone for the purposes of cl 3. In fact, the drafting of cl 4(a) suggests quite the opposite. It suggests that the parties used a number of terms (including the defined term "SE") interchangeably to refer to only *one* entity, the first plaintiff, and not to any other entity or group of entities.

54 The first defendant seeks to draw an analogy between this case and *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 ("*Amalgamated Investment*"). In that case, a guarantor guaranteed a principal debtor's indebtedness to a bank in anticipation of the bank concluding a loan agreement with the principal debtor. The guarantee was drafted in the first person and addressed to the bank in the second person. It obliged the guarantor to pay the bank on demand "all moneys…due or owing or payable to *you*…by the principal" (emphasis added). The bank and the guarantor intended this phrase to mean moneys which the principal debtor owed to the *bank itself.*

55 After the guarantee was executed, the structure of the anticipated loan changed. For reasons unrelated to the guarantor and the principal debtor, the bank decided that its subsidiary (and not the bank itself) would be the lender under the loan agreement with the principal debtor. Under the loan agreement, therefore, there would now never be any money owing by the principal debtor to *the bank*. The principal debtor would owe money only to the bank's

subsidiary. Despite this, the bank did not ask the guarantor to execute a fresh guarantee promising to pay the bank on demand all moneys owing to the *subsidiary* by the principal debtor.

56 Eveleigh LJ and Brandon LJ (as he then was) readily interpreted the phrase "all moneys…owing…to *you*" [emphasis added] in the guarantee as meaning all moneys which the principal debtor owed to the bank's *subsidiary* and not to the bank itself. Both judges arrived at their decision by using as an interpretive aid the context which existed when the loan agreement was concluded, which was *after* the guarantee was executed. They did so on the basis that the guarantee was a part of a large transaction including the loan agreement: at 124G and 128H-129A. The larger transaction was concluded only when the loan agreement was executed. It was therefore legitimate to interpret the guarantee by reference to the context which existed when the loan agreement was concluded. That context allowed Eveleigh LJ and Brandon LJ to construe "you" as meaning the bank's subsidiary.

57 *Amalgamated Investment* is of little assistance to the first defendant. If the first defendant relies on *Amalgamated Investment* to submit that a contract should be interpreted in the context that exists at the time it is concluded, that is simply the contextual approach. I have already accepted that. What I do not accept is that the text in this case allows any scope for the context to add to or vary the meaning of the text. If the first defendant relies on *Amalgamated Investment* to submit instead that a contract may be interpreted in context which arises after the contract is concluded, that proposition is contrary to the basis on which *Amalgamated Investment* was decided and is contrary to the objective of the contextual approach. That objective is to ascertain the parties' intention at the time a contract is concluded. In any event, when the parties executed the

Agreement, they already knew that it was SEP and not the first plaintiff who would receive the payments under the Scheme. That is quite unlike the position in *Amalgamated Investment*.

58 In summary, the meaning of the text of cl 3 is so clear that there is no scope for the context to prevail over its meaning. That is so even though the meaning of the text leads to the wholly absurd and uncommercial result that the first defendant was obliged to provide services to the first plaintiff with no possibility whatsoever of receiving any fees. At the same time, it is equally clear that this absurd and uncommercial result is one which neither party could have intended. That suggests that the criteria for rectification may be satisfied. I therefore turn to consider rectification.

Common law rectification

No clear mistake on the face of the Agreement

59 A court has the power when construing a contract to correct "obvious mistakes in the written expression of the intention of the parties": *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 ("*Edwards Jason Glenn*") at [60], citing Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) at para 9.01. Correction by construction in this way is also known as common law rectification: Goh Yihan, *The Interpretation of Contracts in Singapore* (Sweet & Maxwell Singapore, 2018) ("Goh, *The Interpretation of Contracts in Singapore*") at para 12.001. The word "construction" here carries the meaning given to it in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [31]. In this sense, "construction" is not a synonym for interpretation, but means a process encompassing interpretation,

implication of terms and rectification. Prof Goh thus describes common law rectification as "the use of contractual construction (a composite process including implication and interpretation) to remedy obvious drafting errors": *The Interpretation of Contracts in Singapore* at para 12.001.

60 Common law rectification is available if the two elements set out in *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111 ("*East v Pantiles*") are satisfied (*Ng Swee Hua v Auston International Group Ltd and another* [2008] SGHC 241 ("*Ng Swee Hua*") at [33]–[35]):

(a) there is a clear mistake on the face of the instrument; and

(b) it is clear what correction ought to be made to cure the mistake.

61 The first defendant submits that both *East v Pantiles* elements are satisfied and therefore that "SE" in cl 3(a) and cll 3(c)–(e) should be corrected by construction to refer to the Sun Electric group of companies.[42] The first plaintiff submits in response that correction by construction is unavailable because neither *East v Pantiles* element is satisfied.[43]

62 I accept that the first *East v Pantiles* element is not made out because there is no clear mistake on the face of the Agreement, though not for the reason which the first plaintiff advances.

63 In *Ng Swee Hua*, a case on which the first defendant relies,[44] the parties' mistake rendered the clause meaningless in the sense that it was impossible to

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42 D1SS at [32].

43 NEs, 2 July 2020, at p 4, lines 11–25.

44 D1SS at [31(b)].

carry out. A literal reading of the clause would have required the board of directors of one company to register a person as a shareholder in the records of another company and to issue share certificates in that other company to that person: at [32]–[33]. It was "plain from the language used that a mistake was made by the draftsman" and it was clear what corrections had to be made: at [33].

64 In this case, by contrast, it is not plain from the language of the Agreement that there is a mistake in the drafting. The first recital defines "SE" to mean "Sun Electric Pte Ltd". It is common ground that the first plaintiff is a party to the Agreement and that its status as a party was what the parties intended. Nothing on the face of cl 3 indicates that it is meaningless. On the face of cl 3, it is perfectly possible for the first plaintiff to receive payments under the Scheme and to pay the first defendant fees based on those payments.

65 The case of *Edwards Jason Glenn*, another case cited by the first defendant,[45] is distinguishable for the same reason. In that case, the court corrected by construction several mistaken numerical cross-references which resulted from obvious typographical errors. The mistake was clear on the face of the instrument because the clause containing the mistaken numerical cross-references nevertheless described accurately the content of the clauses to which the parties intended to cross-refer. Without correction by construction, therefore, the clause in question would have been "nonsense" : at [54]–[63].

66 The first defendant cites *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] 1 AC 1101 ("*Chartbrook*") to argue that common law rectification is no longer restricted to a clear mistake on the face

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[45] D1SS at [30], n 26.

of the instrument, as required by the first *East v Pantiles* element.[46] In *Chartbrook*, Lord Hoffman extended the first *East v Pantiles* element by allowing the court to consider the instrument's background and context in ascertaining whether the first element is satisfied (at [24]–[25]):

> … *in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context.* As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.
>
> … All that is required is that *it should be clear that something has gone wrong with the language* and that it should be clear what a reasonable person would have understood the parties to have meant. …
>
> [emphasis added]

67 Lord Hoffman's extension has not been considered in the Singapore cases which have applied *East v Pantiles*: see *Soon Kok Tiang and others v DBS Bank Ltd and another matter* [2011] 2 SLR 716 at [47]; *Edwards Jason Glenn* at [61]–[63]. *Chartbrook* is an example of what Lord Sumption calls "the more advanced positions seized during the Hoffmann offensive": Jonathan Sumption, "A Question of Taste: The Supreme Court and the Interpretation of Contracts" (2017) 17(2) Oxford University Commonwealth Law Journal 301 at p 313. The UK Supreme Court and the English Court of Appeal have begun to retreat from these advanced positions: Paul S Davies, "Rectification Rectified" (2020) 79(1) CLJ 8 at p 11.

68 For two reasons, I prefer to decide this case on the basis that Lord Hoffman's extension in *Chartbrook* of the first *East v Pantiles* element is not part of Singapore law. First, the parties did not address me on whether Lord Hoffman's extension can be part of Singapore law despite the authorities

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[46] NEs, 2 July 2020, at p 27, line 27 to p 28, line 8.

binding on me and the constraints of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act"). Second, it appears to me that Lord Hoffman's approach, manifested not only in *Chartbrook* but also in other cases, blurs the important distinctions between: (a) contractual interpretation; (b) implication of terms in fact; (c) common law rectification; and (d) equitable rectification. Each of these doctrines is based on different historical and conceptual underpinnings and addresses different shortcomings of the law of contract. Subject only to the provisions of the Act, my view is that the distinctions between these doctrines are important and should be observed and preserved.

69 I therefore prefer to decide this case on equitable rectification rather than common law rectification. Before I leave this topic, however, I make a few observations on common law rectification and the Act.

Observations on the Act

70 The effect of Lord Hoffmann's extension of the first *East v Pantiles* element is *always* to allow the court to consider an instrument's background and context in ascertaining whether there is a clear mistake on the face of the instrument. In English law, the contextual approach is purely a common law doctrine. It was therefore open to Lord Hoffman to extend English law as he did, in the usual incremental way in which the common law develops.

71 In Singapore, however, the contextual approach must operate within the constraints of the Act: see *Sembcorp Marine* ([59] above) at [39]. That is especially true of common law rectification. Proviso (*a*) to s 94 of the Act exempts *equitable* rectification from the parol evidence rule embodied in s 94 of the Act: Goh, *The Interpretation of Contracts in Singapore* at paras 12.048–12.051; Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence in India,*

Pakistan, Bangladesh, Burma & Ceylon (Wadhwa and Company, 15th Ed, 1999) ("*Sarkar*") at p 1358. There is no analogous proviso which exempts common law rectification from the parol evidence rule. Common law rectification must therefore operate only within the constraints of the Act. As the Court of Appeal noted in *Yap Son On* ([40] above), the scope of common law rectification is "greatly circumscribed" by the Act: at [61], citing Goh Yihan, "Clarifying Rectification in Singapore" (2015) 27 SAcLJ 403.

72 Lord Hoffman's extension of the first *East v Pantiles* element is therefore too broad to be accepted into Singapore law without close examination to reconcile it with the constraints of the Act. The potential for conflict with the Act is real. It does appear to me, however, that in narrowly defined situations, ss 97 and 99 of the Act allow – and may even be said to require – the court to consider extrinsic evidence of background and context on both *East v Pantiles* elements.

73 Section 95 of the Act is a significant constraint on common law rectification in Singapore. This provision prohibits the court from receiving extrinsic evidence to determine what correction ought to be made to the language of a document if the language is "on its face ambiguous or defective":

> **Exclusion of evidence to explain or amend ambiguous document**
>
> **95.** When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.
>
> *Illustrations*
>
> (*a*) *A* agrees in writing to sell a horse to *B* for $500 or $600. Evidence cannot be given to show which price was to be given.

> (*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

The effect of s 95 is that a court can have regard only to the document itself to determine what correction ought to be made: Goh, *The Interpretation of Contracts in Singapore* at paras 12.028–12.033. Resort to extrinsic evidence for assistance in determining what words to read into or to read out of the document is prohibited.

74 The Act does, however, leave *some* room for extending the *East v Pantiles* elements. Section 97 allows extrinsic evidence to be adduced where the language in a document is plain on its face but is meaningless by reference to existing facts. And s 99 allows extrinsic evidence to be adduced to show to which of two sets of existing facts the language in a document was intended to refer. Sections 97 and 99 of the Act read as follows:

> **Evidence as to document meaningless in reference to existing facts**
>
> **97.** When language used in a document is plain in itself, but is meaningless in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.
>
> *Illustration*
>
> *A* conveys to *B* by deed "my plantation in Penang".
>
> *A* had no plantation in Penang, but it appears that he had a plantation in Province Wellesley, of which *B* had been in possession since the execution of the deed.
>
> These facts may be proved to show that the deed related to the plantation in Province Wellesley.
>
> …
>
> **Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies**

> **99.** When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the 2 it was meant to apply.
>
> *Illustration*
>
> *A* agrees to sell to *B* "my land at *X* in the occupation of *Y*". *A* has land at X, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

For completeness, s 98 – the intervening section – is not relevant to common law rectification as it concerns the interpretation of equivocal language rather than enabling the correction of erroneous language.

75 Sections 97 and 99 of the Act can apply to permit proof of extrinsic facts to effect common law rectification. In the illustration to s 97, proof of extrinsic facts results in "my plantation in Penang" being construed as "my plantation in Province Wellesley". This amounts to the court using common law rectification to replace "Penang" with "Province Wellesley": Goh, *The Interpretation of Contracts in Singapore* at para 12.041. In the illustration to s 99, proof of extrinsic facts results in "my land at *X* in the occupation of *Y*" being construed either as "my land at *X*" or "my land in the occupation of *Y*". This amounts to the court using common law rectification to strike out a phrase: see *Sarkar* at p 1431.

76 What makes the phrase "my plantation in Penang" meaningless, and the phrase "my land at *X* in the occupation of *Y*" inaccurate, is evidence of context. Although there is no clear mistake on the face of the document, the Act allows extrinsic evidence to be adduced to prove that there is nevertheless a mistake in the document which becomes clear once the context is appreciated. That is an extension of the first *East v Pantiles* element.

77 An extension of the first *East v Pantiles* element is therefore not prohibited by ss 97 and 99. Those sections make extrinsic evidence admissible even if the mistake is not clear *on the face* of the instrument. It suffices that the mistake becomes clear once extrinsic evidence is admitted under ss 97 or 99. For example, the Indian equivalent to s 97 of the Act has been used to admit extrinsic evidence to show that a creditor's name was wrongly written as *K* instead of *R*: *Aijaz v Ramsarup* A 1931 O 54, cited in *Sarkar* at p 1424.

78 But this approach is permissible only when the conditions of s 97 or s 99 are satisfied, not in every case of common law rectification. That is why, quite apart from the retreat from *Chartbrook* in England, Lord Hoffman's extension of the first *East v Pantiles* element (see [66] above) is not authority on the scope of that element in Singapore law. Lord Hoffman said that "the background and context [of the document] *must always* be taken into consideration": *Chartbrook* at [24], emphasis added. In Singapore, a court can do so only when permitted by the Act.

79 I now turn to consider the first defendant's case on equitable rectification.

Equitable rectification

80 Whereas common law rectification uses construction to rectify mistakes which are clear on the face of the instrument, equitable rectification is the intervention of equity to effect a reconstruction where there is a "mismatch between the parties' agreement and the instrument which purports to record it": *Yap Son On* ([40] above) at [61], citing Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011) at para 17.01.

81 The first defendant seeks to have cll 3(a) and 3(c)–(e) (but not cl 3(b)) rectified in equity by striking out "SE" wherever it appears in these clauses and replacing it with "Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies".[47] The first defendant seeks the remedy of equitable rectification on the ground of common mistake or unilateral mistake.[48] I begin my analysis with common mistake.

82 The court will grant equitable rectification for common mistake only if the party seeking rectification proves the following (*Yap Son On* at [67], citing *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 at 74; *Cold Storage Holdings plc and others v Overseas Assurance Corp Ltd and another* [1988] 1 SLR(R) 255 at [30] and [34]–[36]):

(a) the parties had a prior concluded agreement (*ie*, a contract) or a continuing common intention in respect of a particular matter in the document to be rectified;

(b) there was an outward expression of accord;

(c) the common intention continued up to the time the parties executed the document to be rectified; and

(d) by mistake, the document did not reflect that prior concluded agreement or continuing common intention.

83 The party seeking rectification bears the burden of producing "convincing proof" not only that the document does not accord with the parties' common continuing intention at the time of its execution but also that the

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47 Defence & Counterclaim (Amendment No 3) ("D&CC") at prayer (4), p 36.

48 D&CC at [32], [33].

document in its proposed form will accord with that intention: *Yap Son On* at [65], citing *Industrial & Commercial Bank Ltd v PD International Pte Ltd* [2003] 1 SLR(R) 382 at [29]. All relevant evidence, including evidence of declarations of subjective intent, is admissible in an action for equitable rectification: *Yap Son On* at [64].

84 The question which then arises is whether the continuing common intention which must be established to secure equitable rectification is a subjectively ascertained intention or an objectively ascertained intention. Both the first defendant[49] and the first plaintiff[50] take the view that it is to be objectively ascertained: see *Kok Lee Kuen and another v Choon Fook Realty Pte Ltd and others* [1996] 3 SLR(R) 182 at [44], citing Denning LJ in *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450 at 461.

85 Some English commentators advocate the subjective approach to ascertaining the continuing common intention: Gerard McMeel, *McMeel on the Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 3rd Ed, 2017) at ch 17; Paul S Davies, "Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75(1) CLJ 62. In *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2020] 2 WLR 429, the English Court of Appeal held that, although an objective approach should be taken to ascertain whether there was a prior concluded agreement, a subjective approach should be taken to ascertain the parties' continuing common intention: at [141]–[142] and [176].

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49 NEs, 2 July 2020, at p 36, line 25 to p 37, line 5.

50 NEs, 2 July 2020, at p 40, lines 23–26.

86 In Singapore, given that common law rectification is legislatively constrained, Prof Goh suggests considering "whether a subjective test should be preserved for at least ascertaining a continuing common intention" for equitable rectification: Goh, *The Interpretation of Contracts in Singapore* at para 12.063. As the parties take a common position on this issue, I need not consider this question further. In any event, given that the only way to ascertain a person's subjective intention is by drawing inferences from that person's outward manifestations of his intent, this issue is unlikely to make a practical difference in all but the most unusual of cases. There is certainly no suggestion that this issue makes any difference to this case.

87 Clause 3(a) specifies two events involving "SE": (a) "SE" would "conclud[e] a Definitive Agreement with the MM Partner"; and (b) "SE" would "receive a net positive payment from the [EMA] and the MM Partner under the [Scheme]". The first defendant's pleaded case is that the parties had an agreement or common intention that, upon any entity in the Sun Electric group entering into a Definitive Agreement with the MM Partner and thereafter receiving a net positive payment under the Scheme, the first defendant would be entitled to a percentage of that payment as set out in cl 3(b) of the Agreement.[51]

88 Even though it is the first defendant who bears the burden of proof on equitable rectification, the first plaintiff has chosen to plead a positive case. The first plaintiff's case is that the parties' agreement or common intention was that the first plaintiff was the entity that would: (a) conclude the Definitive Agreement with the MM Partner; (b) receive payments under the Scheme; and

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[51] D&CC at [32(a)].

(c) be obliged to pay the first defendant its fees as set out in cl 3(b).[52] The first defendant naturally agrees with point (c), but equally naturally disputes points (a) and (b).

89 I accept the first defendant's case on the first plaintiff's points (a) and (b). These two points are wholly inconsistent with what both parties knew when they negotiated the Agreement (see [46] above). In my view, given the parties' knowledge that it was SEP who would enter into the Definitive Agreement and that it was SEP who would receive payments under the Scheme, both parties had a common intention that "SE" in cl 3(a) should mean SEP. Dr Peloso's evidence is that he intended this meaning for "SE" in cl 3(a) throughout the negotiations for the Agreement.[53] Mr Chan's evidence is that he "mistakenly used the term 'SE' in Clauses 3(a) and (c) – (e) of the draft Agreement to refer to 'Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies'."[54] Dr Peloso corroborates Mr Chan's evidence insofar as Dr Peloso says he knew that Mr Chan's view of cl 3 assumed that it was SEP who would enter into the Definitive Agreement.[55]

90 Mr Chan also gave evidence that cl 3 was intended to reflect the parties' "agreement and understanding that [the first defendant] would be entitled to the [fees]…irrespective of how the Definitive Agreement was eventually

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52 Reply (Amendment No 2) and Defence to Counterclaim (Amendment No 2) ("Reply") at [18A(a)].

53 NEs, 30 June 2020, at p 63, line 30 to p 64, line 4; p 66, lines 18–23.

54 Chan's 5th AEIC at [37].

55 NEs, 30 June 2020, at p 64, lines 21–24.

structured, and irrespective of which entity within the SE Group received the [payments]".[56]

91 The objective evidence therefore establishes the first defendant's case on common mistake. The parties negotiated the payment structure and the sliding scale of percentages in cl 3(b) with a continuing common intention that the first defendant would be paid a percentage of the net positive payments received by *SEP*, even though they sometimes referred to it as "SE". For example, in the second draft of the Agreement sent on 3 April 2015, Dr Peloso revised the percentages that Mr Chan had proposed in the first draft.[57] On 8 and 9 April 2015, Mr Chan and Dr Peloso exchanged further counterproposals by email and gave each other reasons for the revised figures.[58] Mr Chan's reasons in his email included a statement that he would "receive only when SE receives". But at this time, Mr Chan knew that only *SEP* would receive the payments under the Scheme. Mr Chan's statement supports a finding that he intended "SE" in the accompanying draft to mean whichever entity in the Sun Electric group would receive payments under the Scheme. I accept Mr Chan's evidence that he "would not do something for free".[59] I find also that Dr Peloso shared Mr Chan's intention in all material respects. The first defendant has established that this was the parties' continuing common intention.

92 I am satisfied that cl 3 was drafted the way it was because of an oversight. In their correspondence, Dr Peloso and Mr Chan often used "SE" to mean SEP. For example, while they were negotiating the Agreement, Dr Peloso

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56 Chan's 5fth AEIC at [36].

57 AB vol 2 at 884, 928.

58 AB vol 2 at 955–956.

59 NAs, 29 May 2019, at p 21, lines 12–14.

forwarded to Mr Chan drafts of agreements that *SEP* was going to enter into with third parties. Even though Mr Chan had no involvement in those agreements, Dr Peloso asked Mr Chan to review them "and see if there is anything that might need modification for *SE*" [emphasis added].[60] As Mr Chan explains in an affidavit of evidence in chief, as a result of their "common usage of the term 'SE' to refer [*sic*] SEP, or to the SE Group as a whole, [Mr Chan] mistakenly used the term 'SE' in Clauses 3(a) and (c) – (e) of the draft [Agreement]" to mean SEP or any entity in the Sun Electric group.[61]

93 The Agreement contains an entire agreement clause.[62] The first plaintiff amended its defence to the counterclaim to plead reliance on the entire agreement clause.[63] It has made no submission, however, on the effect of the clause on the first defendant's claim for equitable rectification.

94 It is true that an entire agreement clause may sometimes be a factor relevant to whether the contract was objectively intended to give effect to a prior concluded agreement or a continuing common intention: David Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell, 2nd Ed, 2016) at para 4-143, citing *DS-Rendite-Fonds Nr 106 VLCC Titan Glory GmbH & Company Tankschiff KG and others v Titan Maritime SA and others* [2013] All ER (D) 224 (Nov) at [48]. In this case, there is no doubt that the Agreement was intended to record a prior concluded agreement. In light of that, the entire agreement clause does not preclude rectification: "a term that says 'all the terms are in the document'

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60 AB vol 2 at 1025.

61 Chan's 5th AEIC at [37].

62 AB vol 2 at 909, cl 11(d).

63 Reply at [18A(d)].

(which is, essentially, what an entire agreement clause does) cannot be read as meaning 'all the terms are in the document when it is in the wrong form'": Hodge at paras 4-137 and 4-140, citing *JJ Huber Ltd v The Private DIY Co Ltd* [1995] NPC 102; McMeel at para 17.108.

95 I accept that the first defendant has discharged its burden of proving its entitlement to equitable rectification on grounds of common mistake. The first defendant is therefore entitled to have cl 3(a) and cll 3(c)-(e) of the Agreement rectified as prayed for, so that those provisions read as follows:[64]

> **3. Fees**
>
> a. Upon *Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies* successfully concluding a Definitive Agreement with the MM Partner, *Sun Electric Power Pte. Ltd. or an entity within the Sun Electric group of companies* will receive a net positive payment from the [EMA] and the MM Partner under the [Scheme] over the 12 quarters of the Market Making Obligations Period.
>
> …
>
> c. If *Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies* receives a minimal fixed annual payment, the Consultant shall get the Schedule 10 business days after *Sun Electric Power Pte. Ltd. or an entity within the Sun Electric group of companies* receives such payment.
>
> d. If *Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies* receives a quarterly payment, the Consultant shall receive the Schedule 10 working days after the quarterly settlement on a pro-rata basis, with the payment in the fourth quarter of the year making adjustment to comply with the Total Annual Receipts as per above table [*sic*].
>
> e. In the event a part of the Total Annual Receipt is deferred and then released, such payment is considered as a part of the Schedule of the original year. The payment to the Consultant is to be settled 10 working days after *Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies* receives such payment.

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64 D&CC at prayer 5.

[emphasis added]

96 Having held that the first defendant is entitled to rectification on grounds of common mistake, I need not consider its alternative case on unilateral mistake.

The CFD ground

97 I next consider the CFD ground. The first plaintiff's case on this ground is that the first defendant is obliged to deduct SEP's gains and losses on the CFDs from the Total Annual Receipt (as defined in the Agreement) *before* calculating its fees by applying the sliding scale of percentages set out in cl 3(b). For the reasons which follow, I accept that the first defendant is entitled to damages without deducting SEP's gains and losses on the CFDs from the Total Annual Receipt.

98 Clause 3(b) calculates the first defendant's fees as a percentage of the Total Annual Receipt, *ie*, the net positive payments under the Scheme in one year. Nowhere does the Agreement, let alone cl 3(b), refer to CFDs.

99 As I found in the Liability Judgment (at [41]), the parties envisaged when they entered into the Agreement that SEP would enter into CFDs to hedge against the risks of participating in the Scheme. The first plaintiff argues that "a consistent interpretation" of cl 3 therefore requires "net positive payment" to be interpreted as being net of SEP's gains and losses on the CFDs.[65]

100 I do not accept this argument for two reasons. First, the complete phrase in cl 3(a) is "net positive payment *from the [EMA] and the MM Partner* under

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65 P1CS at [24].

the [Scheme]" [emphasis added]. This phrase formed a part of cl 3(a) from the very first draft of the Agreement. Although I bear in mind that the Agreement was drafted by laymen and should not be interpreted in a technical, legalistic way, I nevertheless consider that the phrase cannot be interpreted so broadly as to encompass the gains and losses on the CFDs. It was open to SEP to enter into CFDs with counterparties other than the MM Partner. Both parties knew this, as seen from Mr Chan's email to Dr Peloso on 16 April 2015 regarding a draft of the Agreement.[66] In that email, Mr Chan wrote, "the fact that i ahve [*sic*] a consultation on the risk management of FSC will allow SE to seek help from me *to identify third party hedge provider* (the strategy mentioned yest [*sic*])" [emphasis added]. Eventually, SEP entered into seven CFDs with its MM Partner Tong Teik Pte Ltd ("Tong Teik").[67] But that does not detract from the fact that, when the parties were negotiating the Agreement, they contemplated the possibility that SEP would enter into CFDs with counterparties other than the MM Partner.

101 Second, as seen from cll 3(b)–(d), the net positive payment under cl 3(a) was to consist of annual and quarterly payments. But it was open to SEP to enter into CFDs involving payments at any interval, not only at annual and quarterly intervals. That is why, in June 2015, Mr Chan negotiated the payment intervals for the CFDs with Tong Teik. Mr Chan proposed settling the CFDs on quarterly rather than monthly intervals so as to mirror the quarterly settlement under SEP's Definitive Agreement with Tong Teik.[68] His negotiation with Tong Teik shows that, when the parties entered into the Agreement, there was a possibility that CFD payments would be neither annual nor quarterly payments. Given this

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66 AB vol 2 at 1008.

67 AB vol 4 at 2177, 2241, 2465 and 2645; AB vol 5 at 2796 and 2836; AB vol 6 at 3637.

68 Chan's 1st AEIC at [158].

possibility, the gains and losses on each CFD do not form part of the annual and quarterly net positive payments from the MM Partner within the meaning of cl 3.

102 The first plaintiff submits that the August Payment is contemporaneous evidence that the parties intended "net positive payment" to be net of the gains and losses on the CFDs.[69] The August Payment arose in the following way. On 29 July 2015, SEP closed out the first CFD,[70] making a gain of $353,280.[71] On 3 August 2015, Dr Peloso asked Mr Chan to send him "an invoice for [the first defendant's] payout of the hesge [*sic*]".[72] On 5 August 2015, Mr Chan emailed Dr Peloso "the invoice for the fsc hedge in q315".[73] The first defendant's invoice asked for payment of a "Consulting Fee" of $52,992. This figure is exactly 15% of SEP's gain on the first CFD. The sliding scale in cl 3(b) provides that 15% is the first defendant's fee for the first $1m of the Total Annual Receipt. As Mr Chan conceded under cross-examination, his invoice treated SEP's gain on the first CFD as part of the Total Annual Receipt.[74] The first plaintiff therefore argues that, if the parties treated the gain on the first CFD as increasing the Total Annual Receipt, they must equally treat the losses on the remaining six CFDs as reducing the Total Annual Receipt.[75]

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69 P1CS at [25]–[28].

70 AB vol 4 at 2453.

71 Chan's 1st AEIC at [137(a)].

72 AB vol 1 at 406.

73 AB vol 4 at 2515.

74 NAs, 29 May 2019, at p 18, lines 6–9.

75 P1CS at [28].

103 Mr Chan's treatment of the August Payment is evidence of conduct subsequent to the parties' entry into the Agreement. The Court of Appeal has, in a series of cases over the years, deliberately left open whether subsequent conduct is admissible in interpreting a contract, neither endorsing its use nor prohibiting it: *Zurich* ([45] above) at [132(d)]; *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 ("*MCH International*") at [20]–[21]. What is clear is that a court must bear the following three criteria in mind when considering whether to admit evidence of subsequent conduct as an aid to interpreting a contract (*MCH International* at [18]):

(a) the subsequent conduct must be relevant, reasonably available to all the contracting parties, and relate to a clear and obvious context;

(b) the principle of objectively ascertaining contractual intention(s) remains paramount; and

(c) accordingly, the subsequent conduct must always go toward proof of what the parties, from an objective viewpoint, ultimately agreed upon.

104 Even where evidence of subsequent conduct fulfils these three criteria, the evidence may not be probative of the parties' intention at the time they entered into the contract. This is because the evidence can be shaped to suit each party's position with the benefit of hindsight: *MCH International* at [21], citing *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [78]. Indeed, once a party appreciates that a dispute is imminent, the subsequent conduct itself can be shaped in this way.

105 The first defendant does not object to the admissibility of evidence about the August Payment. Neither does it argue that, because it is evidence of subsequent conduct, it should carry less weight in interpreting cl 3. Since I have not heard arguments on this issue, I make no decision on whether this evidence is admissible as an interpretive aid. Instead, I assume in the first plaintiff's favour that it is admissible. Even on that assumption I do not consider that the parties' treatment of the August Payment assists the first plaintiff.

106 I accept that the August Payment was invoiced and paid as part of the first defendant's fees under cl 3(b) of the Agreement. In cross-examination, Mr Chan attempted to characterise the August Payment as a prepayment under cl 3(b) rather than as a payment of fees under cl 3(b).[76] When pressed on the point, Mr Chan said that he told Dr Peloso that it was a prepayment in a conversation.[77] As the first plaintiff points out,[78] this alleged conversation appears nowhere in Mr Chan's five affidavits of evidence in chief. It is inconsistent with Mr Chan's email describing the invoice as "the invoice for the fsc hedge in q315".[79] And it is inconsistent with the first defendant's pleaded case that the August Payment was "its Fees under Clause 3 of the Consulting Agreement for the third quarter of 2015".[80] Mr Chan was also unable to explain what the August Payment was a prepayment for. He said that it was a prepayment "in the sense that … [i]t was derived from the [first CFD]" and "in the sense that the first defendant ha[d] started to provide a lot of services …

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76 NAs, 29 May 2019, at p 16, lines 22–26; p 20, lines 19–21.

77 NAs, 29 May 2019, at p 18, lines 10–17.

78 P1CS at [26]–[27].

79 AB vol 4 at 2515.

80 D&CC at [20].

without getting paid anything".[81] I consider this part of Mr Chan's evidence to be a contrivance.

107 Nevertheless, I decline to draw the inference from the August Payment that the parties intended the phrase "net positive payment" in the Agreement to include gains and losses on CFDs.[82] The relevant intention is the parties' intention, objectively ascertained, at the time they entered into the Agreement. I do not find the circumstances surrounding the August Payment in July and August 2015 sufficiently probative of the parties' intention in April 2015, when they entered into the Agreement. In my view, there are alternative explanations for their subsequent conduct in July and August 2015. The August Payment could have been the result of a bilateral mistake, with both parties labouring under a misapprehension in July and August 2015 about what they had agreed in April 2015 or about the contractual effect of cl 3 of the Agreement. Or it could have been the result of a unilateral mistake by Dr Peloso in July and August 2015. He could have mistakenly understood "net positive payment" to include gains on CFDs, with Mr Chan merely going along with his understanding.

108 For these reasons, I reject the CFD ground.

The Clause 4 ground

109 I next consider the Clause 4 ground.

110 Damages to compensate a plaintiff for breach of contract are intended to put the plaintiff in the position it would have been in had the contract been

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81 NAs, 29 May 2019, at p 19, lines 18–22.

82 P1CS at [24]–[25].

performed: *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [125]. The first plaintiff submits that, had the Agreement been performed, the first defendant would have been obliged to invest part of its fees in the first plaintiff or in one of its infrastructure projects under cl 4.[83] Neither party has adduced any evidence as to how much the first defendant would have invested or what those hypothetical investments would be worth today.[84] The first plaintiff therefore argues that, absent such evidence, the court should assume that the investments would be worth nothing today.[85]

111 The first defendant submits that cl 4 does not impose an obligation on the first plaintiff to invest, instead merely conferring a right to decide whether and how to invest.[86] It also submits that the first plaintiff bears the burden of proving the value of these hypothetical investments today. In the absence of any evidence from the first plaintiff to discharge this burden of proof, the first defendant submits that the court should assume that the investments would have broken even,[87] *ie*, that those investments would be worth today the same as the amount invested, resulting in no net deduction from the first defendant's damages.

Clause 4 imposes an obligation

112 I accept the first plaintiff's submission that cl 4 imposes an obligation on the first defendant. I say that for three reasons. First, cl 4 uses mandatory

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83 P1CS at [31].

84 P1CS at [45]; MCS at [30]–[32].

85 P1CS at [42].

86 MCS at [22]–[23].

87 D1OS at [28].

language. Clause 4(a) provides that the first defendant "*will* invest a minimum of Investment Percentage … into either an infrastructure project of the first plaintiff or the equity of Sun Electric Pte Ltd at the prevalent price at the time of receipt of fees, or prevalent price at the time of Investment, at the discretion of [the first defendant]" [emphasis added]. Although both Mr Chan and Dr Peloso are not legally trained, they are both well-educated and, more importantly, fluent in English. They would have appreciated a distinction between saying that a party "will" invest and saying that a party "may" or "can" invest. Second, as the first plaintiff points out,[88] the word "minimum" shows that the first defendant was obliged to invest *at least* the percentage stipulated in cl 4. Third, as the first plaintiff also points out,[89] in one of Mr Chan's affidavits of evidence in chief, he referred to the investment envisaged by cl 4 as an "obligation to invest".[90]

113 The first defendant submits that the phrase "at the discretion of [the first defendant]" in cl 4(a) means that the first defendant could choose not to invest at all.[91] But this interpretation conflicts with the mandatory language of cl 4(a). A more natural reading of cl 4(a) is that the first defendant was obliged *to invest* the stipulated percentage but had the discretion to choose other features of how it would invest. It could choose: (a) whether the investment would be in one of the first plaintiff's infrastructure projects or in the first plaintiff's equity; (b) whether to invest at the price prevalent at the time of receiving the relevant fees or the price prevalent at the time of making the investment; and (c) whether to invest any sums over and above the stipulated minimum percentage.

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88 P1CS at [36]–[37].

89 P1CS at [39].

90 Chan's 4th AEIC at [23], [25].

91 MCS at [23].

The burden of proof

114 The first plaintiff argues that the first defendant bears the burden of proving the value today of the hypothetical investments under cl 4 because "a claimant bears the burden of proving not only liability, but [also] the extent of its losses claimable".[92] But the first defendant, as the first plaintiff itself acknowledges,[93] no longer pursues its counterclaim for loss of a chance to profit from the investments under cl 4. As such, the first defendant no longer makes any assertion about the value of those investments as part of its case. It therefore bears no burden of proving the hypothetical value of those investments today.

115 Instead, it is the first plaintiff who now makes the only assertion about the value of those investments. The first plaintiff asserts in its defence that the fees which the first defendant would have received under the Agreement should be reduced by the sums which the first defendant would have invested under cl 4 of the Agreement. Implicit in this assertion is a secondary assertion that the investments would be worthless today. Accordingly, under s 105 of the Act, it is the first plaintiff who bears the burden of proving that those investments would be worthless today.

116 Because the first plaintiff adduced no evidence of its infrastructure projects or of the value of such projects or of its equity over time, I have no basis to assess how much the first defendant would have invested under cl 4, let alone to assess what those investments would be worth today. The first plaintiff has failed to discharge its burden of proof on the Clause 4 ground.

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92 P1CS at [43].

93 P1CS at [45].

117 For these reasons, I reject the Clause 4 ground. Given my holding in the first defendant's favour, it is not necessary to consider its alternative arguments that cl 4 is a non-binding expression of intent or is void for uncertainty or incompleteness.[94]

Conclusion

118 The exact sum which the first defendant is entitled to by way of damages, calculated in accordance with its formula (see [16] above), is $1,495,452.53. This includes the sum prayed for in the first defendant's pleadings of $172,336 in fees for December 2015.[95]

119 For all of the foregoing reasons, I now enter final judgment in this action as follows:

(a) Clause 3(a) and cll 3(c) to 3(e) of the Agreement be and are hereby rectified in the manner set out at [95] above;

(b) The first plaintiff shall pay to the first defendant damages for breach of the Agreement assessed at $1,495,452.53; and

(c) The first plaintiff shall pay to the first defendant interest on the sum of $1,495,452.53 amounting to $413,169.36 being interest pursuant to s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) calculated at the rate of 5.33% per annum from 1 March 2016 (the date of the writ) to 7 May 2021 (the date of this judgment).

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94 MCS at [25].

95 D&CC at [26]–[28] and prayer 1; D1OS at [13].

120 As for the costs of this action, I invite the parties to agree a way forward on that issue between themselves. If the parties cannot agree on a way forward, and subject to any further directions, they are to file written submissions within two weeks of the date of this judgment on: (a) who is to bear the costs of this action; (b) on what basis that party is to bear the costs; and (c) whether the quantum of those costs is to be taxed or is to be fixed by me. If either party wishes me to fix the costs, the parties' submissions are also to address the quantum of the costs bearing in mind: (a) the parties' costs schedules in this matter; (b) the guidelines on costs set out in Appendix G of the Supreme Court Practice Directions; and (c) sums which have been awarded on taxation in similar cases. I shall then consider the parties' written submissions, with further oral submissions if considered necessary, and render my decision on costs.

Vinodh Coomaraswamy
Judge of the High Court

Lim Chee San (TanLim Partnership) for the plaintiffs and defendant-in-counterclaim;
Ng Lip Chih (Foo & Quek LLC) (instructed), Jennifer Sia and Rezvana Fairouse (NLC Law Asia LLC) for the defendants and plaintiff-in-counterclaim.