Kosui Singapore Pte Ltd *v* Kamigumi Singapore Pte Ltd and another [2012] SGHC 43

Case Number : Suit No 312 of 2010

Decision Date : 05 March 2012

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Thangavelu and Raymond Wong (Advocates Legal Chambers LLP) for the plaintiff; Philip Jeyaretnam SC, Koh Kia Jeng and Charmaine Ng (Rodyk & Davidson LLP) for the Defendants.

Parties : Kosui Singapore Pte Ltd — Kamigumi Singapore Pte Ltd and another

Building and Construction Law – Building And Construction Contracts – Lump Sum Contract

Building and Construction Law – Building And Construction Contracts – Measurement contracts

Building and Construction Law – Contractors' Duties – Acceleration of works

Building and Construction Law – Sub-contracts – Assignment

Building and Construction Law – Sub-contracts – 'Pay when paid' provisions

5 March 2012 Judgment reserved.

Quentin Loh J:

Introduction

1 The Defendants have appealed against my oral judgment with brief reasons delivered on 31 October 2011. I now set out my reasons for my decision.

2 The 2nd Defendant, Kamigumi Co Ltd, is a company incorporated in Japan with one of its divisions engaged in the building and construction industry. It has a separately incorporated entity in Singapore, the 1st Defendant, (collectively, "the Defendants"). Sometime in early June 2008, the Defendants heard of and decided to try and secure the theme park contract for the Universal Studios Singapore's ("USS") show and ride attractions ("the USS contract"). They were successful. USS awarded the Defendants the contract to erect and install the theme park's eight show and ride attractions at USS ("the eight attractions"):

(a) Water World ("WW");

(b) Jurassic Park River Adventure ("JPR");

(c) Revenge of the Mummy ("ROM");

(d) New York Special FX Spectacular ("SFX");

(e) Journey to Madagascar ("JTM");

(f) Dragon Junior Coaster ("DJC");

(g) Canopy Tour ("C Flyer"); and

(h) Pteranodon Flyer ("P Flyer") – also called the Kiddy Jeep Ride.

3 The Plaintiff is a company incorporated in Singapore carrying on the business of building and construction. It is owned by Mr Ito Fumiyuki ("Mr Ito"). In this case, the Plaintiff became the labour subcontractor, supplying labour to the Defendants in the circumstances set out below ("the USS labour subcontract"). Which Defendant it contracted with is one of the disputes in this case. The Plaintiff's first quotation was addressed to and accepted by the 2nd Defendant ("the 1st Agreement"), and subsequently there was a second, identical quotation, backdated to the date of the first quotation, addressed to and accepted by the 1st Defendant ("the 2nd Agreement") (collectively, "the Agreements"). The other issue is, broadly speaking, the amounts, if any, owed by the parties to each other in respect of various claims.

4 The parties have resolved two issues:

(a) The Plaintiff has admitted to the 1st Defendant's Counterclaim of $125,149.87 (inclusive of GST) being paid by the 1st Defendant to K2 Specialist Services Pte Ltd for the bolt torque works.

(b) The Defendants, as they informed me on 25 April 2011, have decided not to pursue their Counterclaim in respect of the sums paid to one Mr Oshita.

Issues

5 The parties have also helpfully agreed on the remaining six issues:

(i) Whether the 1st Agreement between the Plaintiff and 2nd Defendant remains valid and enforceable, or the 2nd Defendant has been discharged of all its obligations under the 1st Agreement following the execution of the 2nd Agreement between the Plaintiff and 1st Defendant.

(ii) Whether, under the 1st Agreement and/or the 2nd Agreement, the Plaintiff is entitled to claim the total value of man hours incurred less the sums paid to the Plaintiff by the 1st Defendant in the light of Note (1) of the terms and conditions, which reads as follows: "During work progress, if there are changes which are more than your original BOQ, we will charge you accordingly based on our rate first quote to you."

(iii) Whether the Plaintiff is estopped by convention from relying on the Agreements to claim the total value of man hours incurred less the sums paid to the Plaintiff by the 1st Defendant

(iv) Whether the Plaintiff has discharged the burden of proving, on a balance of probabilities, that it has supplied additional manpower valued at $3,134,965.50 (excluding GST).

(v) Whether the 1st Defendant is liable to pay the Plaintiff for its use of the lorry, and if so, the rate to be paid, having regard to the fact that there was no discussion on the rate to be charged

(vi) Whether Mr Hideaki Iwaki ("Mr Iwaki") was in breach of his duties as the Attraction Manager for the JPR attraction, and, if so, whether the Plaintiff is liable for the sum of $74,900 incurred by the 1st Defendant in engaging CUL M&E Pte Ltd to provide an assistant for Mr Iwaki.

Facts

6 The following facts are not really in dispute. Insofar as they are, the following paragraphs constitute my findings of fact. In early to mid-June 2008, the 2nd Defendant's Mr Terayama, who eventually became the Defendants' project manager for the USS project, heard about USS's plans for a Universal Studio attraction on Sentosa Island and alerted his colleague in Singapore, Mr Kamimura, a director of the 1st Defendant. Mr Kamimura, an economics graduate, had no actual construction site experience whether in Singapore or elsewhere. The Defendants decided to bid for the USS contract.

7 The 2nd Defendant had successfully worked with the Plaintiff's Mr Ito before, especially in Dubai, and turned to him for its labour supply. Mr Kiyohara was a director in the 2nd Defendant's building and construction division and was in charge of the 2nd Defendant's Tsurusaki Branch in Japan. Mr Terayama was actually employed by Hoei Sangyo Co Ltd and was seconded at the material time to the 2nd Defendant's Tsuruki Branch. He reported to Mr Kiyohara. Since he started work at the age of 18, Mr Terayama has worked and been involved in installation work of entertainment facilities in Japan. However, he has never worked in Singapore.

8 In August 2008, the 1st Defendant's Mr Kamimura met with Mr Sakaniwa of Resort World Sentosa ("RWS", or "the Employer" in building parlance) to discuss the Defendants' interest in the contract. Mr Kamimura brought along the Plaintiff's Mr Ito and Mr Michinaka to this meeting. Thereafter there were more meetings between the Defendants and the Plaintiff. Mr Terayama was the person in the Defendants with the experience in building show and ride attractions, having been involved in a similar project in Universal Studios Japan. It was not disputed that the Plaintiff and Mr Ito had never done such work before. Mr Ito left the details of the USS labour subcontract to Mr Michinaka to work out. It was soon apparent that the Plaintiff and Mr Michinaka were having difficulty doing so as they had never done this kind of work before. This too was not disputed.

9 There was an important fax with attachments dated 31 October 2008 from Mr Kamimura to Mr Michinaka copied to Mr Ito, setting out in spreadsheet format the Plaintiff's quote, with:

(a) a list of the numbers and type of worker required for each attraction (*eg*, lifting supervisor, foreman, mechanic electrician, welder, rigger, signalman, fitter and forklift driver);

(b) the number of days work for each attraction;

(c) the number of man hours required of each category of worker, (based on "10 working hour(s): 8.00 - 19:00, Lunch 12:00 – 13:00");

(d) a request to multiply the man hours by 1.5 as the estimates were based on experienced Japanese workers as compared to Singapore workers without the experience; and

(e) the start and end dates for each attraction;

It was not disputed that Mr Terayama prepared these attachments with the foregoing details and figures based on his experience. This is clearly illustrated from Mr Terayama's initial inclusion of an

electrician as part of the required workforce of the Plaintiff. Whilst it is common for a Japanese contractor to include electricians in their workforce, in the Singapore context and practice, electricians are from separate electrical subcontractors who have to be separately licensed by a statutory undertaker. Hence, no electrician was included in the Plaintiff's quote.

10 Mr Michinaka worked on the quotation, no doubt discussing the final figure with Mr Ito. A meeting was held on 20 November 2008 between Mr Ito and Mr Michinaka from the Plaintiff and Mr Terayama and Mr Kamimura from the Defendants to discuss the Plaintiff's pending quote. I find that Mr Michinaka had worked out the pricing on a Bill of Quantities ("BOQ") which was based on and incorporated all the details and figures from the attachment referred to above at [9], and this was discussed at the meeting. The original BOQ can no longer be found, but the figures agreed upon are in the Plaintiff's quotation, [note: 1] which I will discuss below.

11 On 25 November 2008, the Plaintiff sent the 2nd Defendant its quotation for its supply of labour and installation of equipment for the USS contract, marked to the attention of Mr Kiyohara. This was "Agreed and Accepted" and signed by Mr Kiyohara for and on behalf of the 2nd Defendant (this was the 1st Agreement). This formed the contract between the parties and consisted of a three-page letter form with terms [note: 2] and a detailed breakdown for each of the eight attractions, indicating the type of workers to be supplied, the sub-totals and totals of man-days per type of worker, the number of hours per category of worker (based on an eight-hour work day from 8 am to 5 pm), the unit rate and the amount to be charged therefor, a two-hour overtime provision per category of worker, the hours and unit rate and overtime amounts to be charged therefor, and three pages covering the scope of works items the Plaintiff would cover. It bears repeating that other than the pricing, these details and figures were based on those worked out by Mr Terayama and referred to above at [9]. It is important to note that the text included the following:

> Note (1) Our quotation to you is solely based on your BOQ for your man power schedule which received on 20th Nov. 2008. During work progress, if there are changes which are more than your original BOQ. We will charge you accordingly based on our rate first quoted to you.
>
> (2) Rate of Worker. (1) Straight Time (x 1.0) : 8:00 – 17:00, (2) Over Time (x 1.5) : 17:00 – 22:00,
>
> (3) Night Time (x 2.0) : 22:00 – 8:00, (4) Sunday / Public Holiday (x 2.0).[Note] (3) Working Hour Condition for Quotation. (1) Monday to Friday : 8:00 – 19:00, (2) Saturday : 8:00 – 17:00, (3) Sunday / Public Holiday : Off."1.
>
> Scope of Work
>
> (1) Supervision and labours, tools and equipment,consumables for installation for equipment for Universal Studia as following 8 atractions…
>
> Schedule :- From 15th January 2009 to 30th January 2010. Quotation Price : S$4,326,707.00 *Please refer to attached break down quotation.
>
> 2. Note Price quoted Excluded the following; (1) All Cranage (2) All Scaffolding
>
> 3. Payment Terms
>
> (1) The claim shall be paid in cash within 30 days from receipt of our invoice which is calculated by work progress at site.

12 The next important fact occurred on 19 March 2009 when Mr Maeda of the 2nd Defendant sent an email to the Plaintiff's Mr Ito which was copied to Mr Terayama, Mr Michinaka, Mr Kiyohara, Mr Kamimura and one Mr Morishita. The subject heading was "Re: Regarding to Agreement" [sic]. This email went on to say:

> I would like to inform you of our decision on the matter as below after discussion with Kiyohara at Tsurusaki Branch.
>
> 1. The contract amount and terms and conditions shall be still valid but the payment will be made through Kamigumi Singapore considering GST matter. Therefore, we would appreciate if you could kindly re-issue all invoices that were issued and acknowledged by Tsurusaki Branch under Kamigumi Singapore. For further invoice, please issue under Kamigumi Singapore after acknowledged by Tsurusaki Branch.
>
> 2. Therefore, agreement between your company and our Tsurusaki Branch in the original contract *shall be still valid*, but in terms of tax matter in Singapore, Kamigumi Singapore will issue purchase order to your company based on the agreement between your company and Tsurusaki Branch.
>
> 3. As for payment guarantee by Kamigumi head office, Kiyohara will inform you of further detail.
>
> 4. As for the payment schedule by Kamigumi Singapore, we haven't received Down Payment from RWS as it takes time to issue bank L/G. (Now we are checking with head office about the issue as RWS requested to change the content of L/G again). I will let you know the payment schedule later.
>
> [emphasis added]

The only point I would make is that at the paragraph numbered "2" above, the phrase "shall be still valid" appears to have been inaccurately translated; I accepted the Interpreter's interpretation during the trial that the phrase should more accurately read: "will be maintained". [note: 3] Counsel for Plaintiff and the Defendants accepted and did not dispute this.

13 Mr Ito complied and sent a quotation on identical terms, backdated to 25 November 2008, to the 1st Defendant, marked for the attention of Mr Kamimura who then "Agreed and Accepted" the same by signing beneath that phrase on behalf of the 1st Defendant (this is the 2nd Agreement). Issue (i) arises from this transfer of payment obligations. It is undisputed that the first or first few invoices were addressed to the 2nd Defendant, but these were subsequently reissued and the 1st Defendant paid all sums invoiced by the Plaintiff.

14 There were delays to the project and the USS contract which were not caused by the Plaintiff. This is not really disputed by the Defendants. Insofar as it is, I find and hold that this has been proven by the Plaintiff, (see [33] below). Consequently, there was a very low take-up rate of man hours that had been catered for, unutilised labour in the first few months of the contract, and a subsequent need to accelerate works to make up for lost time. The Plaintiff put in more workers and their workers often worked overtime. The contract period overran the scheduled end date. The identity of the party who requested the acceleration, the existence of an agreement to pay for this acceleration, and the amount incurred for acceleration were some of the issues that arose out of the USS labour subcontract. At one point in time, RWS requested acceleration for the SFX attraction and

extra work due to unscheduled stockpiling of material at one part of the site, and the Plaintiff put in the labour to do so. The Plaintiff raised an invoice for this work, RWS paid the 1st Defendant, and the 1st Defendant, in turn, paid the Plaintiff.

15 A large part of the dispute between the parties arose from these acceleration measures and the deployment of additional and often overtime labour. The Plaintiff did not submit any claim for additional interim payments during those months where additional labour was deployed and overtime hours were clocked. However, at the end of the contract period, they made a claim for the additional work and costs. This is the background for issues (ii) and (iii) and. Issue (iv) is an evidentiary issue arising out of this dispute. The Plaintiff has conceded that it does not have detailed records of the additional workers it had supplied and relied on the records and claims of its labour sub-subcontractors or suppliers.

16 During the course of construction, the 1st Defendant used the Plaintiff's lorry and driver to transport its workers at the work site. This was not catered for in the quotation. During the course of the contract, the Plaintiff did not submit any periodic interim claim in respect of this lorry and driver, but contended that it was understood that the 1st Defendants would not use the lorry for free. Issue (v) turns on what, if anything, had actually been agreed between the parties as to the use of the lorry and driver and whether the 1st Defendant is liable to pay for the same.

17 Another dispute related to one Mr Iwaki, who was supplied by the Plaintiff to the 1st Defendant as the Attraction Manager for JPR. The 1st Defendant claimed that they were very dissatisfied with Mr Iwaki's performance and contended that because of Mr Iwaki's poor work performance, they had to hire an assistant attraction manager from CUL M&E Pte Ltd to assist Mr Iwaki. The Plaintiff was therefore liable for this additional expense. Issue (vi) arose out of this dispute.

18 I now turn to deal with the Agreed Issues.

(i) Whether the 1st Agreement between the Plaintiff and the 2nd Defendant remains valid and enforceable or the 2nd Defendant has been discharged of all its obligations under the 1st Agreement following the execution of the 2nd Agreement between the Plaintiff and the 1st Defendant

19 The terms and conditions of the Agreements were identical save for the contracting parties, the signatories for the 1st and 2nd Defendants and the backdating of the second quotation.

20 The Plaintiff claimed that it entered into a contract with the 2nd Defendant and the 2nd Defendant subsequently asked it to allow the 1st Defendant to be used for Goods and Services Tax ("GST") purposes. The Plaintiff contended that save for the invoicing and payment, it was agreed that the original contract would remain valid and during discussions to reissue invoices to the 1st Defendant, the Plaintiff claimed that Mr Ito's condition that the 2nd Defendant was to guarantee payment by the 1st Defendant to the Plaintiff was acceded to. [note: 4]

21 The Defendants claimed that there was a substitution of the 2nd Defendant with the 1st Defendant through the sending and acceptance of the second quotation in the name of the 1st Defendant. The 2nd Defendant was thereafter discharged from performance of the contract. The

Defendants contended that the email of 19 March 2009, properly construed, meant that the original terms and conditions of the 1st Agreement with the 2nd Defendant would remain unchanged, except that the 1st Defendant would perform the contract.

22 It is common ground that the 1st Agreement was made between the Plaintiff and the 2nd Defendant. However, once the work commenced, the Defendants must have realised that they were going to suffer a great financial disadvantage if they could not offset the GST amount in the Plaintiff's bills as the USS contract was between RWS and the 1st Defendant, whilst the USS labour subcontract was between the Plaintiff and the 2nd Defendant. This was something entirely of the Defendants' own doing. Hence, on 19 March 2009, the 2nd Defendant made a request for a change. The contents of the request for this change speak for themselves. In the first paragraph of the translated email dated 19 March 2009 (see [12] *supra*), the 2nd Defendant stated that the contract amount and the "terms and conditions *shall still be valid* but the payment will be made through Kamigumi Singapore considering the GST matter" [emphasis added]. The second paragraph is even more telling. The 2nd Defendant unequivocally stated that the agreement between the Plaintiff and their "Tsurusaki Branch in the original contract" shall

> still be *valid [maintained]* but in terms of tax matter in Singapore, Kamigumi Singapore will issue purchase order to your company based on the agreement between your company and Tsurusaki Branch.
>
> [emphasis added]

The meaning of that paragraph is incapable of any construction other than that the 1st Agreement still remains afoot. As noted above, this was made even clearer when, during trial, the Interpreter pointed out that the word "valid" in the second paragraph was not a correct translation. The Japanese word was more accurately translated as "maintained". [note: 5] This was the Defendants' own document. I therefore cannot accept the Defendants' contention that the 2nd Agreement was meant as a discharge of the 1st Agreement and the 2nd Defendant from the USS contract.

23 Further, under cross-examination, Mr Kamimura admitted: "My understanding is that the contract remains valid." [note: 6] Mr Kiyohara admitted that when he approached Mr Ito for a change in contracting party, Mr Ito's condition for agreeing was a guarantee from Kamigumi Japan, *ie*, the 2nd Defendant. Mr Kiyohara replied to Mr Ito that he would consider this and he did. But he did not reply or follow through because at the end of March 2009, the Tsurusaki Branch was closed and he was transferred to the Kamigumi Head Office at Kobe. However, Mr Kiyohara then went on to say that he discussed the 19 March 2009 email with Mr Maeda before the latter sent it out. Although Mr Kiyohara did not inform the Head Office about Mr Ito's condition for substituting the 1st Defendant with the 2nd Defendant, he did tell Mr Maeda of Mr Ito's condition: "I told him that parent's company's guarantee is required." [note: 7] Mr Maeda then told Mr Kiyohara to consider "[t]he process of getting parent company's guarantee [sic]." [note: 8] I find Mr Kiyohara's evidence on this point quite unsatisfactory. Thereafter his evidence was nothing but dodging about each question in an effort to undo what he had just said. I also do not accept his reason for not pursuing the guarantee, *viz*, the fact that the payments from the 1st Defendant were "successfully done" thereby implying that a Head Office guarantee was no longer necessary. He chose not to answer questions and kept beating about the bush, in an effort to justify the Defendants' contention that a substitution had taken place. I

therefore do not accept his evidence on this point. I find that for his own purposes and reasons, he did not pursue the guarantee with the Head Office. I find that he knew Mr Ito had imposed a condition for the substitution, and he discussed the contents of the 19 March 2009 email with Mr Maeda before Mr Maeda sent it out. That email speaks for itself.

24 Accordingly, I find and hold that the 1st Agreement between the Plaintiff and the 2nd Defendant remains valid and enforceable. The 1st Defendant and 2nd Defendant are jointly and severally liable to the Plaintiff for all sums that are or may be due to it. For all sums due and payable by the Plaintiff to the Defendants, payment by any one Defendant will be good discharge of the other.

25 Much was made of the fact that a guarantee was never eventually issued. I find that as the parties were all Japanese, there was an element of trust between them. Many matters were dealt with verbally or informally and there was little or no follow-up or documentation.

26 The issue of the guarantee does not really arise unless the 1st Defendant fails to pay any sum due to the Plaintiff under the USS labour subcontract. Insofar as it is necessary, having considered the evidence, I find and hold that the Plaintiff required a guarantee of payment by the 2nd Defendant in the event that it was not paid by the 1st Defendant, for acceding to the GST arrangements requested for by the 2nd Defendant. This guarantee was promised with the statement that Mr Kiyohara would inform Mr Ito of "further detail". [note: 9] In cross-examination, Mr Ito testified, and I accept his evidence, that he understood from this that the 2nd Defendant was to provide payment guarantee: [note: 10]

Q: If you could look at page 34, 1 AB 34, by paragraph 2 of this email, and indeed by parasgraph 1 as well, it is explained that the contract amount in terms and conditions shall be still valid, but payment would be made through Kamigumi Singapore, considering GST matter. Agreed?

A: Yes, correct.

Q: So what this meant was that, in terms of payment, you would have to look to Kamigumi Singapore?

A: It's correct.

Q: And you asked, or had asked about whether Kamigumi Japan would provide a payment guarantee, isn't that correct?

A: Yes, correct.

Q: And in paragraph 3 of this email at page 34, what the gentleman signing the letter says— sorry email, says, is: "As for payment guarantee by Kamigumi head office, Kiyohara will inform you of further detail."

A: Yes.

Q: And subsequent to this email, there was no further communication about the issuing of any payment guarantee, was there?

A: Well, after that, I have asked them verbally several times to issue the payment guarantee,

but they have not done it. Can I add something?

Q: Yes, certainly.

A: Well, regarding the payment guarantee, well, I'm not very well-versed in legal matters, so I held the impression that this email from Mr Maeda was enough to say that they guaranteed the payment.

27 Mr Kamimura agreed that the phrase "… will inform you of further details…" did not mean that the Plaintiff would not be getting a guarantee: [note: 11]

Ct: Can you translate paragraph 3: "As for payment guaranteed by Kamigumi head office, Kiyohara will inform you of further details."

A: Yes.

Ct: As a matter of English, that doesn't mean, "No, we will not give you a guarantee." It just seems to suggest at a later stage he will be informed of further details. That's what it says. Now, that's how I read it. I do not know if, in Japanese, on page 35, whether it means, "No, you are not going to get a guarantee." Can you help me, first as a matter of English I'm telling you paragraph 3 does not say, "No, you will not be getting a guarantee", all right? My question to you is at page 35, paragraph 3, what is written in Japanese, does it say, "No, you will not be getting a guarantee"?

A: The Japanese original doesn't say that the guarantee will not be given.

28 In any event Mr Kiyohara failed to follow up and Mr Ito did not pursue the matter as he was in the thick of subcontract performance. Insofar as it is necessary, if the Plaintiff had asked for specific performance, they would be entitled to it. If so, the 2nd Defendant's defence which relies on s 6, Civil Law Act (Cap 43, 1999 Rev Ed) would fall away.

(ii) Whether the Plaintiff is entitled to claim the total value of man hours incurred less the sums paid by the 1st Defendant in the light of Note (1) of the terms and conditions

29 The Defendants claimed that this was a true lump sum contract in the sense that a price for the construction and installation work for the eight attractions was fixed and agreed upon. If, on the contrary, payment was to be on a measurement basis, it would not have been necessary to make detailed calculations for the estimation of man-days. Further interim invoices were rendered on a milestone basis; this was a clear indication of a fixed price contract. No interim claims were made for additional man hours, and there was no mechanism for calculation of costs for the additional supply of labour and additional man hours incurred. The only one time an additional invoice was raised was for the SFX attraction, where the Plaintiff was specifically asked to do additional work therefor and invoiced for that additional work. The provision for changes in Note (1) of the terms and conditions [note: 12] meant an extension of the scope or timing of the works rather than payment for additional labour for the same work. [note: 13]

30 The Plaintiff disagreed completely and contended that this was not a lump sum or fixed price contract, pointing out that it had no experience at all in such works and were pricing their work on the Defendants' estimates. In these circumstances they could hardly have agreed to a true lump sum basis which may have turned out to be quite inadequate to cover their costs. [note: 14] (The Plaintiff

points to Note (1) of the terms and conditions, which was inserted to protect itself and which clearly provided that the Defendants will be charged "if there are changes which are more than your original BOQ" based on the rates first quoted to the Defendants by the Plaintiff.

31 My following findings of fact, set out below, were not really in dispute, especially for those leading up to the contract:

(a) It is common ground that the Plaintiff, to the knowledge of the Defendants, did not have any experience in this kind of work. The quotations in the 2nd Agreement were provided by the Defendants as an estimate of what would be required. Mr Terayama (as an employee albeit on secondment) of the 2nd Defendant and who had experience with this kind of work, testified in his affidavit that [note: 15]

> Kamimura told me that Ito did not have sufficient experience in show and ride attractions and that he neither knew the number of workers required for the works of this scale, nor the rate applicable for him to supply workers for such work. Hence, Ito had difficult quoting. Given this, I worked out a construction schedule and the number of man-hours required to be supplied from Kosui based on my experience in the USJ [Universal Studios Japan] project and provided the same to Kosui… I *estimated* the manpower needed for the USS project to be about 2,556 man-weeks (not including Saturdays and Sundays).
>
> [emphasis added]

(b) There was a series of meetings in the latter half of 2008, during which Mr Michinaka, who had been tasked by Mr Ito to work on the quotation, asked Mr Kamimura for material and data as he was having difficulty working out a quotation. Mr Kamimura liaised with Mr Terayama, who represented the 2nd Defendant.

(c) As noted at [9] *supra*, pursuant to these communications, the 2nd Defendant sent the Plaintiff an email on 31 October 2008, [note: 16] containing enclosures [note: 17] and asking the Plaintiff to quote as a labour subcontractor to the 2nd Defendant. The format of some of these documents was provided by RWS to the 2nd Defendant, but it was the 2nd Defendant (mainly Mr Terayama [note: 18] and Mr Kamimura [note: 19]) who prepared the documents and put in the figures for the amount of labour required. This included, for each attraction, the required labour in terms of man days, man hours, type of labour (foreman, rigger, welder, fitter, *etc*), start and end dates, and the T&C periods. Mr Michinaka adopted the figures for the man days per attraction but made adjustments to the particular categories of labour and/or their number. [note: 20]

(d) Based on the numbers, in particular the total man days per attraction, the material and data put forward by Mr Terayama, through Mr Kamimura, and the adjustments (noted at [(c)] *supra*) by Mr Michinaka, the Plaintiff came up with a BOQ which was discussed at a meeting on 20 November 2008, and the parties agreed on the figures. I accept Mr Michinaka's evidence that his low range was about 19,000 man-days and his high range was about 23,000 man-days, and the figure finally adopted was 20,611 man days. [note: 21] This BOQ no longer exists, but the data, figures and numbers for each attraction from this BOQ went into the manpower schedule quoted to Kamigumi and prepared by Mr Terayama [note: 22] - this was not really in dispute. These documents set out for each attraction the type of labour required, the number of workers for each category of labour, the number of man days per category of worker, the unit rates

(including those for normal time and overtime) and the total amounts. I find and hold that this was, for all intents and purposes, having been taken from the BOQ initially discussed, the BOQ referred to in the Plaintiff's quote dated 25 November 2008 which was accepted by the Defendants.

(e) The contractual provision in Note (1) reads:

> Our quotation to you is solely based on your BOQ for your man power schedule which received on 20th November 2008.
>
> During work progress, if there are changes which are more than your original BOQ. We will charge you accordingly based on our rate first quote to you.

The meaning of these words is clear and unambiguous. It says "if there are *changes* which are *more*" than the original BOQ [emphasis added], then the Defendants will be charged for this extra work at the rates set out in the quotation. It can hardly be clearer. This is clearly not the wording of a lump sum or fixed price contract where the contractor has promised to carry out and complete a set piece of work for a fixed sum agreed in advance.

(f) The contract sets out in detail, for each attraction, the man days required per category of worker, their respective unit rates or cost, the normal eight hour day charge and a two hour overtime charge per day, with appropriate totals and subtotals. For example, for the Canopy Flyer, the Plaintiff would supply one Site Supervisor, for 122 man days in return for the sums of$30,256 (for 122 MD for eight hours a day at $31 which is the normal rate) and $11,346 (for the daily two hours overtimefor 122 MD at $46.50 per hour, being the overtime rate of 50% more than the normal rate), making it a total of $41,602 for the Site Supervisor for the envisaged period. The other workers were worked out in a table similar to the building up of a BOQ. Contractually this meant that if the Defendants required the Site Supervisor for the Canopy Flyer for more than the 122 MD, they had to pay more based on the rates set out in the manpower schedule. [note: 23]

(g) The Defendants accepted the quote without demur and signed the contract beneath the annotation which says "Agreed & Accepted". The contract is in a simple letter form. The terms, albeit after translation, were simple and brief. The Defendants did not question that provision or said that it was wrong. Neither did they ask for rectification in the alternative, if indeed that was the common understanding. In fact they signed a second agreement with identical wordings and Note (1), again without demur. The contract cannot, on any construction, be construed as a lump sum or fixed price contract in the sense that the Plaintiff would only charge the set price of $4,326,707 for the work it was to do: the Plaintiff would suffer a loss if the work turned out more than envisaged and would receive a windfall if the same turned out less than envisaged.

(h) Mr Kamimura accepted that "changes" in Note (1) could mean an increase in workers; and that "original BOQ" referred to the document that was discussed at the 20 November 2008 meeting:

> Q: Of course. I'm not going into the factors, I'm just trying to understand what you mean, of your understanding of the word "changes" under note 1. So would you agree now with me, then, that "changes" could also mean a change in the number of workers?
>
> A: Yes. [note: 24]

…

Q: Which original BOQ do you think Kosui was referring to?

A: My understanding is that it is based on the manpower schedule which was used during the discussion held on 20 November. [note: 25]

…

Q: No. All I'm saying, all I'm asking is Kosui has given a quotation of 4.326707 million for 20,611 man-days to be supplied. If Kosui, with Kamigumi's approval, with RWS's approval – which is not really the importance of my question but never mind, since you're sticking to that – with all the necessary approvals, then expends 30,000 man-days, my simple question is: would Kosui then be entitled to additional payment for the additional approximately 10,000 man-days?

A: Yes. [note: 26]

(i) None of the Defendants' witnesses provided any satisfactory explanation (if there was any explanation at all) as to why they said this was a lump sum contract despite the obvious contradiction in Note (1) with that construction or contention. Mr Kiyohara stopped short of saying he was, or thought he was, signing a lump sum contract. Rather, his evidence was that he "wanted" a lump sum contract, [note: 27] that such an understanding was "consistent with Kamigumi's agreement with RWS," [note: 28] that the manpower schedule was "essentially" provided on a lump sum basis, [note: 29] and that the contract was "basically" a lump sum contract. [note: 30] Mr Kiyohara only said once that the contract definitively "was" a lump sum contract. Even then, he qualified this by saying that it was subject to RWS's willingness to pay for additional labour: [note: 31]

Q: So it's your evidence that if the client, meaning RWS, makes a mistake and more manpower is required, RWS will pay Kamigumi and then Kamigumi will pay Kosui; is that correct?

A: Yes.

Q: And what if RWS refuses to pay Kamigumi? Does that mean that Kosui, who has expended more manpower, will not be paid as well?

A: Well, this contract was a lump sum contract. That's why we cannot make such payment, but when the request come [sic] from RWS, we are prepared to pay for such request.

Similarly, Mr Terayama's evidence was that he "expected" the contract to be on a lump sum basis, [note: 32] and that the margin given above the estimated labour requirement meant that the manpower schedule was "essentially" provided on a lump sum basis. [note: 33] Mr Kiyohara specifically said he left all matters of the BOQ to Mr Terayama and did not check it before accepting the quotation. The evidence tendered by the Defendants' witnesses was disingenuous, and did not go far toward supporting the interpretation that the Defendants' understanding was that their contract was on a lump sum basis.

(j) These were all experienced building contractors. First, it is a well known basic fact that the lump sum contract, in the sense contended by the Defendants, is normally used where the construction design is well developed and where the quantities can be estimated with some degree of accuracy. This is certainly not the case here, not for installations of this nature, and, *a fortiori*, not the case for such installations in Singapore where no such installations have been erected before. Secondly, seasoned building contractors do not make such basic mistakes like construing the words used in Note (1) to mean a true lump sum contract. Even if I give an allowance for non-familiarity with English, which I do not for the purposes of my judgment as the key witnesses showed a fair working knowledge of English during the trial, there can be no mistaking the meaning of Note (1) and confusing it with a true lump sum contract formulation and language.

(k) The Defendants' first attempt to get around this was to put forward a theory that a margin had been built in for contingencies and unexpected difficulties, thereby ensuring that this was a true lump sum contract and the risk was passed on to the Plaintiff. I do not believe the Defendants' witnesses' evidence of the meeting in Singapore on 19 January 2009 where they allegedly asked Mr Ito for his confirmation that his quote covered contingencies, delay and/or difficulty of work – "essentially that it was provided on a lump sum basis" [note: 34] - and Mr Ito allegedly responded "I understand", thereby signifying his agreement. [note: 35] I note that even this is couched in language that is less than positive: *eg*, "...essentially…provided for..." instead of it "*was*" a lump sum contract, and, "I understand" instead of "I agree." I do not accept their evidence on this score. It bears noting that initially the Defendants' witnesses all deposed that 9 December 2008 was the date of this important meeting in all their Affidavits. [note: 36] But upon receiving the Plaintiff's reply Affidavit, which proved that Mr Ito was not in Singapore on that date, and therefore could not have been present at that meeting, the Defendants' witnesses changed their evidence just prior to cross-examination, stating the date to be 19 January 2009 instead. [note: 37] The Defendants' witnesses obviously gave the earlier date to show that the lump sum nature of the agreement was agreed on before the work started. However, by 19 January 2009, the work had already started. [note: 38] I find it implausible that such an important detail as whether or not the contract was a lump sum agreement was not discussed at the earlier meetings in October and November 2008, but only introduced after the work had started in January 2009. I find that it is more likely that the dates were deliberately changed in the Affidavits to reflect the more favourable position for the Defendants that some agreement on lump sum was made before the works started. There were also other inconsistencies which surfaced during the cross-examination of the Defendants' witnesses. Mr Terayama, for example, gave evidence that he had not communicated his estimate of 17,000 man-days until the 19 January meeting, [note: 39] and that he did not explain to the Plaintiffs and Mr Kiyohara how he had arrived at this figure. [note: 40] Just one page earlier, it had been his testimony that he had explained that this figure was arrived at by taking a 15% margin of 20,000. [note: 41] Given the discrepancy in Mr Michinaka's figure of 19,000, [note: 42] it is unlikely that this number would have been accepted without question if it had been brought up. Yet, Mr Terayama testified that he was not questioned on how he had arrived at this figure: [note: 43]

> Q: … My question is: how did you arrive at 17,000 man-days?
>
> A: When I calculate man-days, usually I include 15 per cent margin, and *since Mr Michinaka and Mr Ito have experience in construction works, I explained to them* that there is 15 per cent of margin in 20,000.

…

Q: Mr Terayama, did you explain to Mr Ito and Mr Michinaka how you arrived at 17,000 man-days?

A: *I didn't explain to them how I arrived at this figure*. I just told them that around 17,000 man-days are required to complete.

Q: Mr Terayama, did you explain to Mr Kiyohara how you arrived at 17,000 man-days?

A: But I didn't explain to him the details, but since I have been working under him for the projects other than this, and he knows that I always include margin with I work out the estimate, and maybe he doesn't know how many per cent I consider as margin, but he is aware that the margin is already included.

Q: Mr Terayama, at this meeting on 19 January, you say that you brought up this number, 17,000 man-days, and this is the first time that this number was brought up in any of your meetings with Mr Ito and Mr Michinaka.

A: No, 17,000, this figure was mentioned for the first time during that meeting.

Q: You are saying that neither Mr Ito nor Mr Michinaka asked you how you arrived at 17,000 man-days?

A: *They didn't ask me*.

[emphasis added]

(l) I also do not accept their evidence on the 17,000 man hours estimate and the increase of the figures to 20,611 man days to cater for contingencies; I accept Mr Michinaka's evidence that that figure was never discussed or even brought up. I find that it was an afterthought and an *ex post facto* calculation to justify an alleged margin for contingencies and bolster the lump sum theory. The objective evidence shows, and on his own evidence Mr Terayama said, [note: 44] that he estimated 2,556 man weeks which translated into 12,780 man days, and after multiplying that by 1.5 to cater for the difference in quality between Japanese labour and labour in Singapore, he reached the figure of 19,170 man days. This came close to the 20,611 man days settled upon at the 20 November 2008 meeting which found its way into the quotation. I have referred to Mr Michinaka's evidence at paragraph (d) above, which I accept, as to how this figure was arrived at.

(m) The second attempt was to contend that this was a 'pay-when-paid'-type contract. When the Defendants' witnesses were hard pressed under cross-examination, they brought up this theory that even if the fault in incurring the additional labour was RWS's and not the Plaintiff's, the Plaintiff was not entitled to payment therefor unless RWS paid the Defendants for the same. Both Mr Kamimura and Mr Kiyohara's cross-examination on this point is very telling – if the Defendants were not paid, then no matter what happened at site, or the facts of the matter, the Plaintiff would not get paid. When pushed on this point, Mr Kamimura could not explain why this should be so. [note: 45]

Ct: Now, if CJY [RWS' main contractor for civil works] is late by two months in putting down the foundation, and Kamigumi and Kosui then have to get more workers to catch up with

the work, in your understanding of your contract – that means Kamigumi with RWS – can you make a claim for additional labour to catch up?

A: I think the payment should be made. This is my understanding.

…

Ct: …You have said Kamigumi can claim against RWS. Of course, in the normal course, RWS might claim against CJY for delaying everybody. But my question is different. If Kamigumi can claim against RWS for that situation, wouldn't Kosui also be able to claim against Kamigumi if Kosui provided the extra workers to catch up with the work?

A: If Kamigumi receives the payment from RWS, I believe that Kosui has the right to receive the payment by claiming for it.

Ct: I see. So if there is no payment from RWS, then Kosui also cannot get payment?

A: I think unfortunately it should be like that.

Mr Kiyohara conceded that there was no 'pay-when-paid' provision written in this contract:

Q: I'm sorry, Mr Kiyohara, where did you get what you have just said from note(1)? I don't even see RWS being mentioned in note (1).

A: Well, we signed with RWS and we signed the contract with Kosui, so as a matter of fact, only after our client or our customer approve [sic] and make payment to us, we can make payment to Kosui.

Q: Where can I find this stipulation that Kamigumi will only make payment to Kosui after RWS makes payment to Kamigumi? I don't see it in the contract.

A: If the BOQ is exceeded, it means that due to the client's fault, the additional work is required and the client approved the payment and we make payment. This is what I belived.

Ct: That's not the question. Counsel asked you where in this contract do you find this. Tell me, where do you find this in the contract?

A: *It's not written in the contract*.

[emphasis added]

I do not accept this contention at all; it is entirely without basis and there is nothing at all in the contract that even starts to hint at such a provision.

32 I therefore find and hold that this was a contract to supply the categories of workers set out in the manpower schedule, [note: 46] and at the rates and for the duration in man-days (comprising an eight-hours day from 8 am to 5 pm and two hours overtime from 5 pm to 7 pm) therein. If at the end of the day, the Plaintiff was required to supply more labour, work longer hours or both to complete the installation, then the Defendants would have to pay the Plaintiff for the extra labour at the rates set out in the manpower schedule.

33 There was a significant amount of evidence suggesting that the installation of the eight attractions was delayed by various causes not related to or caused by the Plaintiff or the Defendants. These included the late completion of foundations by the main civil contractor to RWS, design changes, and delay in delivery of material to site, followed by a sudden over-delivery of material to site for the SFX and JTM attractions, and consequent prolongation of the installation period to mid-March 2010. I need only refer to the evidence of Mr Terayama himself where he admitted to there being numerous delays, specifically in the completion of the foundations, the site conditions, design changes and the like, and acceleration measures undertaken. [note: 47] He also unreservedly accepted paragraph 13 of Mr Ito's Affidavit of Evidence-in-Chief which sets out the various delays. There were many other witnesses, including Mr Kusano [note: 48] and Mr Sundar Ramachandran, [note: 49] whose evidence was unchallenged on this point and who attested to the same - the slow start, and the huge increase in manpower from the Plaintiffs in September onwards. The same may be said of Mr Saminathan Supramaniam ("Mr Saminthan"), the sole proprietor of Standard Rigging ("SR"), who were the main labour supplier to the Plaintiff and later became the sole supplier. Mr Saminathan was not cross-examined and his evidence was therefore unchallenged. Many of the other witnesses gave the same evidence, which I accept. I therefore find as a fact that there was a slow start to this contract for the reasons which include those set out above in the evidence. There were also instructions to catch up in September, which went into October, November and December, with the result that the contract period was prolonged and extended into March 2010.

(iii) Whether the Plaintiff is estopped by Convention from relying on the Agreements to claim the total value of man hours incurred less the sums paid to the Plaintiff by the 1st Defendant

34 The Defendants contended that the Plaintiff's billing on a percentage completion basis and the use of a "Final Invoice" embodied a practice, and therefore an assumption, that the parties treated this as a lump sum contract. [note: 50] That assumption was also supported by the Plaintiff's non-submission of time sheets for interim billing and the Defendants' payment of on such invoices without requiring time sheets. The Defendants also did not verify or check the number and categories of workers on site at any time, leaving the Plaintiff to deploy the workers as required. The Defendants relied on the fact that at the one time when "extra" work was ordered by RWS (for the SFX attraction) which was therefore outside the lump sum, the Plaintiff agreed, supplied the extra labour and later submitted its invoice and the required particulars therefor, and the Plaintiff was duly paid by RWS through the Defendants. In contrast, no invoices and required particulars were submitted immediately following the supply of additional labour at the other sites.

35 The Plaintiff contended that there could not be any estoppel by convention because there were oral communications between the parties which assured the Plaintiff of payment. [note: 51] The Plaintiff said that, at all material times, it was understood that the Defendants would pay the Plaintiff for the additional labour required for the works, which was why the final invoices were not prepared till much later.

36 The parties accepted the requirements to establish an estoppel by convention as laid down in *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195, namely that –

(a) The parties to a transaction act on an assumed state of facts or law;

(b) The assumption is either one which both parties share or one which is made by one party and acquiesced by the other; and

(c) There is either an "agreement or something very close to it" in respect of a shared assumption.

37 The Defendants submitted that they have satisfied these requirements and the Plaintiff is estopped from denying that the contract was a lump sum contract. I cannot and do not accept that submission.

38 The fact that interim billing is rendered on a percentage completion basis does not invariably mean that the contract is a lump sum contract. Parties may adopt this method of interim payment for other different reasons, for example, as a matter of convenience and cutting down time-consuming paper work. This was the very reason Mr Ito gave in his evidence, and I accept his evidence in this respect:

Q: This is in relation to ROM, which is the attraction known as Revenge of the Mummy. Could you just explain your process in issuing this invoice?

A: First, I discussed with the project manager, Mr Terayama. Well, because while we were discussing that it would be very tedious to count every month how many people were deployed, so we have agreed that we take certain percentage and issued an invoice, and Mr Terayama said that after all, we are going to look at the total labour, the total account, so it should be all right. So this was what we agreed. [note: 52]

...

Q: And you had this conversation [in relation to progress billing before 28 February 2009] because you wanted to issue a progress claim?

A: Well, the first of all, it is progress billing, not progress payment. By right, we are supposed to count how many people have worked how many hours at the site, but it is very, very tedious. So I discussed with Terayama-san, and we decided that for the convenience we just set the percentage approximately. [note: 53]

It was easier to just look at the stage of completion and set the percentage for interim payment; it cut out a lot of paperwork and verification and certification procedures. Moreover, this basis of interim payment was specifically provided for in the contract: [note: 54]

Payment Terms (1) The claim shall be paid in cash within 30 days from receipt of our invoice which is calculated by work progress at site.

It should be noted that a major assumption of manpower utilisation was based on Mr Terayama's figures and data which contained start and end dates for each attraction, bar charts for utilisation of labour, a bell curve with a maximum number of workers for June and July 2009 and with an end date of 30 January 2010. This term sat together with Note (1) on page 1 (referred to at [11] *supra*) in a simple contract that was essentially 2-pages long and almost in point form. As noted at [31(e)] *supra*, the meaning and import of Note (1) are clear and unambiguous.

39 The Plaintiff's failure to keep detailed timesheets is also explicable on the above grounds. Mr Ito's evidence was that he had not addressed his mind to the financial issues until required, as all his time and effort had been spent on ensuring a "smooth and speedy progress of the Works" [note: 55] which had been severely disrupted. The Plaintiff conceded that it had been remiss in keeping

these records, [note: 56] but that the task of keeping the records was shared:

> Q: Mr Ito, you have said that you had this conversation with Mr Terayama and that it was agreed that it was too tedious to count labour and so you would do it by work progress instead, and that later on, I suppose after the project had concluded, you would then count up the labour? Is that your evidence?
>
> Intpr:Sorry, after the project counted labour?
>
> Q: Count up the labour.
>
> A: *We decided to do the progress billing because it was very, very tedious to trace and account all the manpower* because, for example, the bill you send for this number of labour at this attraction at this date, but what actually happens in the site is that group of people may shift to another attraction in the afternoon so we really cannot trace everybody. That's one thing and I need to highlight to you that in this invoice it is written in English, "Supply labours and installation of equipment for above project", but while this is what I wrote in English, I think my English was not right. Actually, it should be, "Supply labours for installation of equipment for above project." I think it should be that way. It was my mistake, I'm sorry.
>
> Q: Now, the second part of my question you haven't answered so let me just ask that part. Later, at the end of the project, it was your intention, then, to count up you [sic] the amount of labour supplied to the project?
>
> A: Yes. [note: 57]
>
> …
>
> Q: So it is your evidence, then, that it is not important for the supplier to present any records to the receiver of labour and should just leave it up to the receiver of labour to check according to how they want to check?
>
> A: Well, basically, we have to keep the record, but the user, the one who receives he labour supply, also have to review, so *it's something that both parties have to share the burden*. And as for me, we have checked whatever the record when the project was completed and I have given to Mr Morishita and Mr Morishita said that he would check everything and settle the payment. [note: 58]
>
> [emphasis added]

40 Importantly, I also find the immediate reaction of the Defendants when the Plaintiff presented its claim telling. Mr Terayama did not protest that this was a lump sum contract and the Plaintiff could not present such a claim, *ie*, as if it was a measurement contract, [note: 59] and neither did Mr Kiyohara [note: 60] until a later stage. Their reactions at the stage of service were merely to check the figures, [note: 61] and to attempt to persuade Mr Ito to reduce his claim. [note: 62] This is not the behaviour of parties who believed that they had contracted on a lump sum basis.

41 There was another incident that goes against the Defendants' contention of a lump sum contract. I accept the evidence of Mr Kusano who testified that RWS asked Mr Terayama, in his

presence, and Mr Terayama, in turn, asked the Plaintiff to deploy more workers for the JTM and SFX attractions in a bid to clear a sudden surge in delivery or material for those attractions, the storage of which was causing congestion problems at the site: [note: 63]

Q: At paragraph 5, you have referred to a request – this is paragraph 5 of your AEIC, you have referred to a request from RWS for more workers to be deployed for the JTM and SFX attractions. Was this request made to you?

A: To Kamigumi.

Q: And then how did you find out about this request?

A: Well, I was present at the meeting, so the project manager was there and I was there when it was requested.

Ct: Project manager from which company?

A: Kamigumi.

Ct: Thank you.

Q: So by that you're referring to Mr Terayama.

A: Yes, correct.

42 Four things are noteworthy:

(a) First, the Plaintiff was asked and did provide time sheets for a claim for the deployment of extra workers for SFX; the Defendants received payment therefor and the Plaintiff was paid in turn. If this was a lump sum contract as contended by the Defendants, then it is strange that the Plaintiff was paid for the deployment of extra workers for the SFX attraction.

(b) Secondly, the Plaintiff was able to produce time sheets and other information to support their claim and these documents were obviously acceptable to the Defendants, who paid them for these claims.

(c) Thirdly, although the acceleration order was for both the SFX and JTM attractions, the Plaintiff inexplicably got paid for one but not the other. The reason is clear and I find that it was because RWS paid the Defendants for one but not the other, and the Defendants took the untenable stand that this contract was also a pay-when-paid contract: since they were not paid for the JTM attraction, they did not have to pay the Plaintiff.

(d) Fourthly, I accept the evidence of an independent sub-subcontractor, Kobo Design's Mr Onodera, who testified that there were a lot of problems on site, many instances when work was interrupted or suspended, and his workers had to work overtime to make up for the delay. [note: 64] He was asked by Mr Terayama at the site, in the presence of Mr Michinaka, Mr Ito and one Mr Mizota, to compile his delays, variation and extra work done for the murals for the attraction, again for submission to RWS. [note: 65] This was certainly not behavior indicative of a lump sum contract.

43 I find that the root of the Defendants' problems lay in their agreeing with RWS to do the work

on a lump sum basis. Mr Kiyohara, under cross-examination, said: [note: 66]

> Q: No, Mr Kiyohara, let's say that there is no way at all that you can catch up without getting more manpower and working more hours. You have said that you will refuse to get more manpower and work more hours unless RWS agrees to your quotation. Is that what you are saying? I'm just trying to understand you.
>
> A: We have to do our very best to catch up with the schedule, *because we have signed a lump sum contract with RWS*.
>
> [emphasis added]

44 Mr Kamimura explained that the Defendants claimed about $15 million from RWS, but it appears that the Defendants compromised this claim for only $4 million and, reading between the lines, this sum was insufficient to pay all their subcontractors' claims: [note: 67]

> A: I can explain to you briefly. The initial amount that Kamigumi Singapore claimed to RWS was about 15 million, but that figure was – I'm sorry. The approved figure at the end, by RWS, was about 4 million. And that 4 million has been spent, all has been spent as the payment for the subcontractors.

45 I therefore find and hold that there was no estoppel by convention as contended by the Defendants which prevents the Plaintiff making this claim.

(iv) Whether the Plaintiff has discharged the burden of proving, on a balance of probabilities, that it has supplied additional manpower to the value of $3,134,965.50

46 The Plaintiff claimed that the total value of labour supplied by it amounted to $7,474,272.00. This figure was calculated by taking into account the Defendants' daily records, the Plaintiff's time sheets recorded by Mr Sundar A/L S Ramachandran ("Mr Sundar") and the attendance sheets prepared for Mr Johnson Cher ("Mr Johnson"), the 1st Defendant's Site Safety Officer. The Plaintiff accepted that it did not keep proper records but has, in effect, reconstructed its claim from the documents and information of other parties, especially its subcontractor, Mr Sundar. The Plaintiff claimed that when one looks at these various records and information, they tally and this proves the unpaid 'balance' of $3,134,965.50.

47 The Defendants relied heavily on the Plaintiff's own admission that it did not keep proper records; they contended that this failure was very telling and showed how unreliable the Plaintiff's claim was. Further, the fact that these records were not produced prior to the trial showed that they were an afterthought and could not prove that these sums were in fact owed by the Defendants to the Plaintiff. These claims were unverified and improperly recorded. The Defendants accordingly contended that the Plaintiff had failed to discharge its burden of proof.

48 Both counsel have informed me that quantum is to be decided on the basis of the burden of proof. As I was informed, going for an assessment of damages will not change anything as the state of the evidence cannot be improved upon. I proceeded accordingly to determine whether or not, on a balance of probabilities, the Plaintiff has proved its entitlement to its claim.

49 I also proceeded on the submissions as made by the parties. The Defendants, after the hearing on evidence was concluded, stated that they looked at the documents and noticed discrepancies in the figures which were not put to the witnesses during cross-examination as they did not realise their

significance. A compromise was reached: rather than allow further cross-examination, the Defendants were allowed to put in submissions and the Plaintiff was allowed to reply thereto.

50 As noted above, the Defendants themselves have admitted and insofar as they have not been made above, I so make the following additional findings of fact that:-

(a) there was a slow start to the project, many attractions were not ready for installation according to the programme and some workers were idling in the first few months from February 2009;

(b) during the course of the works, there were numerous disruptions and delays caused to the works resulting from, amongst other things, delays in readiness of the site for the installation work to begin, late completion of the foundations, delays in the main contractor's works, design changes and delays in the delivery of materials and equipment to the site;

(c) there were orders, and I accept the evidence of Mr Kusano (see paragraph [41] *supra*) as well as other witnesses, (see [33] and [42(c)] *supra*), including Mr Terayama's admission under cross-examination, [note: 68] to increase manpower and accelerate works; the manpower of the Plaintiff increased dramatically from September to December 2009 and there are many different documents which support this; and

(d) the Plaintiff's works did not complete by 30 January 2010 but extended into mid-March 2010.

51 The Plaintiff candidly admitted that it did not keep proper records by way of time sheets [note: 69] during the course of the works. However, the Plaintiff did not keep any permanent work force (except for a very few key employees like Mr Thuriraj at the supervisor/project manager level), and obtained their supply of labour from their labour subcontractors. [note: 70] In late September or early October 2009, Mr Ito centralised all labour he provided for the works under SR. Mr Saminathan explains this in his Affidavit [note: 71]

> It was not until late September 2009 or October 2009 that the pace of work picked up. At or around this time, Ito told me that the 1st defendant required more workers to make up for the lost time, and that he would be recruiting more works. He told me that *SR would have overall control of all the workers so that they would be centrally administered and their work and movement could be co-ordinated*.
>
> [emphasis added]

It is important to note that this evidence was unchallenged in cross-examination. [note: 72] SR kept their time records of labour supplied. Mr Thuriraj also kept his own time sheets recording his time spent working on site. It was from this record that the Plaintiff constructed its claims. The Plaintiff basically took the total amounts in terms of time charged by its labour subcontractors and subtracted the payments made by the Defendants, leaving a balance which comprised their claim.

52 There were also other attendance records that were kept. These were taken from the Daily Toolbox Briefings held every morning and evening when there was appropriate work, and these recorded the workers present, who signed against their names, and were submitted to the Defendants. It was also clear that the Defendants kept their own records, which were more organised

and detailed and were submitted to RWS. The 'Johnson Records' [note: 73] show this clearly. Despite Mr Terayama's attempt to say that the Johnson Records were only estimates and they did not need to be accurate, [note: 74] Mr Johnson Cher admitted that the records he submitted were largely accurate: [note: 75]

Q: And your reports would be accurate, then?

A: My reports will be *close to accurate*, I would said [sic].

Ct: Do you input them every day?

A: *Every day*, sir.

Ct: Religiously?

A: Yes.

Ct: So why do you say "close to accurate"?

A: Because it's not every day I receive Kosui's manpower report on time, so if I don't receive this report, for example, today, I will just input in my report yesterday's manpower for today and submit to Resort World.

Ct: I see.

Q: Because you are at the site, you could verify for yourself, if you needed to do so; right?

A: Yes.

Q: So when you say – I don't know – I can't remember the actual word you used but you say they are reasonably accurate or –

A: Yeah – *close to accurate*.

Q: Close to accurate. What kind of margin of error would you give on a percentage basis – 5 per cent – plus/minus 5 per cent?

A: *Plus/minus 5 per cent*.

[emphasis added]

53 Mr Terayama also testified that he had never told RWS that these were meant to be estimates. [note: 76] To the contrary, his evidence was that they were accurate enough for RWS to challenge that the records showed three workers at one of the attractions but they were not present:

Q: Do you know – and I'm just asking whether you know – whether RWS thinks that these are just estimates?

A: I think they think that these figures are estimate. The reason is that I have received complaints several times from them that the workers that this daily manpower record claims that there are not there are the site.

Q: When did you receive these complaints?

A: I don't remember when.

Q: But it was during the time of the works in 2009?

A: Yes.

Q: That being the case, when RWS made these complaints to you, why did you not explain to RWS that these are just estimates?

A: At the time, I just apologised to RWS. [note: 77]

...

Q: You don't think they wanted accurate figures but just a few minutes ago, you told his Honour that RWS complained to you.

A: I received the complaint because the worker who was supposed to be at the attraction, according to daily manpower, was not at the attraction.

Q: So that means that RWS was using these records to check on the workers; would you agree with me?

A: No.

Q: Then how did RWS know whether a worker was missing, as you say?

A: Well, I cannot recall very clearly whether it was CP [sic] Flyer or DJC, but *there was an instant that said that there are supposed to be three workers but there was none, and I received complaint*.

Q: That's right. How did RWS know there were supposed to be three workers?

A: Since RWS also has attraction managers and those attraction managers are at the site, so I think they realised that – they realised, through their attraction maangers, that Kamigumi workers were not there.

Q: Mr Terayama, how was RWS supposed to know that there were supposed to be three workers?

A: *By looking at the daily manpower record*. [note: 78]

[emphasis added]

54 In fact, Mdm Nasimah, Mr Ito's wife and Plaintiff's accounts executive, put forward a table comparing the entries on SR's time sheets and the Johnson Records, [note: 79] and for those months which enabled a comparison (July to 30 December 2009), the figures were quite close.

55 The Defendants attacked the accuracy of the Plaintiff's records from its labour suppliers. They pointed to a seemingly impossible claim for 30.5 hours per day when the maximum seemed to be only

27.5 hours in a 24 hours day. When this was put to Mdm Nasimah in cross-examination was stumped. But Mr Sundar, a supervisor from SR, convincingly explained without hesitation how that came about: [note: 80]

Q: Did you work 30.5 hours overtime?

A: Yes, I did.

Q: So that would be from what hour to what hour?

A: I started at 8 am, and continued to work till 11 am the following day. After that I returned home and I returned to work that night, 10 o'clock, returned to work at 10 pm that night – that day. And I returned home the following morning.

Q: And then you had a rest on the 5th?

A: That's right.

Q: Now, for the overtime, you have 8 hours on the third. That will be until 5 pm, okay?

A: That's right.

Q: And then you have 30.5 hours, so that will be five hours at one and a half times?

A: Okay. The calculation is that if I were to work from 5 pm to 10 pm, it will be considered as 1.5 times.

Q: Yes. So that would equal 7.5?

A: Yes.

Q: And then from 10 pm to 8 am?

A: That's double payment.

Q: That would be 10 hours, double?

A: That's right.

Q: Making 27.5. And then you recorded for yourself three hours from 8 to 11 am?

A: Yes, 8 to 11, that's right.

56 The Defendants also attacked the Plaintiff on their seemingly large mark-up from their labour subcontractors to the rates in the contract. The Defendants knew the rates set out in the contract, but had never questioned them. The fact that the Plaintiff was getting its supply of labour at a far lower cost is no basis to attack the accuracy of the Plaintiff's claim, nor is it a legitimate basis to say that, therefore, there was a huge margin to cater for contingencies, showing that this was a lump sum contract. I need only say, for a largely co-ordinating role, the Defendants themselves made a profit over their subcontractors' costs when it came to their contract with RWS.

57 As noted at [49] *supra*, after the evidence was completed, the Defendants asked for a further hearing to make submissions because they noticed errors and inaccuracies in Mdm Nasimah's tables, the significance of which they had not realised during the hearing. As it was too late to re-open the hearing, and it would have caused significant prejudice to the Plaintiff to have their witnesses go through the details of the claim when those questions could have been put to the witnesses during the trial, I allowed the Defendants the opportunity to put in submissions to point out these errors and inaccuracies and gave the Plaintiff the right to respond.

58 The Defendants alleged overcharging of some $752,000 on the Plaintiff's own evidence, as some workers were classified in the 'Sundar Timesheets' as riggers ($17 per hour) but were classified differently in Mdm Nasimah's table as supervisors ($23 per hour). They tabulated some of these alleged detected differences in Annex 1 of their Further Submissions. The Plaintiff's response was that a perusal of the Sundar Timesheets would show only 2 classes of workers: "Lifting Supervisors" or "Riggers". They explained that, under law, both these categories of workers had to be trained and certified to perform these tasks, and in SR's case, many of their workers were trained and certified to perform both tasks. However there is no requirement under the law for Site Supervisors and Foremen to have special training or certification. The Plaintiff was able to point to a letter dated 2 December 2008 [note: 81] where the Plaintiff had identified some of SR's workers to be Site Supervisors and Foremen for the USS project. These workers were also Lifting Supervisors and Riggers. Mr R Thankapandian, who was singled out as an example by the Defendants, was identified as one of the suitable candidates in the 2 December 2008 letter. The Plaintiff says, with some merit, that they did have Site Supervisors and Foremen on site; there was no evidence of any complaint by the Defendants that the Plaintiff did not have such people on site. I therefore accept this explanation. I also do so for the more fundamental issue. These questions could have been put to the appropriate witnesses but they were not. This is especially so in the case of Mr Saminathan, the sole proprietor of SR, but the Defendants chose not to cross-examine him. [note: 82]

59 On a balance of probabilities, I therefore find and hold that the Plaintiff has made out its claim for the sum of $3,134,965.50 (excluding GST).

(v) Whether the 1st Defendant is liable to pay the Plaintiff for its use of the lorry, and if so, what is the rate to be paid, having regard to the fact that there was no discussion on the rate to be charged

Liability for use of the lorry

60 The parties did not dispute that the Plaintiff provided a lorry and a driver to drive the Defendants' engineers and staff around the site, which was spread out over a few kilometres. This request arose at a dinner meeting on 15 September 2008. The Plaintiff's Mr Ito agreed to let the Defendants use the lorry and the driver, but the price therefor was not discussed. Mr Terayama thought it was provided *gratis*; Mr Kusano, the Attraction Manager for JTM, who was at that dinner, did not think it was for free.

61 Having considered the evidence, including the documents that exist and the witnesses on this point, I find and hold that the Defendants' use of lorry and the driver was not *gratis* and that the Defendants would have to pay for its use. I do not accept Mr Terayama's evidence on this point. I note that in Mr Terayama's Affidavit, he never mentioned that the lorry was offered to the Defendants for free. Rather, his evidence was that Mr Ito did not say that it would be chargeable, nor did he invoice the Defendants for it. Mr Terayama stopped short of saying that he understood that the lorry was being offered for free, and instead gives his evidence as a hypothetical, suggesting an

ex post facto rationalisation of the situation: [note: 83]

> *If* there were cost implications, I would definitely have informed Kamimura, and/or ensure that there was some written record of such an agreement.
>
> [emphasis added]

62 Mr Ito gave evidence that the lorry was primarily used to transport workers and was parked at the site when not in use. [note: 84]

> Q: My Ito, first question: the lorry in question was used to transport workers to the site and then later back from the site at the end of the work day?
>
> A: Yes.
>
> Q: And in between, when it was not ferrying workers to or from the site, it would be parked at the site?
>
> A: When it was not used in the daytime, it was parked. But it doesn't mean that the lorry was idle all the time.
>
> Q: But, in effect, what you were offering was the use of the lorry when it was at the site and when it was not being used for any other purpose?
>
> A: Well, actually, it's the other way around. It's a long distance between the site office to the site, so it's about several kilometers, and it's very difficult for all the workers to walk from the site office to – it's difficult for the Kamigumi's engineer to walk from the site office to the site, and there was a complaint that there's not transport, and the Kamigumi's engineer, Mr Kusano, requested for a lorry for the transport purpose, and three of us discussed, and we found that it is fastest and the easiest to use our lorry.

The notion that the parked lorry was not idle, contrary to Mr Terayama's evidence, [note: 85] was consistent with Mdm Nasimah's evidence that the driver was used during the day to transport tools within the site at a later stage. [note: 86] This was also consistent with Mr Kusano's evidence that the Defendants had 2 lorries, but that one was not there during the day, and the other was not used for ferrying people. [note: 87] It was undisputed that the lorry was used to transport the Defendant's workers. Given the additional distance that the lorry would have had to go to do so, and the disingenuous nature of Mr Terayama's evidence, I prefer Mr Ito's and Mr Kusano's evidence.

Rate to be paid for use of the lorry

63 As to the quantum of rent to be paid for the use of the lorry, I find that the driver was separately charged under the Time Sheets ("NAS-2" in Mdm Nasimah's "Affidavit), and his name appeared from June 2009 to 14 March 2010. I find that the main use of the driver and the lorry was to ferry the Plaintiff's workers to and from the site in the mornings and evenings or at night, and, at a later stage, to transfer tools and equipment to and from the eight attractions. The meeting was in mid-September 2009 and I find that the lorry was used to ferry the Defendants' engineers and site staff about 1 week later; this continued to 14 March 2009. The important point to note is that it was also used by the Plaintiff and the Plaintiff owned the lorry; it was not hired from a third party.

64 I find and hold that a reasonable charge for the lorry, bearing in mind its use and taking into account that the driver was charged separately, would be 40% of $500 per day multiplied by 172 days (being 1 week in September 2009, 6 months from October 2009 to February 2010 and 14 days in March 2010); this amounts to $34,400 (excluding GST). The Defendants must pay the Plaintiff $34,400 (excluding GST) for the use of the lorry YN405X.

(vi) Whether Mr Iwaki was in breach of his duties owed as the Attraction Manager for the JPR attraction, and if so, whether the Plaintiff is liable for the sum of $74,900 incurred by the 1st Defendant in engaging CUL M&E Pte Ltd

Whether Mr Iwaki was guilty of a breach of duty

65 Having considered the evidence and the rival contentions of the parties, I find that Mr Iwaki was not delinquent in carrying out his duties to the extent that the Defendants had to hire CUL M&E Pte Ltd to carry out Mr Iwaki's duties.

66 Some of the factors which brought me to this finding include, first, the evidence of Mr Ito and Mr Michinaka, whose evidence I prefer over Mr Terayama's evidence, and the obvious inconsistencies in Mr Terayama's evidence and performance under cross-examination. In particular, Mr Ito specifies in his Affidavit the exact days when Mr Iwaki was absent from work, [note: 88] and this was not challenged by the Defendants. Mr Ito also provided a persuasive explanation for why Mr Iwaki was not seen at the weekly meetings: [note: 89]

> He said that he did instruct one of his juniors to attend many of the weekly meetings on his behalf as he felt that the weekly meetings were a waste of time, which time could be better spent overseeing the ongoing works at the JPR attraction. He conceded that it could be his absence from these weekly meetings that the 1st Defendant arrived at the conclusion that he was often absent from work, but he said that the 1st Defendant need only check its daily staff movement records to confirm that, although he did not attend the weekly meetings. He was nonetheless still at the site.

This effectively refuted the basis for part of Mr Terayama's claim, which was that he was personally cognisant of Mr Iwaki's absences through his own personal observations and the observations of others. [note: 90]

> Q: So paragraph 43(a) of your affidavit is based on information given to you by other people; is that correcty?
>
> A: Not only that. *Since I was always at the work site, I am aware* that he took MCs on the week dates and there were incidents that he was not there during installation.
>
> Q: I will move on to the MCs in a short while but I'm looking at paragraph 43(a). Are you aware, yourself, leaving aside anything that anybody else may have told you, that he failed to comply with his contractual working hours by either starting work after 8 am or leaving before 5 pm?
>
> A: Yes, *I have seen and I knew it*.
>
> [emphasis added]

67 More importantly, Mr Terayama only gave discovery of daily toolbox meeting records, which verified that Mr Iwaki was on site at the material times, after the commencement of trial proceedings. [note: 91] Even then, Mr Terayama was evasive and maintained that these records, along with the Johnson records, were not accurate. [note: 92] Mr Terayama's evidence also failed to include details beyond the assertion that Mr Iwaki "took frequent and unjustifiable medical leave and emergency leave at critical times, including in April, May and June 2009." [note: 93] Throughout the proceedings and on cross-examination, the Defendants failed to challenge Mr Ito's evidence, and Mr Terayama has not produced the documents supporting his claims: [note: 94]

Q: Where are your records for these assertions that you have made?

A: I don't have the documents, but I have the emails. Besides the emails that we saw, I have the email from Franky.

Ct: From Franky?

Q: Franky, who is one of the employees of RWS.

Ct: Thank you.

...

Q: All you have are email from RWS; is that correct?

A: Yes, because the complaints come to me.

68 Secondly, the Defendants never asked for Mr Iwaki to be replaced. On the contrary, they admitted that they attempted to retain Mr Iwaki after his contract expired in November 2009.

69 Thirdly, the evidence was that Mr Iwaki did not get on with some of the RWS staff. The email dated 10 June 2009 [note: 95] tells the true story. When RWS wanted to increase manpower, Mr Iwaki insisted on proper instructions, and RWS's strong complaint to the Defendants was: "he (Mr Iwaki) is constantly playing the contractual game with us. When we ask him to increase the manpower, he is saying that we need to pay for it." To this very strongly worded complaint by RWS, the Defendants' response was: "We believe that his working attitude towards job is not wrong [sic]. However, we apologize for any inconvenience caused." [note: 96]

70 Fourthly, the Johnson Records showed Mr Iwaki's attendance at site and I do not believe the attempt to resile therefrom by Mr Terayama under cross-examination (see [52] *supra*).

71 Fifthly, Mr Terayama admitted that he never wrote any emails or letters to Mr Iwaki complaining about his work or his need to improve. Inexplicably, Mr Terayama gave evidence that he never made it clear to Mr Iwaki that his conduct and work performance were not up to standard: [note: 97]

Q: Do you consider, as project manager, that you could issue orders or instructions to the attraction managers?

A: Yes.

Ct: So if you found Mr Iwaki was not doing his job properly, having hangovers and not going to

the site, not doing his work propertly, taking leave all the time, didn't you call him up and say, "Look, Iwaki-san, you have to improve your performance".

A: Yes, I have ever told him.

Ct: Did you write him any notes or emails or letters to say, "Look, if you do not perform, we're going to remove you"?

A: I did not send to him anything in writing. I told him verbally and I didn't use the strong word like, "I am going to remove you."

Ct: But *did you make clear to him that his conduct and his work performance was not up to standard*?

A: *No, I didn't*.

[emphasis added]

72 Sixthly, there was the coincidental withdrawal of the claim for Mr Oshita after Mr Kamimura's cross-examination, an appointment which Mr Ito said, and I believe him, that he knew nothing about.

Liability for the cost incurred for engaging CUL M&E Pte Ltd

73 I find the Defendants' claim for payment to CUL M&E Pte Ltd an unwarranted attempt to make a claim that was without merit. Mr Michinaka explained the 1st Defendant's real reasons for engaging CUL M&E Pte Ltd: [note: 98]

It is true that the 1st Defendant engaged CUL M&E Pte Ltd ("CUL") to, amongst other things, prepare the daily reports for Iwaki, but this had nothing to do with Iwaki's alleged failures. The 1st Defendant's appointment of CUL arose because of an arrangement between the 1st Defendant, RWS and CUL. RWS had appointed CUL to undertake the maintenance of the attractions after the attractions had been commissioned and had become operational. However, due to the delay in the completion of the project, RWS requested the 1st Defendant to take CUL into its payroll for the time being as it (RWS) did not have the budget for it. The 1st Defendant agreed, and decided to deploy CUL as Iwaki's assistant for the JPR attraction, which was then still under construction, and as his assistant, CUL also prepared the daily reports for him.

74 Mr Terayama disagreed with this statement when it was put to him in cross-examination, but, tellingly, he did not offer an alternative explanation, nor did he attempt to defend his position. In the light of the reasons given above, I accept the evidence of the Plaintiff and find that the Defendants engaged CUL M&E Pte Ltd to accommodate RWS, and not to make up for Mr Iwaki's poor performance. Having done so, they cannot now attempt to recover the same from the Plaintiff. I therefore dismiss the Defendants' counterclaim against the Plaintiff on this issue.

Conclusion

75 My answers to those issues in relation to construction of the contract and the parties to the contract have been set out above. As for the monetary claims (including GST), I find and hold that:

(a) There will be judgment for $125,149.87 (inclusive of GST) against the Plaintiff in respect of

the Defendants' counter claim for the payment by the 1st Defendant to K2 Specialist Services Pte Ltd;

(b) there will be judgment for the sum of $3,134,965.50 (excluding GST) against the Defendants in favour of the Plaintiff in respect of Issue (iv) above;

(c) there will be judgment for the sum of $34,400.00 (excluding GST) against the Defendants in favour of the Plaintiff in respect of the use of lorry YN405X;

(d) the Defendants' claim for $74,900 incurred by the 1st Defendant in engaging CUL M&E Pte Ltd is dismissed.

76 The Defendants are entitled to interest on the sum of $125,149.87 at the rate of 5.33% p.a. from the date of the filing of the Counterclaim to payment. The Plaintiff is entitled to interest on the sums of $3,134,965.50 and $34,400 at the rate of 5.33% p.a. from the date of the filing of the Writ to the date of payment.

77 When I delivered oral judgment with brief grounds, counsel asked that they be allowed to make written submissions on costs. I agreed. However, no submissions have been made to date.

[note: 1] AB, Vol 1, pp 11-13.

[note: 2] *Ibid.*

[note: 3] Notes of Evidence, 25 April 2011, p 56.

[note: 4] Plaintiff's Opening Statement, p 4.

[note: 5] Notes of Evidence, 25 April 2011, p 56.

[note: 6] Notes of Evidence, 21 April 2011, p 47.

[note: 7] Notes of Evidence, 25 April 2011, p 50.

[note: 8] *Ibid.*

[note: 9] AB, Vol I, p 34, para 3.

[note: 10] Notes of Evidence, 18 April 2011, pp 72- 73.

[note: 11] Notes of Evidence, 21 April 2011, pp 48-49.

[note: 12] AB, Vol 1, p 8.

[note: 13] 1st Defendant's Closing Submissions, p 32.

[note: 14] Plaintiff's submissions, 18 May 2011, pp 6- 7.

[note: 15] Jiro Terayama's Affidavit of Evidence-in-Chief, BA, Vol 3, pp 711-712.

[note: 16] AB, Vol 1, p 1.

[note: 17] AB, Vol 1, pp 3-7.

[note: 18] AB, Vol 1, pp 3-4, 6- 7.

[note: 19] AB, Vol 1, p 5.

[note: 20] Notes of Evidence, 20 April 2011, pp 24-26.

[note: 21] Notes of Evidence, 20 April 2011, pp 21-22; AB, Vol 1, p 3.

[note: 22] AB, Vol 1, pp 11-13.

[note: 23] *Ibid.*

[note: 24] Notes of Evidence, 21 April 2011, pp 31-32.

[note: 25] *Ibid.*, p 32.

[note: 26] *Ibid.*, p 34.

[note: 27] Yoshio Kiyohara's Affidavit of Evidence-in-Chief, BA, Vol 2, p 408, para 6(d).

[note: 28] *Ibid.*

[note: 29] *Ibid.*, p 409, para 6(i).

[note: 30] Notes of Evidence, 26 April 2011, p 12.

[note: 31] Notes of Evidence, 25 April 2011, p 22.

[note: 32] Jiro Terayama's Affidavit of Evidence-in-chief, BA, Vol 3, page 713, para 15(h)

[note: 33] *Ibid.*, p 715, para 15(s).

[note: 34] Yoshio Kiyohara's Affidavit of Evidence-in-Chief, BA, Vol 2, p 409, para 6(i); Jiro Terayama's Affidavit of Evidence-in-Chief, BA, Vol 3, p 715, para 15(s).

[note: 35] Yoshio Kiyohara's Affidavit of Evidence-in-Chief, BA, Vol 2, p 409, para 6(j); Jiro Terayama's Affidavit of Evidence-in-Chief, BA, Vol 3, p 716, para 15(t).

[note: 36] Yoshio Kiyohara's Affidavit of Evidence-in-Chief, BA, Vol 2, p 409, para 6(g); Takahiro Kamimura's Affidavit of Evidence-in-Chief, BA, Vol 2, p 338, para 12; Jiro Terayama's Affidavit of

Evidence-in-Chief, BA, Vol 3, p 715, para 15(q).

[note: 37] Notes of Evidence, 21 April 2011, p 34.

[note: 38] JT-1, BA, vol 3, p 733.

[note: 39] Jiro Terayama's Affidavit of Evidence-in-Chief, BA, Vol 3, p 714, para 15(l); Notes of Evidence, 26 April 2011, p 45.

[note: 40] Notes of Evidence, 26 April 2011, p 47.

[note: 41] Notes of Evidence, 26 April 2011, p 46.

[note: 42] Notes of Evidence, 20 April 2011, p 21.

[note: 43] Notes of Evidence, 26 April 2011, pp 46-48.

[note: 44] Jiro Terayama's Affidavit of Evidence-in-Chief, BA, vol 3, p 711, para 15(d).

[note: 45] Notes of Evidence, 21 April 2011, pp 71-73.

[note: 46] AB, Vol 1, pp 11-13.

[note: 47] Notes of Evidence, 26 April 2011, p 77.

[note: 48] Taro Kusano's Affidavit of Evidence-in-Chief, BA, Vol 1, pp 199-200, paras 4-6; Notes of Evidence, 20 April 2011, pp 52-53.

[note: 49] Sundar A/L S Ramachandran's Affidavit of Evidence-in-Chief, BA, Vol 1, pp 213-214, paras 5-7.

[note: 50] Defendant's Closing Submissions, p 33, para 95.

[note: 51] Ito Fumiyuki's Affidavit of Evidence-in-Chief, BA, Vol 1, p 8.

[note: 52] Notes of Evidence, 18 April 2011, pp 19-20.

[note: 53] *Ibid.*, p 26. Also see Ito Fumiyuki's Affidavit of Evidence-in-Chief, BA, Vol 1, p 9, para 20.

[note: 54] AB, Vol 1, p 8.

[note: 55] Ito Fumiyuki's Affidavit of Evidence-in-Chief, BA, Vol 1, pp 8-9, para 20.

[note: 56] *Ibid.*

[note: 57] Notes of Evidence, 18 April 2011, pp 29 and 30.

[note: 58] *Ibid.*, pp 31-32.

[note: 59] Jiro Terayama's Affidavit of Evidence-in-Chief, BA, Vol 3, p 729, paras 65-66.

[note: 60] Yoshio Kiyohara's Affidavit of evidence-in-Chief, BA, Vol 2, p 416, paras 25-27.

[note: 61] Jiro Terayama's Affidavit of Evidence-in-Chief, BA, Vol 3, p 729, para 66.

[note: 62] Yoshio Kiyohara's Affidavit of evidence-in-Chief, BA, Vol 2, p 416, para 27.

[note: 63] Notes of Evidence, 20 April 2011, pp 52- 53.

[note: 64] Hiroyuki Onodera's Affidavit of Evidence-in-Chief, BA, Vol 1, p 222, para 4; Notes of Evidence, 20 April 2011, p 69.

[note: 65] Notes of Evidence, 20 April 2011, p 77-79.

[note: 66] Notes of Evidence, 25 April 2011, p 33.

[note: 67] Notes of Evidence, 21 April 2011, pp 74- 75.

[note: 68] Notes of Evidence, 26 April 2011, pp 69-70.

[note: 69] Ito Fumiyuki's Affidavit of Evidence-in-Chief, BA, Vol 1, pp 8-9, para 20.

[note: 70] Notes of Evidence, 18 April 2011, p 57.

[note: 71] Saminathan Supramaniam's Affidavit of Evidence-in-Chief, BA, Vol 1, p 207, para 5.

[note: 72] Notes of Evidence, 21 April 2011, pp 17 and 18.

[note: 73] AB, Vol 2, p 575 to AB, Vol 3, p 771.

[note: 74] Notes of Evidence, 26 April 2011, pp 52- 53.

[note: 75] Notes of Evidence, 27 April 2011, pp 32-33.

[note: 76] Notes of Evidence, 26 April 2011, p 62.

[note: 77] *Ibid.*

[note: 78] *Ibid.*, p 63-64.

[note: 79] "NAS-1" in Nasimah Binte Mohmed Kunju's Affidavit of Evidence-in-Chief, BA, Vol 1, pp 241-257.

[note: 80] Notes of Evidence, 20 April 2011, pp 90-91.

[note: 81] AB, Vol 3, p 772.

[note: 82] Notes of Evidence, 21 April 2011, pp 17-18.

[note: 83] Jiro Terayama's Affidavit of Evidence-in-Chief, BA, Vol 3, p 726, para 54.

[note: 84] Notes of Evidence, 19 April 2011, pp 6-7.

[note: 85] Jiro Terayama's Affidavit of Evidence-in-Chief, BA, Vol 3, p 726, para 52.

[note: 86] Notes of Evidence, 19 April 2011, p 27.

[note: 87] Notes of Evidence, 20 April 2011, p 55.

[note: 88] Ito Fumiyuki's Affidavit of Evidence-in-Chief, BA, Vol 1, p 18, para 33(c).

[note: 89] *Ibid.*, para 33(a).

[note: 90] Notes of Evidence, 26 April 2011, p 73.

[note: 91] *Ibid.*, pp 54- 55.

[note: 92] *Ibid.*, p 56.

[note: 93] Jiro Terayama's Affidavit of Evidence-in-Chief, BA, Vol 3, p 723, para 43(c).

[note: 94] Notes of Evidence, 26 April 2011, p 71- 72.

[note: 95] AB, Vol 1, p 51.

[note: 96] AB, Vol 1, p 50.

[note: 97] Notes of Evidence, 27 April 2011, p 7.

[note: 98] Masaaki Michinaka's Affidavit of Evidence-in-Chief, BA, Vol 1, p 195, para 14(h).