# Longyuan-Arrk (Macao) Pte Ltd *v* Show and Tell Productions Pte Ltd and another suit [2013] SGHC 160

**Case Number** : Suit Nos 81 and 592 of 2011

**Decision Date** : 22 August 2013

**Tribunal/Court** : High Court

**Coram** : Belinda Ang Saw Ean J

**Counsel Name(s)** : Timothy Ng and Kelvin Chia (Timothy Ng LLC) for the plaintiff in Suit 81/2011 and the defendant in Suit 592/2011; Oh Kim Heoh Mimi (RHTLaw Taylor Wessing LLP) and Rajan s/o Sankaran Nair (Rajan Nair & Partners) for the defendant in Suit 81/2011 and the plaintiff in Suit 592/2011.

**Parties** : Longyuan-Arrk (Macao) Pte Ltd — Show and Tell Productions Pte Ltd

*Building and Construction Law – Sub-Contracts*

*Tort – Defamation*

22 August 2013 Judgment reserved.

**Belinda Ang Saw Ean J:**

**Overview**

1 This is a dispute between the Plaintiff nominated sub-contractor and its sub-contractor, the Defendant, over the fabrication and installation of signage works for the Universal Studios project at Sentosa. In Suit No 81 of 2011 ("Suit 81"), the Plaintiff, Longyuan-Arrk (Macao) Pte Ltd, is suing the Defendant, Show and Tell Productions Pte Ltd, for breach of contract and defamation. In Suit No 592 of 2011 ("Suit 592"), the Defendant is suing the Plaintiff for the release of a retention sum. The parties have filed counterclaims against each other.

2 It is common ground between the parties that Resort World at Sentosa Pte Ltd ("RWS") wanted the Universal Studios project to be completed and ready for opening on 14 February 2010, the first day of the Lunar New Year. Unsurprisingly, in the midst of the chaotic rush amongst all contractors to meet the deadline, short cuts were taken in the sense that some contractual terms were not observed. [note: 1] For instance, the standard written approvals for acceptance of fabricated signage were not obtained because of time constraints and, in the interest of expediency and practicality, the signage was installed first and defects, if any, rectified later.

3 The dispute here concerned, amongst other matters, some signs that did not adhere to contractual specification requiring steelwork for the contracted signage to be hot-dip galvanised ("Non-compliant Signs"). The Non-compliant Signs were installed in early January 2010. Although the Defendant had fabricated and installed as many as a few hundred signs for the Plaintiff, only 11 signs were allegedly non-compliant and they were subsequently replaced at the cost of $342,988.50.

4 The Plaintiff's contention at trial was that it is entitled to deduct or set-off the replacement costs from the final payment owed to the Defendant. In response, the Defendant argued that the parties had signed a Statement of Final Account dated 28 September 2010 ("the SFA") that settled all matters under the relevant contract and finalised the sum owed by the Plaintiff at $489,681.03

("the Final Amount"). At the outset, the Plaintiff's pleaded case was that the SFA was void for fraudulent misrepresentations made by the Defendant. However, on the first day of trial, the Plaintiff through its counsel informed the court that it was no longer disavowing the SFA, and that it would accept the Final Amount, subject to various set-offs and deductions.

5 Both actions were heard together over three tranches. The first tranche of five days was from 14 to 18 May 2012; the second tranche of seven days started on 3 September 2012 until 11 September 2012; and the third tranche was for two days from 30 to 31 October 2012.

6 Mr Kelvin Chia and Mr Timothy Ng represented the Plaintiff. Ms Mimi Oh and Mr Nair Rajan represented the Defendant.

**Chronology of events leading to Suit 81**

7 A proper understanding of this action and Suit 592 require the background facts of the main dispute to be set out in some detail. A chronological account of the relevant events is as follows.

8 RWS as employer appointed China Jingye Engineering Corporation Limited (Singapore Branch) ("CJY") as its main contractor for the Universal Studios project at Sentosa.

9 The Plaintiff was a nominated subcontractor engaged by CJY for three sets of works: (a) the construction of the themed facade and area development works for the Hollywood, New York City, Sci-Fi City and Universal Globe zones; (b) interior fitting out work for F&B outlets and retail/merchandise outlets for the Hollywood zone; and (c) the design, fabrication and installation of signage for the zones identified in (a) and the area known as Entrance Plaza.

10 On 31 August 2009, the Plaintiff and Defendant signed the letter of award for the design, supply, fabrication and installation of signage at selected zones for a lump sum price of $2.5m ("the Sub-Contract"). Forming part of the Sub-Contract were drawings and specifications as well as some clauses from the main contract between CJY and RWS ("the Main Contract").

11 Eventually, the contract price was $2.3m after deducting a sum of $200,000 for preliminary works already undertaken by the previous sub-contractor.

12 Clause 9 of the Sub-Contract stipulated that all materials and workmanship had to be of the kind and quality described in the Sub-Contract (inclusive of all relevant specifications under the Main Contract). [note: 2] It is common ground that the Main Contract specification required steelwork for the signage to be treated for rust using the hot-dip galvanisation method. [note: 3] The Defendant does not dispute that hot-dip galvanisation was within its scope of work under the Sub-Contract.

13 It is also not disputed that that the signs fabricated by PT Intermega ("Intermega"), the Indonesian company engaged by the Defendant, were not hot-dip galvanised ("the Galvanisation Issue"). According to the Defendant, Intermega did not have the capacity in its factory to hot-dip galvanise steel frames that spanned 2m or more in length. Intermega raised the Galvanisation Issue in an e-mail dated 7 November 2009 addressed to CJY and the Plaintiff (and later forwarded to the Defendant). On 28 November 2009, CJY's project director, Peter Lim ("Peter"), replied to Intermega (with copies to the Plaintiff and later forwarded to the Defendant) stating that the Galvanisation Issue was a deviation from the contract specification, that CJY had no authority to accept the deviation, and that in order to obtain the approval of RWS's consultants, the alternative anti-rust method had to be submitted to CJY by 1 December 2009. [note: 4] By 28 November 2009, the Intermega signs were fabricated and delivered to site at Sentosa.

14 The next day, on 2 December 2009, the Plaintiff's project manager, Ivan Ho ("Ivan), wrote to the Defendant's general manager, Jason Teo Kek Seng ("Jason") in connection with the Galvanisation Issue as follows: [note: 5]

> Hi Jason,
>
> I will like to inform you that [the Plaintiff] reserves the rights to reject any part of your signage that does not conform to specification as distributed. Pls revert with the appropriate specifications/method for your mild steel corrosion coating as such we could clear this matter.
>
> Thank you.
>
> Ivan.

15 Sometime between 2 and 3 December 2009, representatives from CJY, the Plaintiff and the Defendant met to discuss the Galvanisation Issue. During the meeting, Peter asked Jason to submit the specifications and method statement for the alternative anti-rust method for RWS's approval. [note: 6]

16 The Defendant agreed that it was asked by CJY and Ivan to submit an alternative anti-rust coating method for RWS's approval. [note: 7] On 10 December 2009, Jason e-mailed Ivan (with copies to the Plaintiff's commercial manager, CS Lim and the Plaintiff's project director, Johnny Ong Geok Chye ("Johnny Ong") the technical specifications and method statement for the alternative anti-rust treatment that involved coating the steel surfaces of the signs with a type of epoxy paint ("the Epoxy Anti-rust Method"). [note: 8] Jason wrote: [note: 9]

> Ivan finally we have gotten the translated technical spec and the method from our Indonesian factory. Attached plse find the technical spec and the method statement.
>
> Please note what had transpired in our Indonesian factory during the process of manufacturing:
>
> Reasons why anti-rust paint system was used for sign manufactured in Indonesia:
>
> The Indonesian factory went ahead to purchase the mild steel hollow section in thinking that there will be large enough galvanising bed for the structure, however they could not find any that could take on the irregular size signs but had to use the more expensive method of using Zinc enrich paint system to coat the sign instead. This was witness by Mr Lui of CJY when he was posted to Indonesia and was brief by our factory partner Mr Danny Widjaya.
>
> Other precaution taken to ensure that the steel will withstand the weather are:
>
> 1. The sign will be completely sealed from the ingress of water by sealing the perimeter edge with water repelling silicon.
>
> 2. All open ends of the mild steel structure seal off by welding with end mild steel end caps to prevent the ingress of water.
>
> 3. Regular checks to be conducted within the 16 month DLP to ensure that the anti rust system is working.

4. Show and Tell will provide a 5 years warranty for the anti rust of the signs done by our Indonesian factory.

We hope the above anti-rust measures will be sufficient to ensure that the anti rust paint system is compatible to the stipulated galvanising provided in our signs manufactured in Indonesia.

Warmest regards,

Jason

17 Ivan replied on the same day. His e-mail (with copies to CS Lim and Johnny Ong) reads as follows: [note: 10]

Hi Jason,

We will forward them to CJY for submission, as spoken in our meeting, if they are not accept [sic] by RWS, you are to replace, dismantle & reinstall all the signage from Intermega (Indonesia) at your own cost.

Kindly issue these documents in your company letterhead or your supplier letterhead so that we could submit officially to CJY.

Thank You.

Ivan.

18 Between 24 and 30 December 2009, the Defendant's staff e-mailed CS Lim some documents on the Epoxy Anti-rust Method for endorsement by the Professional Engineer including the specification and H52-33 paint system. [note: 11]

19 Against the backdrop of these e-mail exchanges was a hive of activity amongst everyone involved in the project to meet the opening date of Universal Studios. As alluded to earlier, Toh Sze Chong, the architect from DP Architect Ltd (the Contract Administrator) explained that in the three months before the opening date on the first day of the Lunar New Year on 14 February 2010, short cuts were taken such as the omission to obtain written approvals for the acceptance of fabricated signage. The common expectation of everyone was for the signs to be installed first and defects, if any, rectified later. [note: 12] It is obvious that exigencies and practicalities necessitated contractual terms to be applied flexibly and even departed from.

20 During the period described by Mr Toh, between 11 and 13 December 2009, the Plaintiff instructed the Defendant to proceed with the installation of the signs. Nothing else was expressly said about whether approval had been granted for the Epoxy Anti-rust Method. The Defendant acted on the instructions and completed installation of all the signs by the first week of January 2010.

21 By end January 2010, the Universal Studios project had reached practical completion. Universal Studios at Sentosa opened on 14 February 2010.

22 On 1 March 2010, the Plaintiff's executive general manager, Edgar Chan ("Edgar"), wrote to the Defendant proposing to pay the outstanding progress payment sum in three tranches in mid-March ($250,000), mid-April ($250,000) and end May 2010 (remaining balance and variation orders). [note:

[13] On 12 March 2010, Edgar again wrote to the Defendant for an extension of a few more days to make the mid-March instalment payment because of cashflow problems. [note: 14] Despite the Defendant's indulgence, the Plaintiff did not make any of the proposed instalment payments.

23 It transpired that the Plaintiff's cashflow problems culminated in the commencement of winding up proceedings against the company on 23 March 2010, and this state of affairs continued for ten months before the winding up proceedings were withdrawn on 25 January 2011. Several events occurred during this period of ten months. They are set out in [24] to [29] below.

24 On 24 September 2010, Jason signed the SFA with Plaintiff's commercial manager, CS Lim, which denoted a final sum of $489,681.03 as owing to the Defendant. The scope of the SFA and, in particular, its impact on the Defendant's liability for Plaintiff's claims in Suit 81 will be examined in due course.

25 Despite signing the SFA, the Plaintiff did not pay the Defendant. Instead, on 8 November 2010, the Plaintiff wrote to the Defendant claiming that 14 of the signs installed by the Defendant were not hot-dip galvanised as required under the Sub-Contract. The Plaintiff gave the Defendant seven days from the date of the letter to replace the Non-compliant Signs (without disrupting the operations of Universal Studios) failing which the Plaintiff would engage other contractors to rectify the defective works and back-charge the Defendant in full. [note: 15]

26 The Defendant was not pleased to hear that it would not be receiving payment of the Final Amount that had been stated as due. The Defendant replied on 15 November 2010 pointing out that some of the signs in the photographs sent under cover of the Plaintiff's letter of 8 November 2010 were not fabricated in Indonesia ("the Non-Indonesian Signs") and that the Non-Indonesian Signs complied with the hot-dip galvanisation method. As for the photographs of signs fabricated in Indonesia ("the Indonesian Signs"), the substitute Epoxy Anti-rust Method was accepted by the Art Director from RWS. To support the Defendant's claim, three separate Defects Lists issued by the Art Director, two in April 2010 and one in September 2010 were sent to the Plaintiff. None of the Defects Lists regarded the substitute anti-rust method as a defect issue. The Defendant pointed out that the 8 November 2010 notice was issued after the Plaintiff had repeatedly failed to make payment as agreed. In any case, there was no credence to the Plaintiff's notice seeing that it would be impossible to carry out and complete rectification works within one week without affecting the daily operations of Universal Studios. The letter ended with the Defendant giving notice of its intention to apply for adjudication of its payment claim under s 13 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). [note: 16]

27 On 16 November 2010, Jason wrote the following letter ("the 16 November Letter") to one Ben Yee of Sentosa Leisure Group ("SLG"): [note: 17]

> Dear Ben,
>
> We are writing in the capacity as a subcontract of Longyuan-Arrk, who in turn is the subcontract of CJY, we want very much to be responsible and forthright to co-operate in quickly rectifying these defects as requested by RWS.
>
> Unbeknown to CJY and RWS, we are suffering great financial hardship due to Longyuan-Arrk's repeated and long-overdue failure to honour payment to us.
>
> So far, Longyuan-Arrk had twice presented us with a schedule of payment, and twice they had

dishonoured their word. As a last resort, Longyuan-Arkk [*sic*] had even resorted to using fraud to deny us any more payment by accusing our works of being "defective", an allegation which is totally baseless and groundless.

We had therefore no choice but to seek legal protection and help by applying for recovering payment through the Security of Payment Act pursuant to Clause 5 of our Subcontract.

In view of Longyuan-Arrk's breach of subcontract by failing to honour their payment to us, we had already given notice to them that due to our economical hardship, we regret that we are no longer able to commit further expenses towards rectification of defects.

We reserve our rights under the subcontract to abstain from doing so, due to the breach of contract by Longyuan-Arrk.

We seek RWS' and CJY's kind understanding that we are not being belligerent or insensitive to your plight, but we have no choice when faced with Longyuan-Arrk's ruthless unreasonableness.

If RWS and CJY could assure us by deducting money due to Longyuan-Arrk to pay to us directly, then we shall more than willing to continue with rectifying defects at our own costs.

We would caution that by engaging others to rectify defects in our subcontract scope which we are unable to do through no fault of ours, there is no grounds for deducting monies due to us. Moreover, the involvement of third party into our works may infringe the warranties and indemnities which we have given to you and render these warranties null and void.

We seek your kind understanding towards our difficult predicament and hope to receive your confirmation if the contract arrangement for payment through RWS/CJY is viable so that we can continue to fulfil our contractual obligation and finished the job.

Yours sincerely

Jason Teo

28 A scanned copy of the 16 November Letter was sent as an e-mail attachment to one "Ben Ee Seck Yong" from RWS with copies to other representatives from the Plaintiff, CJY and RWS on 8 December 2010 ("the 8 December E-mail"). [note: 18] Jason wrote: [note: 19]

Dear Ben,

Please find our reason for not attending to the RWS request for defects to be done as our main contractor LYA is not responding to our payment request which was promised on various occasions but not honoured. We would like to appeal for direct payment of our remaining money for us to clear the remaining defects works that was leave over from the main contract.

Attached plse find our appeal letter.

Hope to hear from your approval of appeal for direct payment ASAP.

Jason Teo

29 On 11 January 2011, the Defendant received a "Neon & Signage Defects list as 11 Jan 2011"

from Ivan. [note: 20] The e-mail referred to an attachment comprising the defects, but no such attachment was produced in the trial bundles. On 12 January 2011, the Defendant replied stating that it would not provide any further assistance to the Plaintiff unless the latter informed the Defendant of when it would make payment. [note: 21] The Plaintiff read the Defendant's reply as a refusal to remedy the defects and in its reply on 17 January 2011 accepted the Defendant's refusal as a repudiation of the Sub-Contract. [note: 22] The Plaintiff treated the Sub-Contract as terminated on 17 January 2011.

30 On 28 January 2011, the Plaintiff engaged Seiho Engineering & Contracts Pte Ltd ("Seiho") to replace the Non-compliant Signs and rectify other defects under the Sub-Contract. On 10 February 2011, the Plaintiff informed the Defendant that it would engage a third party to remedy the defective works. [note: 23] On the same day, the Plaintiff commenced Suit 81.

31 The Defendant commenced Suit 592 on 25 August 2011 after the retention sum of $62,500 ("the Retention Sum") was allegedly due for release after expiry of the defects liability period ("DLP") on 30 June 2011.

32 It is common ground that leaving aside the claim in defamation, the main issues in the both actions (including the counterclaims) overlapped, and that the determination of these issues in Suit No 81 (including the counterclaim) would resolve the main action and the counterclaim in Suit 592.

**The Plaintiff's case**

33 As stated, the Plaintiff's stance at the trial was that the Defendant had breached the Sub-Contract and after set-off and deduction from the Final Amount for various sums arising from the Defendant's breach, the Defendant still owes the Plaintiff money. Its position is the same even if there is a ruling in favour of the Defendant for the release of the Retention Sum.

34 First, the Plaintiff claims that the Defendant breached the Sub-Contract by failing to hot-dip galvanise *11* Non-compliant Signs, and later on refusing to replace them, and remedy other defects. The Plaintiff seeks replacement costs and other expenses incurred by engaging Seiho to replace the Non-compliant Signs as well as rectify other defects during the DLP. Second, the Plaintiff claims that the Defendant is liable for machinery back-charges arising from the Defendant's use of the Plaintiff's machinery and equipment to carry out the Sub-Contract works instead of providing its own machinery and equipment as required under cl 3(j) of the Sub-Contract. Third, the Plaintiff claims that CJY had made a direct payment to the Defendant for work that fell within the scope of the Sub-Contract, and CJY had in turn deducted this direct payment from its account with the Plaintiff. As such, the Plaintiff seeks to recover this deduction from the Defendant.

35 The following table sets out the expenses and back-charges claimed by the Plaintiff:

| Item | Amount (with GST) |
|---|---|
| Costs of hiring Seiho to replace 11 Non-compliant Signs | $342,988.50 |
| Costs of hiring Seiho to rectify defects | $103,625.98 |
| Back-charge for the Defendant's use of the Plaintiff's machinery | $211,271.50 |
| Direct payment from CJY to the Defendant that was back-charged to the Plaintiff | $290,715.79 |

| | |
|---|---|
| **Total Claim Amount** | $948,601.77 |
| **Less Final Amount in SFA** | $489,681.03 |
| **Net Amount due to Plaintiff** | $458,920.74 |

36 Finally, the Plaintiff claims damages for defamation identifying the contents of the 16 November Letter and its republication in the 8 December E-mail as defamatory.

**The Defendant's case**

37 The Defendant's primary argument is that the SFA was a binding final account agreement made between the Plaintiff and Defendant on 28 September 2010 in full and final settlement of the Sub-Contract. The Plaintiff contended that the SFA itself precluded the Plaintiff's claims listed in the table at [35] above or that they were barred by the settlement to make those claims. The Plaintiff's claims for replacement costs, expenses and back-charges were thus baseless; and so was the Plaintiff's plea that the Defendant was guilty of repudiatory breach of the Sub-Contract. It follows that in refusing to pay the Final Amount, the Plaintiff was in breach of the final account agreement (*ie*, the SFA). The Defendant, therefore, counterclaims for payment of the Final Amount.

38 Alternatively, if the SFA did not settle the issue of the Non-compliant Signs, back-charges and other matters, there was no breach of the Sub-Contract in respect of the Non-compliant Signs for the following reasons:

(a) The whole issue of 14 Non-compliant Signs was a sham that was made to avoid paying the Final Amount owed to the Defendant.

(b) The Epoxy Anti-rust Method was approved as a substitute by a representative from RWS during a factory visit in Indonesia.

(c) It was not necessary for the Plaintiff to replace the Non-compliant Signs because neither RWS nor CJY had instructed the Plaintiff to do so.

(d) The Plaintiff is estopped from suing on the issue of the Non-compliant Signs as breach of contract. CS Lim was aware that the signs were non-compliant but had nonetheless instructed the Defendant to install them without telling the Defendant that it would have to replace them if RWS did not approve the Epoxy Anti-rust Method.

(e) Of the 11 allegedly Non-compliant Signs replaced by Seiho, three were Non-Indonesian Signs manufactured by a local company and they were not in breach of the contract specification.

39 In relation to the direct payment from CJY, the Defendant asserts that the payment was for work outside the scope of the Sub-Contract, and/or is not recoverable because of the settlement in the SFA. [note: 24]

40 Finally, in relation to the Plaintiff's defamation claim, the Defendant denies that it had defamed the Plaintiff in the 16 November Letter and the 8 December E-mail. Even if the publications were defamatory, the Defendant relies on the defences of justification and qualified privilege.

41 In Suit 592, the Defendant is suing for the return of the Retention Sum of $62,500. Under the Sub-Contract, the Plaintiff was entitled to retain up to 5% of the Sub-Contract price, with 2.5% to be released within one month of completion and the remaining 2.5% to be released at the end of the DLP. The Defendant's case is that the DLP was for 18 months from the completion date, which was certified as 31 December 2009, thereby rendering the Retention Sum due for release on 30 June 2011.

42 However, the Plaintiff argues that the DLP only expires when the Maintenance Certificate is issued by CJY, which had not when the Defendant filed Suit 592 or indeed as at the time of the trial. The Plaintiff further argues that it is entitled to withhold the Retention Sum since the Defendant had not provided the "as built drawings" required under the Sub-Contract. This is a new allegation which arose from a late amendment to the Plaintiff's Defence and Counterclaim in Suit 592 during the first tranche of the trial on 18 May 2012.

**Issues**

43 The factual issues covered many areas of dispute. Fortunately, it is not necessary for this court to decide every factual issue in dispute. Significantly, counsel agreed that the question of the Plaintiff's alleged entitlement to the set-off its claims against Final Amount entails the determination of the following issues:

(a) Whether the SFA was a final account agreement in full and final settlement of the Sub-Contract such that the SFA itself precluded the Plaintiff's claims listed in the table at [35], or alternatively that the said claims were barred by the settlement.

(b) Whether the Plaintiff can legitimately deduct or set-off its claims against the Final Amount, or withhold the Final Amount; and if so, whether such a set-off or deduction was, on a true construction, precluded or barred by the SFA.

44 Other issues are as follows:

(a) Whether the Sub-Contract was properly terminated. The Plaintiff argued that that the Defendant was guilty of a repudiatory breach of the Sub-Contract that entitled it to terminate the sub-Contract.

(b) Whether each of the Plaintiff's claims in Suit 81 are made out, *viz*:

(i) the costs of replacing the Non-compliant Signs;

(ii) the costs of hiring Seiho to rectify defects during the DLP;

(iii) the machinery back-charges; and

(iv) CJY's direct payment to the Defendant.

(c) Whether the Retention Sum was due for release on 30 June 2011; and

(d) Whether the Defendant had defamed the Plaintiff in the 16 November Letter and the 8 December E-mail, and if so, whether the Defendant is entitled to any defences.

**Discussions and decision**

45 I will deal with each of the issues in [43] to [44] in turn.

***The nature and scope of the SFA***

46 The SFA was drafted by the Plaintiff. It was signed by the Plaintiff and the Defendant on 28 September 2010. After listing the various additions and deductions to the original Sub-Contract sum and arriving at the Final Amount of $489,681.03, the SFA reads as follows:

> We have examined and agreed to this statement of final account and confirm that we have no further claims on this Sub-Contract.
>
> *We confirm that the above Final Sub-Contract Sum is based entirely on* ***a commercial settlement*** *between authorised representatives of our respective companies* ***after taking into due consideration all variations, claims and any other matters arising from the Sub-Contract*** .
>
> We acknowledge that the above Final Sub-Contract Sum is deemed to be ***full and final settlement of all matters in connection with this Sub-Contract*** .
>
> In this respect, please sign and return the duplicate of this letter thereby signifying your ***acceptance*** *of this Final Account* ***Agreement*** , which ***will discharge all liabilities in full*** between us under this Sub-Contract.
>
> However, it is understood that this Agreement ***shall not vindicate the Sub-Contractor of his responsibilities under the Sub-Contract*** or rescind the Sub-Contract in any way. Further, that this Agreement ***shall not prejudice the Contractor's right in respect of instructing the Sub-Contractor to rectify defective works arising from this Sub-Contract or to employ other Sub-Contractors to complete the rectification works on the Sub-Contractor's behalf*** *should the Sub-Contractor fail to respond to the instruction within seven days.*
>
> In the event of failure to respond the Sub-Contractor shall be liable for all costs both direct and indirect incurred by the Contractor and such costs should be deducted from the Sub-Contractor's outstanding payments (if any) otherwise it will become a debt to the Contractor.
>
> [emphasis added in italics and bold italics]

47 The principles that apply to the construction of a written contact are those summarised by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 ("*Zurich Insurance*"). The Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another* [2013] SGCA 43 ("*Sembcorp Marine*") revisited the contextual approach to the interpretation of terms in a contract, and the observations made in *Zurich Insurance* were supplemented in *Sembcorp Marine*. Sundaresh Menon CJ delivering the judgment of the court in *Sembcorp Marine* reminded litigants that whenever a contextual approach to construction of a contract is sought, the relevant background facts relied on must be pleaded with specificity and extrinsic evidence limited to the matters pleaded must be disclosed. In this regard, Menon CJ's provided four requirements as guidelines (at [73]):

> (a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;

(b) second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity;

(c) third, parties should in their pleadings specify the effect which such facts will have on their contended construction; and

(d) fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in (a) and (b).

48 In the context of the present case, the Plaintiff's pleaded case is that the SFA was void for the Defendant's fraudulent misrepresentations that the works were completed when they were not. As stated above at [4], this plea was abandoned completely at trial. Consequently, the Plaintiff accepted that the agreed Final Amount was due to the Defendant, but claimed that it was entitled to withhold payment in order to set-off the Plaintiff's claims against the Final Amount. The concession at trial meant that there was acceptance of a valid and binding final account agreement, and that payment of the Final Amount was due. The Plaintiff is, however, seeking to argue that the SFA did not preclude the Plaintiff's claims, and that, in law, it could still set-off for unliquidated damages for breach of contract against the admitted debt (*ie*, the Final Amount"). I will deal with the issue of set-off in due course, but I turn first to the nature and ambit of the SFA.

49 The first consideration is the scope of the SFA that the parties signed. This is a question of construction applying the principles set out above. In the context of this case, I must consider the background knowledge which would reasonably have been available to the parties in the situation they were at in September 2010, as gleaned from their pleadings. [note: 25] The Defendant had completed the installation of the signage in January 2010. To all intents and purposes, there was practical completion of Universal Studios which opened on 14 February 2010. On 1 March 2010, the Plaintiff was proposing to pay the Defendant at least $500,000 in two instalments (mid-March and mid-April), and thereafter, the third instalment at the end of May 2010 for the remaining balance and value of variation works. [note: 26] It is not disputed that the Plaintiff experienced cashflow woes which culminated in winding up proceedings commenced against the Plaintiff in March 2010. The winding up proceedings were withdrawn in January 2011. In September 2010, a commercial settlement for an apparent lesser amount was reached. The SFA expressly stated that the Final Amount was "based entirely on a commercial settlement" (see [46] above).

50 The Final Amount of $489,681.03 was an agreed figure in the SFA. The agreed final statement in the SFA had the effect that payment of the amount notified (*ie*, the Final Amount) was due to the Defendant. The expressions used by the parties, *viz* "Final Sub-Contract Sum", "Final Account Agreement", "final account", and "final statement of account" all have one thing in common: they were intended and would have been taken by a reasonable businessman as final. The amount notified as the Final Sub-Contract Sum" or "final account" due from the Plaintiff would be the latter's view of the final value of work taking into account any factors that affect the true value of the work, such as the state of completion and execution of the work. Any amount that was due from the Defendant, for example, a back-charge for labour and machinery supplied at the Defendant's request, would also be taken into account so as to arrive at the final account. Therefore, the word "final" denoted the end of an accounting process between the parties.

51 Not only was the final account and statement reached by agreement, it was in "full and final settlement of all matters in connection with this Sub-Contract" except for the specific reservations in the SFA. Notably, the agreement in the SFA effected a full and final settlement of any claims that the Defendant may have had against the Plaintiff under the Sub-Contract and described in the SFA as "all

variations, claims and any other matters arising from the Sub-Contract". Similarly, any amount due by the Defendant in relation to "all variations, claims and any other matters arising from the Sub-Contract" would have been taken into account. The SFA also expressly states that the Defendant's acceptance of the "Final Account Agreement" (*ie*, the commercial settlement) "will discharge all liabilities in full between [the Plaintiff and Defendant] under this Sub-Contract" with the exception of the reservations stipulated.

52 The confirmation that the acceptance of the Final Amount by the Defendant would serve to *discharge in full all liabilities between the parties* in combination with the phrase that the agreement was intended to achieve *full and final settlement of all matters in connection with the Sub-Contract* reinforce the point that the combination of these phrases was intended to take the settlement further than a financial statement between the parties. I will elaborate on the impact of this construction on the Plaintiff's table of claims at [35] in due course.

53 Turning to the related question whether the agreement in the SFA relieved the Defendant of liability for defects in its performance, or otherwise precluded the Plaintiff from raising those defects: the answer to this question is it did *not*. This is borne out by the express reservations in the SFA (see [46] above). In addition, this view is consistent with the state of affairs at the time the SFA was signed. The Defendant was clearly not released from its responsibilities and obligations to rectify defective works during the DLP. According to the Sub-Contract Completion Certificate dated 20 December 2010 (the Plaintiff received this from CJY on 1 February 2011), CJY certified that the Sub-Contracts Works were completed on 31 December 2009 which meant that the DLP which started on 1 January 2010 would end on 30 June 2011.

54 The meaning of "defective work" is explicated in *Hudson's Building and Engineering Contracts* (Nicholas Dennys, Mark Raeside & Robert Clay gen eds) (Sweet & Maxwell, 12th Ed, 2010) at para 4-107 as follows:

> Defective work is work which fails to comply with the requirements of the contract and so is a breach of contract. For large construction or engineering contracts, this will mean work which does not conform to express descriptions or requirements, including any drawings or specifications, together with any implied terms as to its quality, workmanship, performance or design.

This definition of defective work is consistent with the relevant terms of the Sub-Contract:

> **15. DEFECTS LIABILITY PERIOD**
>
> a) Upon completion of the Works, the Subcontractor shall at his own expense make good any defects *due to materials and/or workmanship not in accordance with the requirements of the Subcontract* for a period as defined in the Annex to the Subcontract (The period shall be eighteen (18) months).
>
> ...
>
> [emphasis added]

55 It is clear that the dispute in relation to the Non-compliant Signs (which is equated to the Galvanisation Issue) is a "defect" within the meaning of cl 15(a) above, and was defective work duly reserved in the SFA. The penultimate and last paragraphs of the SFA admit of no other interpretation, and expressly encompassed events which could arise before the end of the DLP. As an aside, the

Defendant's conceded in its Closing Submissions that a defect or non-compliance with the Sub-Contract works could be legitimately raised for rectification during the DLP. [note: 27]

56 The Defendant's principal witness, Jason, claims that the Galvanisation Issue was expressly brought up while he and CS Lim were negotiating the SFA and that CS Lim had agreed that the matter was "water under the bridge": [note: 28]

> A: ... So we actually brought it up during the final accounts and as, you know, as---as a norm, all other related costs will have to be discussed, okay. So for example, is there any more variation, is there any more back charges, this will has [*sic*] to be discussed. So one of the main item that we actually brought up to [Mr CS Lim] was this galvanisation. Okay. I asked him how do we deal with it? Okay, do he---does he want to have a deduction or what, *so he said forget about it, it's already water under the bridge. It's nobody want to rake it up, let's not discuss it any more. So it was closed*. ...
>
> [emphasis added]

57 Jason's explanation in cross-examination was *not* the Defendant's pleaded case. The Defendant's averment was that "the Plaintiffs' CS Lim, when finalizing the accounts with the Defendant's [Jason], had not made any provisions in the Plaintiffs' Final Accounts entered into between the parties on 28th September 2010 for the replacement costs of Indonesian signages [*sic*] nor had the Plaintiffs reserved their rights on the same". [note: 29] I have already ruled on the reservation of right plea (see [55] above). The ruling here also takes care of the first part of the Defendant's pleaded case which, *inter alia*, rested on the Plaintiff's *silence* rather than on any alleged positive representation made by C S Lim on behalf of the Plaintiff that the issue of Non-compliant Signs was "water under the bridge".

58 In fact, the evidence shows that less than a month after the SFA was concluded, Ivan reminded Jason that the Galvanisation Issue was still outstanding on 19 October 2010. Ivan wrote: [note: 30]

> Hi Jason,
>
> We will like to remind your kind self that Intermega's Galvanizing issue is still outstanding. I understand from CS that you will have a undertaking letter from a P.E to undertake it issue from LYAK's liability. Kindly let us know when we can have this letter as such, if not, we will have to reject the signage works from Intermega under the care of Show N Tel as it did not conform to the Specifications.
>
> Kindly revert.
>
> Thank You.

59 From the Plaintiff's viewpoint, the Galvanisation Issue was not closed and resolved by the SFA. Jason's answer in cross-examination is telling. He admitted that he did not reply to the e-mail but offered no explanation for why he did not do so in light of his claim that the Galvanisation Issue was settled by the SFA: [note: 31]

> Q: So, you---as you can see from the sequence of events, before the final accounts were signed, the issue was raised. After the final accounts were signed, even though my client did

not know about it, the issue was raised again on 19th October 2010. My question to you is: Did the defendants respond to the 19th October email and said, "Why are you chasing us for this when we already have this deviation approved?"

A: No, we did not write back.

60 For the reasons stated, the SFA did not settle the issue of Non-compliant Signs which was intended to be treated as defective work to be resolved during the DLP. Accordingly, the Plaintiff is permitted to raise allegations and make claims of defective work in relation to the Non-compliant Signs, and for the Defendant's failure to observe its duty to remedy other defects notified during the DLP that might qualify in law as entitling the Plaintiff to the rights prescribed in the Sub-Contract.

***Right of Set-off***

61 The Plaintiff in its Closing Submissions asserts "rights of set-off", [note: 32] and maintains the position that rights of set-off exist in that they were not excluded since clear words in the SFA were needed to take away such rights. However, it is not clear whether the Plaintiff is relying on equitable set-off as a substantive defence and claiming that this defence is available in the present case. There is no definitive assertion of this in the Plaintiff's pleadings or Closing Submissions, and the court is left to guess what was intended from the Plaintiff's reliance on *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("*Jia Min*") at [43] where V K Rajah JC (as he then was) said:

> It is hornbook law that the common law and/or equitable right to exercise set-off in diminution of a claim can only be removed by clear and unequivocal words.

62 In Suit 81, the Plaintiff claims damages against the Defendant for breach of contract and the Defendant counterclaimed in debt (*ie*, the Final Amount) due under the SFA. The Plaintiff pleaded that under the Sub-Contract it was entitled to withhold payments. The plea did not make reference to cl 15(c) of the Sub-Contract. By cl 15(c), all payments due under the Sub-Contract could be withheld pending full rectification of the defects. I must point out that the Plaintiff did not pursue and develop this contractual right to withhold in evidence and in its Closing Submissions. [note: 33] This is not surprising as the Final Amount was due under the SFA and not under the Sub-Contract for cl 15(c) to be invoked (see [118] below for the text of this clause). Besides, the Plaintiff had all along claimed that it had no knowledge of the existence of the SFA until 8 March 2011 after the action had started and that the Plaintiff's contracts manager, Tao Mudong ("Mr Tao") (who took over after CS Lim left the Plaintiff), found a copy of the SFA in the file. [note: 34]

63 In contrast, the Defendant's pleaded case is that the Final Amount was payable forthwith or at the latest by or on 28 October 2010 in accordance with cl 4(d) of the Sub-Contract. [note: 35] By cl 4(d), the Plaintiff is to pay the Defendant "such sum as certified in the Payment Certificate... within 30 days after the date of the Payment Certificate". In the Plaintiff's Defence to the Counterclaim, set-off was relied upon as a defence in diminution or extinction of the Defendant's counterclaim. [note: 36]

64 The Plaintiff's contention presupposes that a right of set-off exists without more. Whilst a defence of set-off is allowed in O 18 r 17 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (the "ROC") read with s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), the Plaintiff is still required to establish as a matter of law that its claim is the subject matter of a set-off be it a legal set-off, an equitable set-off or a set-off as a matter of abatement. Confusion arises if the

important threshold question of whether the Plaintiff as a matter of law is able to establish that that its claim is the subject matter of a set-off is not addressed first. The subsidiary question that follows is whether, on a true construction of the SFA, the right of set-off was precluded or barred by terms of the SFA. At this stage of the analysis, if the set-off is part of general law, it can only be excluded by clear provisions to that effect.

65 I begin with the threshold question. In the present case, the Plaintiff's claim for damages exceeded the Final Amount and the claim for damages was advanced by way of set-off against the Final Amount. In other words, the Plaintiff seeks to set-off or withhold payment of the Final Amount against a claim for damages for breach of contract. The issue is whether either the common law doctrine of equitable set-off or a contractual set-off clause permits the Plaintiff to do that before judgment. It is not controversial that clear words in a contract permitting the set-off against a sum otherwise due will usually be required. Other than an allowable contractual set-off, the doctrine of equitable set-off, which is a substantive defence, allows a set-off to be raised before judgment. An important feature of the doctrine of equitable set-off is that it is usually raised as an answer to a liability to pay money otherwise due before the debtor's own cross-claim is determined. The debtor's cross-claim, however, must be closely connected with the demand for payment of the debt such that it would be manifestly unjust to allow enforcement of payment without taking into account the cross-claim. (The formulation of the test for equitable set-off in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927 *("The Nanfri")* which was applied in *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 was restated, freed of any reference to the concept of impeachment, in *Geldof Metaalconstructie NV v Simon Carves Ltd* [2011] 1 Lloyd's Rep 517). As stated earlier, the Plaintiff did not deal with the application of the test for equitable set-off to the facts of the present case.

66 In the final analysis, the set-off plea in the Defence to the Counterclaim (a set-off as a matter of abatement) was not advanced in Closing Submissions. If anything, the court is looking at a set-off by judgment. This happens after cross-liabilities are each established by judgment, and there can be a set-off by judgment where one sum is netted off against another leaving one single liability for the balance sum. The observations of George Leggatt QC sitting as a deputy High Court judge in *Fearns (trading as Autopaint International) v Anglo-Dutch Paint & Chemical Co Ltd and others* [2011] 1 WLR 366 on the powers of the court to set-off by judgment is apposite and I gratefully adopt them. Judge Leggatt said (at [36]–[37]):

> 36. As well as by agreement, cross liabilities can be netted off (and thus extinguished to the extent of the other) pursuant to a judgment of the court. Before such a set-off can be effected it is of course necessary that the existence and amount of each liability has been established by agreement or judgment.
>
> 37. …More generally, it has long been the practice of the courts as part of their inherent jurisdiction over their own procedures to allow cross-judgments given in the same action, or in different actions, to be set off against each other: see *Edwards v Hope* (1885) 14 QBD 922; *Reid v Cupper* [1915] 2 KB 147 and *In re A Debtor (No 21 of 1950) (No 2)*; *Ex p The Petitioning Creditors v The Debtor* [1951] Ch 612. As these cases show, this jurisdiction encompasses judgments for damages and also orders for costs. Unlike legal or equitable set-off, such a "set-off" involves treating the judgment in favour of one party as satisfying pro tanto the judgment in favour of the other. There is accordingly an extinction of liabilities.

67 Accordingly, the subsidiary question of whether the SFA has excluded an equitable set-off is moot because the court here is dealing with a set-off by judgment which is a matter of the court's inherent jurisdiction.

***The Defendant's repudiatory breach***

68 The Plaintiff proceeded to terminate the Sub-Contract at common law on 17 January 2011, alleging that the Defendant was guilty of repudiatory breach when it refused to replace the Non-compliant Signs and remedy other defects until it was paid the Final Amount.

69 The question is whether the Sub-Contract was properly terminated. However, the parties seem to accept in their respective Closing Submissions that this question would be answered by a determination of the dispute on the Non-compliant Signs even though it embraced a number of issues. To elaborate, the Plaintiff's Closing Submissions do not deal with the termination of the Sub-Contract on 17 January 2011. The arguments were confined to the Defendant's breach in failing to replace the Non-compliant Signs and remedy the other defects. Similarly, the Defendant did not directly challenge the termination on 17 January 2011 in its Closing Submissions. Broadly, the Defendant's position is that it had valid reasons for not replacing the Non-compliant Signs and the Plaintiff was informed of the reasons on 15 November 2010 and 11 January 2011, and hence it was not in breach. Furthermore, the purported termination of the Sub-Contract prevented it from carrying out any remedial work during the DLP. [note: 37] As for the Defendant's contention that it was improper to terminate the Sub-Contract for completed signage works and further arguments on the effect of the SFA on the Non-compliant Signs, [note: 38] these points have been addressed in my discussions on the nature and scope of the SFA.

70 In addition, the thread of e-mails on 11 January 2011 is pertinent. A closer study of the thread of e-mails on 11 January 2011 revealed that the request to rectify the "Neon & Signage Defects as 11 Jan 2011 originated from RWS to CJY, and the relevant e-mail from RWS reads: [note: 39]

> Subject: Neon & Signage Defects as 11 Jan 2011
>
> Dear CJY,
>
> See attachment for the neon & signage defects as 11 Jan 2011.
>
> FYNA.
>
> Thanks.
>
> Best Regards.
>
> Mohamad Ramil

71 Ivan wrote to the Defendant and Jason on the same day. Ivan's e-mail dated 11 January 2011, that was titled "FW: Neon & Signage Defects as 11 Jan 2011", reads: [note: 40]

> Dear Show n Tell,
>
> With reference to the defects list as attached, you are to mobilize to make good such occurrences. You are to revert to your earliest date for mobilization.
>
> Thank you.
>
> Ivan

72 The attachment comprising the list of signage defects referred to in the e-mails above was not produced in the trial bundles. Be that as it may, Jason's response is pertinent. His e-mail dated 12 January 2011, that was titled "Re: Neon & Signage Defects as 11 Jan 2011", reads: [note: 41]

> Dear All,
>
> We have written to inform all parties of our request for novation of the remaining liability to CJY due to non payment issue from our main contractor LYA, we would appreciate if you can let us know how we can proceed with our request so as to provide further service to RWS. Please note until and unless LYA let us know when they can pay us we will not provide further assistance to this company due to payment default and breach of contract terms.
>
> Jason

73 What did Jason's 12 January e-mail demonstrate? The message conveyed in the e-mail was that the Defendant did not intend to perform its remaining obligations under the Sub-Contract any time soon or in the future. In doing so, Jason did not distinguish between the Galvanisation Issue and other defects in relation to the signage works: his position was that the Defendant was no longer going to work with the Plaintiff because of the latter's persistent failure to pay what was due to the Defendant, and that it was looking to CJY to take over the remaining part of the Sub-Contract (as suggested by Jason's use of the phrase "novation of the remaining liabilities to CJY").

74 Accordingly, I accept the Plaintiff's case that the sending of the Defendant's e-mail dated 12 January 2011 amounted to a repudiation of the remaining part of the Sub-Contract in relation to signage works that was expressly reserved in the SFA.

75 To the extent that the proposition in *Jia Min* (see [61] above) is relevant, I agree that there is no general right at common law to stop or suspend work unless expressly agreed. Therefore the contractor/sub-contractor cannot stop or suspend work even if payment is wrongly withheld (see *Jia Min* at [55]–[57]). *Chitty on Contracts* vol 2 (Sweet & Maxwell, 31st Ed, 2012) at para 37-221 states:

> In relation to acts or defaults of the contactor, a refusal to carry out work is likely to evince the appropriate intention no longer to be bound. Poor workmanship, however, will generally not be sufficient to constitute repudiation, unless there is a manifest inability to comply with the requirements of the contract indicative of a basic inability, or basic lack of competence and intention, to perform the contract. Unless time is of the essence, delay may amount to a repudiation only where the delay gives rise to the inference that the defaulting party does not intend to be bound by the terms of the contract. In relation to acts or defaults of the employer, an act of prevention such as a refusal to grant the contractor access to the site, or dismissal of the contractor from the site, is likely to amount to a repudiation. A failure by the employer to pay the contractor could amount to a repudiation, depending on the terms as to payment, and the circumstances of the refusal, but generally there is no right to suspend work where payment is withheld from the contractor.

76 For the sake of completeness, I should mention the Defendant's plea that the Plaintiff's persistent failure to make payment is a repudiatory event. In March 2010, winding up proceedings were commenced against the Plaintiff on account of the latter's inability to pay its debts. Those proceedings were not withdrawn for ten months, and during this period, the Defendant received no payment of the Final Amount. In a proper case, a failure by the contractor to pay its sub-contractor may amount to a repudiatory event. However, there is no evidence that the Defendant accepted the

repudiatory breach in an attempt to put an end to the contract. On ordinary principles, if the innocent party does not treat the contract as at an end, but affirms the contract, the contract continues with all its terms effective.

***The Plaintiff's various claims***

*(a) The Non-compliant Signs*

Did RWS or CJY instruct the Plaintiff to replace the signs?

77 The Plaintiff contends that the Defendant had refused to replace the Non-compliant Signs despite notice to do so on 8 November 2010 and again on 11 January 2011. The Defendant's counter argument is that it was under no contractual obligation to replace the Non-compliant Signs on 8 November 2010 and 11 January 2011. According to Samuel Ip, the project director of CJY, the latter handed over possession of Universal Studios to RWS on 31 January 2010. [note: 42] A key complaint of the Defendant is that neither RWS nor CJY had required the Non-compliant Signs to be replaced. The argument is that after CJY handed over possession of Universal Studios to RWS, CJY's obligation to remedy defects would have to be by way of Architect's Direction issued after the handover of possession to the RWS. I understand the Defendant to be referring to cl 27(6)(a) of the Main Contract on Rectification of Defects after Handover to Employer. If CJY did not comply with the Architect's Direction issued after the handover, the employer, RWS, would be entitled to recover as damages the cost of remedying the defects (see cl 27(6)(b) of the Main Contract). The Defendant's argument is premised on cl 27(6) of the Main Contract which was incorporated as a term of the Sub-Contract. Cl 27(6) reads as follows:

> (a) The Contractor shall, upon receipt from the Architect of a written direction, rectify any defects, omissions, shrinkages or other faults in any part of the Works which shall be due to:
>
> (i) defective workmanship or materials;
>
> (ii) the Works not having been constructed in accordance with the Contract; or
>
> ...
>
> The Contractor shall rectify such defect, omission, shrinkage or other fault ("the Defects") to the satisfaction of the Architect within 7 days from the date of the Contractor's receipt of the written direction.
>
> (b) If the Contractor fails to rectify any Defects referred to in sub-clause 27(6)(a) to the satisfaction of the Architect within 10 days from the date of the Contractor's receipt of the written direction, the Employers may either:
>
> (i) rectify such Defects himself; or
>
> (ii) engage another contractor to rectify such Defects; or
>
> ...

78 The Plaintiff's project director, Johnny Ong admitted in cross-examination on 4 September 2012 that there was no Architect's Direction to replace the signs. [note: 43] Johnny Ong was not wrong that there was no Architect's Direction after the handover. However, later on 10 September 2012, he

pointed to the Architect's Direction to CJY dated 18 January 2010 ("the AD of 18 January 2010") to, *inter alia* "verify all signage installed on site and identify the non-conforming signage and rectify accordingly". [note: 44] The AD of 18 January 2010 was issued before the handover of the site to RWS on 31 January 2010. According to Johnny Ong, the AD of 18 January 2010 was only received by the Plaintiff around 15 March 2010. [note: 45] The Plaintiff's Reply was amended in the second tranche of the trial to plead the AD of 18 January 2010.

79 As I understand it, the Defendant is making a distinction between an Architect Direction issued after handover which is governed by cl 26(b) of the Main Contract which was incorporated in the Sub-Contract, and the AD of 18 January 2010.

80 There is some force in the Defendant's contention seeing as there was practical completion and handover of Universal Studios to RWS. The Plaintiff's 8 November letter and e-mail of 11 January 2011 were sent after handover and during the DLP. Insofar as the AD of 18 January 2010 was pre-handover, the Defendant maintains that there was no proper Architect's Directions.

81 The Defendant argued separately that the list of Non-compliant Signs was only added to the Schedule to CJY's Sub-Contract Completion Certificate dated 20 December 2010 on 27 January 2011. Johnny Ong admitted that the additions to the list of minor outstanding works were made by one Jim Tan of CJY after they both consulted with each other. [note: 46] This evidence of late updating of the list of minor outstanding works is not fatal to the Plaintiff's case on the issue of Non-compliant Signs. This updating appeared to be one of form when taken together with the Plaintiff's previous e-mails to the Defendants on the Galvanisation Issue, that approval for the substitute method must be sought and that if no approval was given, the Non-compliant Signs had to be replaced at the Defendant's costs (see [14], [17] and [58] above). It appears that eventually there was no Professional Engineer endorsement for the substitute method, and consequently, the Plaintiff asked the Defendant to rectify the Non-compliant Signs on 8 November 2010.

82 To reinforce my view that the updating of the list of minor outstanding works on 27 January 2011 was one of form, for completeness and consistency, the list of minor outstanding works that was attached to the Main Contractor's Direction dated 17 December 2010 was similarly updated on 27 January 2011. [note: 47] In these circumstances, even though CJY *did* ask the Plaintiff to replace 11 rusty signs in a Main Contractor's Direction dated 17 December 2010, [note: 48] the evidence shows that the list was updated to include the Non-compliant Signs on 27 January 2011 and that this updated list and the Main Contractor's Direction dated 17 December 2010 were received by the Plaintiff on 1 February 2011 well after the Plaintiff terminated the Sub-Contract on 17 January 2011.

83 Returning to the Defendant's contention that there was no obligation to replace the Non-compliant Signs as there was no Architect's Direction issued after handover of possession of the site to RWS, it seems to me that this contention was not an issue at the material time. The e-mail sent by Jason on 12 January 2012 was clear evidence that the Defendant's position on the Sub-Contract was because of the non-payment issue rather than a contractual right pertaining to directions from RWS or CJY (*ie*, cl 27(6) of the Main Contract). In my view, the evidence does not support the Defendant's argument that its obligation to rectify or replace the Non-compliant Signs was contingent on an express direction from RWS or CJY.

84 As stated, a closer study of the thread of e-mails on 11 January 2011 revealed that the request to rectify the "Neon & Signage Defects as 11 Jan 2011 originated from RWS to CJY, and was eventually passed down the line to the Defendant who responded on 12 January 2011. Jason's reason for wanting CJY to step in to take over the Plaintiff's Sub-Contract with the Defendant was the

Plaintiff's non-payment of the Final Amount.

Is the Plaintiff estopped from suing the Defendant for the Non-compliant Signs?

85 According to the Defendant, the Plaintiff instructed the Defendant to install the signs without notification that it would have to replace them if RWS did not approve its Epoxy Anti-rust Method. The Defendant pleads that the Plaintiff is therefore estopped from alleging that it had breached the Sub-Contract by failing to hot-dip galvanise those signs.

86 The Defendant is not asserting that the galvanisation requirement had been waived; rather, the Defendant appears to be arguing that the Plaintiff is estopped by virtue of its silence when it permitted the Defendant to put up the Non-compliant Signs. The allegation, from a legal perspective, is that the Plaintiff's conduct is best characterised as silence in the face of a continuing contractual relationship.

87 Although estoppel by representation usually requires a clear and unequivocal statement by the representor that he will not be insisting on his strict legal rights, silence can amount to such a representation if there is a duty to speak in the circumstances. As *Chitty on Contracts*, vol 1 (sweet & Maxwell, 31st Ed, 2012 ) states (at para 3-092):

> Although a promise or presentation may be made by conduct, mere inactivity will not normally suffice for the present purpose since "it is difficult to imagine how silence and inaction can be anything but equivocal." Unless the law took this view, mere failure to assert a contractual right could lead to its loss; and the courts have on a number of occasions rejected this clearly undesirable conclusion. ...The only circumstances in which mere "silence and inaction" can have this effect are the exceptional ones (discussed elsewhere in this book) in which the law imposes a duty to disclose facts or to clarify a legal relationship and the party under the duty fails to perform it.

88 The Court of Appeal in *Tacplas Property Services Pte Ltd v Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased)* [2000] 1 SLR(R) 159 observed (at [62]–[64]):

> 62 In order for the appellants to succeed in their claim in estoppel, there must be a clear and unequivocal representation on the part of the respondent that he did not dispute the binding effect of the agreement which was purportedly entered into by Christina Lee and that he treated the agreement as being valid. Although a representation giving rise to such an estoppel need not be express and may be implied, it must, nonetheless, be clear and unequivocal. Mere silence and inactivity will not normally suffice, and in the words of Robert Goff LJ in *The Leonidas D; Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA* [1985] 1 WLR 925 at 937 "it is difficult to imagine how silence and inaction can be anything but equivocal" (endorsed by this court in *Fook Gee Finance Co Ltd v Liu Cho Chit* [1998] 1 SLR(R) 385).
>
> 6 3 *However, it would be different where there is a duty to speak. In such a situation the silence could amount to a representation.* One example would be in a situation like that in *Greenwood v Martins Bank Ltd* [1933] AC 51 where an account holder, knowing that his wife had been forging his signature, failed to inform the bank of the same until the wife had died. He was estopped from recovering from the bank the money paid out under the forged cheques. The court was of the view that his silence had been deliberate and was intended to produce the effect which it in fact produced, namely, leaving the bank in ignorance of the true facts so that no action might be taken by it against his wife.

64 In *Spiro v Lintern* [1973] 1 WLR 1002, the defendant's wife purported to sell his property to the plaintiff. When the plaintiff sued the defendant for specific performance of the contract, he contended that his wife had acted without his authority. The court held that he was estopped from proving that the contract had been made without his authority because he had known that the plaintiff was acting in a mistaken belief that there was a legal obligation on the defendant to sell the house to the plaintiff. In those circumstances, the defendant had been under a duty to disclose to the plaintiff that his wife had acted without his authority and his failure to do so amounted to a representation by conduct that she had his authority. Buckley LJ opined at 1011:

> ... in our judgment, if A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B's disadvantage if A were thereafter to deny the obligation, A is under a duty to disclose the non-existence of the supposed obligation.

[emphasis added]

89 In this case, no duty to speak is alleged. Furthermore, the Defendant's did not address the two e-mails in December 2009 (see [14] and [17] above) reserving the Plaintiff's right to have the Defendant replace the signs if no approval for the substitute method was granted by RWS. There is also no evidence that the Plaintiff made any further representations subsequent to those e-mails to change the Defendant's understanding of this position. In the circumstances, the assertion of an estoppel is rejected.

Did RWS approve the Epoxy Anti-rust Method?

90 It is common ground that only RWS had the authority to approve any deviation from the contract specification. Jason claimed on the stand that the Epoxy Anti-rust Method was approved by RWS's Gina Nanong during a factory visit in Indonesia: [note: 49]

Q: I'm just talking here about the approval of the alternative design.

A: The approval has been given; it's just pending submission to formalise the method.

Q: Sorry, approval had been given---

A: That's right.

Q: ---by RWS?

A: Given but on site, on---in the factory level.

Q: By whom?

A: By RWS.

...

Q: Okay. So you're saying there were some kind of approval have been given by RWS---

A: Yes.

Q: ---prior to 3rd December 09?

A: That's right.

...

Q: So and this representative of RWS that you claimed to have given this approval is Mr Kevin Barbie?

A: No, Gina Nanong.

However, he conceded that he had no written documentation to support his claim that approval was given by RWS. [note: 50] The problem with this is that cl 3(1)(B)(m) of the Particular Conditions of Main Contract requires the approval of any "Alternative Design Proposal" by RWS to go through the Architect. [note: 51]

91 Mr Toh, the Architect-In-Charge for the RWS project, stated in his Affidavit of Evidence-in-Chief that structural changes to the steel frame could only be approved by the Architect, and no approval had been given: [note: 52]

17. The change of coating method from hot dip galvanising to cold galvanising was a variation that required an instruction from the Architect.

18. I can confirm that no request was made to the Architect by any party for permission to deviate from the specification that required coatings on iron and steel articles to be hot dip galvanised.

19. Even if such a request was made, I would not have agreed to it...

...

30. I am told by the Plaintiff's counsel, Mr Timothy Ng that the Defendant has in its Further and Better Particulars to the Defence and Counterclaim filed on [*sic*] identified the RWS representatives who "*gave permission*" for the deviation as:

a. RWS's Art Director, Mr Kevin Barbie; and

b. RWS's project manager, Ms Gina Nanong.

31. I have not seen any evidence of permission being given for cold galvanising and do not believe that such permission was given.

32. In any event, Mr Barbie is the Art Director. His responsibility would be on the aesthetic and cosmetic aspects. Mr Barbie is not qualified to approve any structural changes and would not have any authority to approve such structural changes.

33. Ms Gina Nanong is a project manager and not a consultant. She was not authorised to approve such structural changes.

34. In summary, the unilateral change in coating method applied by the Defendant was not authorised and did not comply with the contractual specifications.

92 The Defendant also relies on two documents to support its claim that approval was given: (a) the epoxy anti-rust paint methodology that was submitted to the Plaintiff, and (b) the indemnities and warranties of 5 years given by the Defendant for signs fabricated in Indonesia. [note: 53] However, Jason admitted under cross-examination that the documents relating to (b) were not in evidence before the court. [note: 54] In any case, it is clear that neither of these documents actually evidences RWS's approval; rather, the documents were submitted by the Defendant in the hope of obtaining approval for its Epoxy Anti-rust Method.

How many signs were non-compliant?

93 The parties disagree over the exact number of signs that were not hot-dip galvanised. A production manager from Seiho, Woo Fock Wah ("Mr Woo"), deposed that (a) he had personally supervised the replacement of the 11 signs; (b) all of them were rusty; and (c) he did not believe the signs were hot-dip galvanised because if they were, they would not have rusted at all. [note: 55] On the stand, he also added to his Affidavit of Evidence-in-Chief a sentence stating that if the signs were hot-dip galvanised, "there would be shine". Mr Woo was called as a witness of fact and not an expert witness. It was too late in the day to have him take the stand as an expert witness. Besides, proper information on his credentials to qualify him as an expert was not available. As far as Mr Woo was concerned, his eye-witness account was that 11 signs appeared to be rusty.

94 For its part, the Defendant has admitted that eight of the 11 signs were not hot-dip galvanised. Jason testified as follows: [note: 56]

> Q: So, Mr Teo, is it your evidence that all the 11 replaced signs were actually hot-dip galvanised and that Seiho was wrong?
>
> A: No.
>
> Q: So what is your position?
>
> A: Our position is that the Indonesia signs were not hot-dip galvanised.
>
> Q: So, Mr Teo, what you are saying is that---I understand from your---your learned counsel's position mentioned during cross that three signs, according to you, were actually hot-dip galvanised – China Bistro, Brown Derby and Super Candies – correct? That's your position?
>
> A: Yes.
>
> Q: So you are admitting that the eight other signs replaced by Seiho and definitely from Indonesia, definitely not hot-dip galvanised, correct?
>
> A: Yes.

95 There was some controversy over the origins of the remaining three signs, namely Hollywood China Bistro, Brown Derby and Super Candies. The Defendant said that they were made in Singapore and therefore had nothing to do with the Indonesian Signs that were not hot-dip galvanised. The Plaintiff, on the other hand, maintained that they were Indonesian Signs (and was able to adduce evidence to show that Hollywood China Bistro and Super Candies were fabricated by Intermega), but argued that in any event, the origin of the signs did not matter because they were, as a matter of

fact, not hot-dip galvanised. I am inclined to agree with the Plaintiff – even if the signs were made in Singapore, it did not necessarily mean that they were hot-dip galvanised.

96 Jason's evidence on whether the three disputed signs were hot-dip galvanised was confused and inconsistent. He initially admitted that the three signs did not comply with the contract specification: [note: 57]

> Q: Do you agree that under the original contract, this item P of 3AB795 is the governing specification for hot-dip galvanisation?
>
> A: That's right.
>
> Q: Thank you. So just to make things very clear, you are admitting that the eight---out of 11 signs replaced by Seiho, eight of the signs you admit to be Indonesian, are not in compliance with 3AB795, correct?
>
> A: Agreed.
>
> Q: Okay. Now, of the remaining three signs – China Bistro, Brown Derby and Super Candies, which you say was done by Ministry of Signs – was it in compliance with 3AB795, yes or no?
>
> A: Not to this specification.
>
> Q: Okay, thank you. So "No"?
>
> A: I said not to this specification, yes.

However, he subsequently recanted and claimed that they were in fact compliant: [note: 58]

> Q: Now Mr Teo, you mentioned earlier, if when---if you recall this morning's cross-examination, I did ask you specifically on these three signs. And I recall your evidence and I'm sure it will appear in the transcripts, and I asked you whether they were in compliance, and you said no. Do you recall that? I showed you the specification from Meinhardt.
>
> A: Yes.
>
> ...
>
> Q: In reference to the Meinhardt spec. I'm not talking about any other specs. Was it---are the---are the three alleged Singapore signs in compliance?
>
> A: Yes, they are.
>
> Q: So you are changing the position from this morning?
>
> A: Yes.

97 Jason's evidence was that two of the three signs were hot-dip galvanised, [note: 59] and that the remaining sign that was not galvanised – Brown Derby – was made of aluminium instead of steel and thus need not be hot-dip galvanised, because there was no way that aluminium could corrode. [note: 60] Although the original design called for a hot-dip galvanised mild steel structure, Jason

asserted that the Defendant was allowed to substitute it with a superior product like aluminium. [note: 61] However, the evidence does not bear out Jason's assertion that approval was given for this substitute. Moreover, his disbelief that there could be rust because the frames were aluminium was contradicted by Mr Woo who had personally examined all 11 signs and testified they were all rusty (see [93] *supra*).

98 In summary, I find that all 11 signs were defective and that the Plaintiff is entitled to incur the costs of replacing the 11 signs, and to recover the replacement costs from the Defendant. As the quantum of the claim amount for replacement costs is not challenged, the Plaintiff succeeds to the extent of $342,988.50.

*(b) Other defects remedied by Seiho*

99 The Plaintiff is also claiming $103,625.98 (inclusive of GST) as the costs of hiring Seiho to remedy other defects that the Defendant refused to carry out during the DLP. This claim is split into two components: (a) $54,216.28 being the sum charged by Seiho for the maintenance works, and (b) $49,409.70 being the costs incurred by the Plaintiff in providing machinery to Seiho to carry out the maintenance works during the DLP. [note: 62]

100 The Defendant maintained that it was prevented or obstructed by the Plaintiff from carrying out the remedial works because the Plaintiff had terminated the Sub-Contract on 17 January 2011. However, this contention is clearly a non-starter. The evidence show that it was the Defendant who first wrote the Plaintiff on 12 January 2011 stating that it would not rectify any defects pending payment from the Plaintiff. It was in response to the Defendant's refusal to remedy defects that the Plaintiff decided to treat the Sub-Contract as repudiated. There is therefore no basis for the Defendant to claim that it was prevented from remedying the defects.

101 Given my conclusion that the SFA did not affect the Defendant's obligation to remedy defects during the DLP, it follows that the Plaintiff is not precluded or barred from making a claim for the costs incurred to remedy the defects. As the quantum of the claim amount is not challenged, the Plaintiff succeeds to the extent of $103,625.98.

*(c) The machinery back-charges in the sum of $211,271.50*

102 Under the Sub-Contract, the Defendant was obliged to supply its own machinery to carry out the signage works. Clause 3(j) of the Sub-Contract provides that the scope of the Sub-Contract works include the provision of "installation, labour, support materials, machinery, plant and equipment including all necessary diesel". [note: 63] Clause 3 goes on to state that "the scope of work shall include ... the provision of all labors [*sic*], materials, goods, plants/machineries/equipment/tools temporary works [*sic*], for the complete supply, delivery, installation, construction and maintenance of the whole of sub-contract works including work in connection therewith...". [note: 64]

103 It is not disputed that the Defendant used the Plaintiff's machinery and equipment to carry out the Sub-Contract works. Jason deposed in his Affidavit of Evidence-in-Chief that the Defendant had installed the signs using scaffoldings, boom-lifts or cranes provided by or set up by the Plaintiff, [note: 65] and he further confirmed this in cross-examination. [note: 66]

104 The burden of proof is on the Plaintiff to establish that its claim for machinery back-charges in the sum of $211,271.50 was not settled in the final account settlement. In my view, the Plaintiff has

failed to appreciate the nature of the SFA, and I find that the Plaintiff has not discharged the burden of proof. Johnny Ong admitted that he has no personal knowledge of the back-charges in question. In addition, the Plaintiff's contracts manager, Mr Tao (who took over after CS Lim left the Plaintiff), raised the claim on the basis that the SFA was void. He conceded that if the SFA was valid and binding on the Plaintiff the back-charges should not be allowed. [note: 67]

Q: Where is my client's admission that he has agreed to the back charge for the machinery cost for the main contract sum?

A: It doesn't show here.

Q: Second question, now, on the 22nd of---27th of September 2010 with reference to the 5AB one-zero---no, 5AB1028 to 1034 when your previous colleague, Mr CS Lim, was finalising the accounts with the defendants, was there any deduction for the machinery?

A: No.

Q: What's the plaintiff's basis for back charging this machinery cost as of the 10th of February 2012?

Chia:Your Honour, should be 2011 or 2012?

Q: Oh, sorry, yes, 2011.

A: Okay. As just now I was saying, this---in the contract, this provision of the subcontractor to provide the machinery and I didn't aware this, er, final account at that time. So I was based on my interpretation of the contract to do this statement of account.

...

Q: Okay. What is your stand with regards the back charge for machinery item set up---

Court:Do you understand the question, yes?

Witness: Yah, I, er, understand.

Court:I'm sure you do.

*A: So basically, the final account is have been established then this back charge should not be consider.*

[emphasis added]

105 In my view, any amount that is due by the sub-contractor (*ie*, the Defendant) for a back-charge for labour and machinery supplied at the sub-contractor's request would have been be taken into account so as to arrive at the final account in the SFA. Bearing in mind that the SFA was signed on 28 September 2010 some nine months after the signs were installed in January 2010, the Defendant's use of machinery and equipment supplied by the Plaintiff was something that the Plaintiff would have known about before it signed the SFA. If the Plaintiff wished to reserve its right to back-charge the Defendant for the use of its machinery, it should have expressly said so in the SFA (as it did with the issue of defects). In any event, even if there is any ambiguity in the words used by the

Plaintiff in the SFA (which I do not accept), then that ambiguity must be resolved against the Plaintiff in accordance with the *contra proferentem* principle, seeing as the wording of the SFA was the Plaintiff's.

106 Accordingly, I find that the machinery back-charges of $211,271.50 were already settled by the SFA and the Plaintiff's claim for $211,271.50 is disallowed.

107 For avoidance of doubt, I do not consider the Plaintiff's claim of $49,409.70 in costs for machinery used by Seiho during the DLP to remedy the defects (see [99] above) as being settled by the SFA. This is because those costs were incurred *after* the SFA was signed, and they formed part of the costs of rectifying defective works reserved in the SFA.

*(d) CJY's direct payment to the Defendant*

108 On 13 April 2010, CJY issued a Works Order ("CJY Works Order") to the Defendant for the supply and installation of certain signs. [note: 68] This CJY Works Order was based on the Defendant's quotation dated 2 March 2010. [note: 69] For installing those signs, the Defendant was paid $271,697 by CJY on 27 August 2010. [note: 70] The Plaintiff wants to back-charge the Defendant because CJY had back-charged the Plaintiff for the same amount.

109 The Defendant's position is that the direct payment from CJY was in respect of a totally separate contract, *ie* it was for work that fell *outside* the scope of the Sub-Contract between the Plaintiff and the Defendant. Thus, the Defendant submits that there is no basis for offsetting this payment against what the Plaintiff owed the Defendant under the Sub-Contract. In any case, this back-charge is not recoverable by reason of the settlement in the SFA.

110 The Plaintiff's contention is to the contrary. First, there was a substantial overlap between the signs listed in the CJY Works Order and the signs listed in Appendix C to the Sub-Contract [note: 71] being within the scope of the Sub-Contract works. Second, the signs listed in the CJY Works Order were virtually identical to the signs contained in a list of defective and/or incomplete works that were rectified by the Defendant for the Plaintiff. [note: 72] Jason agreed in cross-examination that the two lists were identical save for one item (which the Plaintiff's lawyer pointed out – correctly in my view – was a typographical error): [note: 73]

> Q: Now Mr Teo, 315 to 319 is within TKS-8, therefore according to your evidence, it pertains to incomplete or remedial works, correct? ...
>
> A: ...Yes.
>
> ...
>
> Q: Cross-reference you to 1AB254 to 257. ... Now, Mr Teo, I showed you this document earlier, this is the works order for the 271[k], correct?
>
> A: Mm-hm.
>
> Q: The date is 13th April 2010, so am I right to assume that you received this document on or after 13th April 2010?
>
> A: Yes.

Q: Okay. Now Mr Teo, looking at the scope of works at 254 to 257 and the scope of works in 315 to 319, can you confirm that the scope of works are identical?

...

A: Three-nine---39 is not there, "HOL-SG-039" is not there.

...

Q: Mr---Mr Teo, item 4 appears to be a typographical error. ... The description is identical. If you look at 315 of your affidavit, item 4 versus item 4 of page 254, of 1AB254, except the number 39 and 99, the description is identical, right? ...

A: May not be...

Q: Well, do you accept it might be a typographical error?

A: No.

...

Q: Apart from that, do you agree that the scope of works are identical?

A: Yes.

111 The Plaintiff further contended that if the direct payment by CJY was not recoverable as a back-charge, the Defendant would be benefiting from an unwarranted windfall at the Plaintiff's expense.

112 There is evidence that the direct payment from CJY was made on behalf of the Plaintiff and should be accounted for in the accounts between the Defendant and the Plaintiff.

113 First, CJY's Mr Ip, the projects director for the Universal Studios project, testified that the payment to the Defendant was for work that fell within the scope of the contract between CJY and the Plaintiff and consequently, it was back charged to the Plaintiff: [note: 74]

Q: So Mr Ip, would did---this be a separate contract?

A: Yah, this is the separate contract we issued to Show And Tell. We issued is on behalf of Longyuan-Arrk because we back-charged back to Longyuan-Arrk.

...

Court: Okay, so we take it step by step, right. You consider this as a separate contract, right, the separate contract is between who and who?

Witness: Er, the contract, we issued the contract to Show And Tell. Actually we issued this contract on---*actually this contract on work is inside Longyuan's scope of work*.

[emphasis added]

114 Second, Jason sought CS Lim's permission to back-charge CJY's payment to the Plaintiff in an e-mail dated 28 June 2010 (the e-mail is titled "FW: Final Claim For Works Order Ref: MCC/QS/WO/JH/769", which is the reference number for the CJY Works Order): [note: 75]

> Hi CS as spoken CJY wants the attached list of sign which we have quoted, fabricated some install some not, to be fully endorsed by you before they pay us. Can U plse endorse this to be acceptable to be back charge to LYA.
>
> Hope to receive your endorsement soon.
>
> Jason

As a matter of logic, there would be no need for the Defendant to obtain the Plaintiff's endorsement for the back-charge if the work done by the Defendant under the CJY Works Order was a totally separate contract that had nothing to do with the Plaintiff.

115 Third, the Defendant had pleaded in its Defence and Counterclaim (Amendment No 2) that CJY had "interfered" and paid the Defendant "at least $200,000" because the Plaintiff was having cash flow problems and was unable to pay up (at para 22.3):

> RWS had earlier on in the sub-contract works, **'interfered'** and allow for the Defendants to be paid directly by CJY, whilst the Plaintiffs were having cashflow problems and could not repay the Defendants and the other sub-contractors. To this end, CJY were then directed to make payments of at least S$200,000 to the Defendants directly and which were received by the Defendants. [emphasis in original]

It is more likely than not that the Defendant's own pleadings alluded to the CJY Works Order and that the payment was made by CJY on behalf of the Plaintiff.

116 However and more importantly, in relation to the SFA, the burden of proof is on the Plaintiff to establish, on a balance of probabilities, that this claim for back-charges was not settled in the final account agreement recorded in the SFA. The alleged windfall – that the Defendant would effectively be paid twice for the same work – once by CJY and once by the Plaintiff if the Plaintiff's claim is disallowed misses the point.

117 I have already discussed the true meaning and legal effect of the agreement recorded in the SFA, and I apply the same reasoning with the same full force and effect to the Plaintiff's claim for $271,697. The difficulty faced by the Plaintiff is with the binding final account agreement between the parties. The SFA recorded the agreement between the parties pursuant to which the Defendant agreed to accept the Final Amount in full and final settlement of *all matters in connection with the Sub-Contract*, and the Defendant's acceptance of the Final Amount would serve to *discharge in full all liabilities between the parties* (see [52] above). In addition, the SFA made use of the phrase "in connection with the Sub-Contract" rather than a narrower phrase like "under the Sub-Contract". The phrase "in connection with" has generally been held to be very broad, encompassing all matters that had a direct or indirect nexus with the agreement in question (see *Sabah Shipyard (Pakistan) Ltd v Government of the Islamic* [2004] 3 SLR(R) 184 at [18]; *Re Rasmachayana Sulistyo (alias Chang Whe Ming), ex parte The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483 at [41]). Thus, the settlement agreement in the SFA is capable of a wider interpretation to encompass the direct payment of $271,697 to the Defendant in respect of the CJY Works Order. At the time the SFA was signed on 24 September 2010, the parties were aware that the Defendant had been paid by CJY for the CJY Works Order (see Jason's e-mail to CS Lim on 28 June 2010 at [114]

above). The Plaintiff has *not* established that the sum of $271,697 is recoverable from the Defendant. Accordingly, this claim fails.

***Retention Sum***

118 The issue here is whether the Defendant is entitled to be paid the Retention Sum of $62,500. The relevant provisions are cll 4(g), 5 and 15 of the Sub-Contract:

> **4. PAYMENT TERMS (Cont'd)**
>
> ...
>
> g) Each interim payment is subject to 10% retention, to a maximum of 5% of Sub-Contract Price.
>
> **5. RETENTION MONIES**
>
> The first half of the retention monies shall not be release [*sic*] until:-
>
> a. 2.5% of retention will be released within one month upon completion of Sub-Contract Works.
>
> b. 2.5% of retention will be released after Defects Liability Period.
>
> ...
>
> **15. DEFECTS LIABILITY PERIOD**
>
> a) Upon completion of the Works, the Subcontractor shall at his own expense make good any defects due to materials and/or workmanship not in accordance with the requirements of this Subcontract for a period as defined in the Annex to the Subcontract (The period shall be eighteen (18) months).
>
> b) The Contractor shall give written notice to the Subcontractor to remedy any defects and if the Subcontractor fails to respond within 7 days thereof, the Contractor may engage others to carry out the remedy and charge all costs and expenses incurred to the Subcontractor.
>
> c) Notwithstanding clause 12 above, all payments due under this Subcontract shall be withheld pending full rectification of defects.

(I should note that the reference to "clause 12" in cl 15(c) appears to be a typo, because cl 12 deals with the unrelated issue of illegal foreign workers.)

119 The Sub-Contract Certificate of Completion was issued by CJY on 20 December 2010 stating that the Sub-Contract works were completed on 31 December 2009. [note: 76] Therefore, the DLP ended on 30 June 2011 and the Retention Sum is *prima facie* due for release.

120 The Plaintiff makes two arguments as to why the Retention Sum is not to be released:

(a) the Sub-Contract Maintenance Certificate has not been issued by CJY and hence the DLP has not yet expired; and

(b) further or in the alternative, the Plaintiff is entitled to withhold payment under cl 15(c)

since the Defendant had failed to submit "as-built" drawings as requested. [note: 77]

121 As regards the first argument, the Plaintiff is referring to the Sub-Contract Maintenance Certificate mentioned in cl 12.1(a) of the "Conditions of Sub-Contract" between the Plaintiff and CJY. [note: 78] Clause 12.1(a) provides that the maintenance period only commences upon the issue of the Sub-Contract Maintenance Certificate:

> **12. MAINTENANCE FOLLOWING COMPLETION**
>
> 12.1(a) The Maintenance Period for the Sub-Contract Works shall commence upon the issue of the Sub-Contract Completion Certificate under clause 11.3 of this Sub-Contract and shall continue until the issue of the Sub-Contract Maintenance Certificate by the Contractor under clause 12.2 of this Sub-Contract.

122 However, the Conditions of Sub-Contract is an agreement between the Plaintiff and CJY, and the Plaintiff has not demonstrated that this cl was incorporated as term of the Sub-Contract between the Plaintiff and the Defendant. The Sub-Contract made clearly stated that the DLP is to end 18 months after "[c]ompletion of the works", which is evidenced by the Sub-Contract Certificate of Completion issued by CJY.

123 As for the second argument, this arose from a late amendment of the pleading. Jason agreed in cross-examination that the Defendant was obliged under cl 3(t) of the Sub-Contract to provide "as-built" drawings. [note: 79] Its failure to do so was therefore a breach of contract. However, cl 15(c) of the Sub-Contract only allows the Plaintiff to withhold the Retention Sum pending full rectification of *defects*. It did not confer on the Plaintiff a general right to withhold the monies for any kind of breach. It would be straining the word "defect" (whose meaning I have examined earlier at [55] above) to regard the non-provision of "as-built" drawings as an outstanding defect that entitled to the Plaintiff to retain the Retention Sum.

**The claim in defamation**

***The meanings of the words complained of***

124 The Plaintiff is claiming damages for libel in respect of words contained in written communications published by the Defendant. The first communication was the 16 November Letter addressed to a single addressee and the second communication was the 8 December E-mail (see [27]–[28] above) that was copied to several individuals. The alleged offending portions in the 16 November Letter and the 8 December E-mail (collectively referred to as "the Disputed Words") are as follows:

(a) The 16 November Letter:

> Unbeknown to CJY and RWS, we are suffering great financial hardship due to Longyuan-Arrk's repeated and long-overdue failure to honour payment to us.
>
> So far, Longyuan-Arrk had twice presented us with a schedule of payment, and twice they had dishonoured their word. As a last resort, Longyuan-Arkk [*sic*] had even ***resorted to using fraud*** to deny us any more payment by accusing our works of being "defective", an allegation which is totally baseless and groundless.
>
> We had therefore no choice but to seek legal protection and help by applying for recovering

payment through the Security of Payment Act pursuant to Clause 5 of our Subcontract.

[emphasis added in bold italics]

(b) The 8 December E-mail:

Dear Ben,

Please find our reason for not attending to the RWS request for defects to be done as our main contractor LYA is not responding to our payment request which was promised on various occasions but not honoured. We would like to appeal for direct payment of our remaining money for us to clear the remaining defects works that was leave over from the main contract.

Attached plse find our appeal letter.

125 The 16 November Letter had only one addressee: "Ben Yee" of SLG. The 16 November Letter was sent as an attachment to the 8 December E-mail that was copied (*ie*, published) to 12 names. [note: 80] In the Plaintiff's Closing Submissions, the Plaintiff stated that seven representatives of RWS and CJY received the 8 December E-mail. [note: 81]

126 The Plaintiff pleaded that the natural and ordinary meanings of the Disputed Words used in the 16 November Letter meant and were understood to mean the following: [note: 82]

(a) The Plaintiff was dishonest ("Meaning (1)").

(b) The Plaintiff was not trustworthy ("Meaning (2)").

(c) The Plaintiff had resorted to fraudulent means to avoid payment to the Defendant ("Meaning (3)).

127 In relation to the 8 December E-mail, the Plaintiff relies on the same facts relied on in relation to the 16 November Letter (*ie*, Disputed Words) and for purposes of this action, the Plaintiff pleaded Meaning (1), Meaning (2) and Meaning (3), in addition to a further meaning, namely, "the Plaintiff could not be relied upon to honour its word ("Meaning (4)")". [note: 83]

128 For its part, the Defendant pleaded a lesser meaning: [note: 84]

In refusing to pay the Defendants and having earlier on failed to honour their proposed repayments at least twice, the Plaintiffs propped up claims that the Defendants had purportedly failed to attend to the rectifications of the subcontract works apart from contending they have overpaid the Defendants a sum of S$438,877.33 set out in paragraph 14 of the Statement of Claim.

***The legal principles***

129 The natural and ordinary meaning of the Disputed Words may be either the literal meaning or an implied, inferred or indirect meaning. It is a meaning that does not require the support of extrinsic facts surpassing the general knowledge of the ordinary reader. The Court of Appeal summarised the principles for determining the natural and ordinary meaning of the offending words in a defamation action in *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1

SLR 506 as follows (at [18]):

(a) the natural and ordinary meaning of a word is that which is conveyed to an ordinary reasonable person;

(b) as the test is objective, the meaning which the defendant intended to convey is irrelevant;

(c) the ordinary reasonable reader is not avid for scandal but can read between the lines and draw inferences;

(d) where there are a number of possible interpretations, some of which may be non-defamatory, such a reader will not seize on only the defamatory one;

(e) the ordinary reasonable reader is treated as having read the publication as a whole in determining its meaning, thus "the bane and the antidote must be taken together"; and

(f) the ordinary reasonable reader will take note of the circumstances and manner of the publication.

130 After determining the natural and ordinary meaning of the offending words, the court turns to consider whether that meaning ascribed to the offending words is defamatory. A statement that is untrue is not necessarily defamatory: see *Halsbury's Laws of Singapore* vol 18 (LexisNexis, 2009 Reissue) at para 240.091.

131 In determining the meaning of the words complained of, the court is not limited by the meanings which either the plaintiff or the defendant seeks to ascribe to them (see *Lucas-Box v New Group Newspapers Ltd* [1986] 1 WLR 147 at 152).

132 In general, a statement is defamatory if it tends to: (a) lower the plaintiff in the estimation of right-thinking members of society generally, (b) cause the plaintiff to be shunned or avoided, or (c) expose the plaintiff to hatred, contempt or ridicule: see Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at para 12.014. I pause here to refer to two decisions that were released one after the other in 2010: *Kay Swee Pin v Singapore Island Country Club and other* [2010] 4 SLR 288 ("*Kay Swee Pin*") and *Segar Ashok v Koh Fonn Lyn Veronica and another suit* [2010] SGHC 168 ("*Segar Ashok*"). Kumaralingam Amirthalingam and Gary Chan Kok Yew, writing in the *Singapore Academy of Law Annual Review of Singapore Cases* (2010) 11 SAL Ann Rev 557, commented at paras 23.41 and 23.43 that both cases applied a test that was materially different from the test worded in (a) above. In *Kay Swee Pin*, the statement in question was held to be defamatory "as it is enough to induce an ill opinion of KSP in the mind of the hypothetical reasonable reader of the Notice and to cause KSP to be shunned or avoided as a result of these words" (at [53]). In *Segar Ashok* at [54], the e-mail message in question was held to be defamatory as hypothetical reasonable reader of the e-mail was called to judge Dr Segar and what was written there was "enough to induce an ill opinion of Dr Segar in the minds of the recipients and to deprive him of their society." All I want to say, for now, is that the definition of "defamatory" in the terms of the phraseology used in (a) has its origin in *Sim v Stretch* [1936] 2 All ER 1237 at 1240 (hereafter (a) is referred to as the "*Sim v Stretch* definition"). The editors of Duncan & Neill on Defamation, 2nd Ed, para 7.07 worded the *Sim v Stretch* definition as follows: a statement would be taken as defamatory if it "would be likely to affect a person adversely in the estimation of reasonable people generally". The phrase "induces an ill opinion of the plaintiff" merely paraphrases without changing the meaning of the *Sim v Stretch* definition. This paraphrase should likewise attract the same acceptability as the following reworded version of the *Sim v Stretch* definition with no change in the definition's meaning:

a statement that tends to make reasonable people think the worse of the plaintiff (see David Price, Korieh Duodu and Nicola Cain, *Defamation: Law, Procedure and Practice* (Sweet & Maxwell, 4th Ed, 2010) at pare 2-16, who also observed that the definition enunciated in *Sim v Stretch* in (a) above incorporates an element of discredit or moral blame. The same element resides in the paraphrase "induces an ill opinion of the plaintiff").

133 In the case of a company, particular considerations apply. Whilst a company can sue for defamation without having to show actual damage, a company cannot be injured in its feelings but only in its business reputation. Hence, in the case of a company, a statement is defamatory if it tends to injure a company in the way of its business or trade reputation in the eyes of reasonable readers of the words complained of (per Eady J in *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 737 at [42]). The characteristics of the ordinary reader consistently remains the same (see [129] above).

134 In *Derbyshire County Council v Times Newspaper* [1993] AC 534 at 547, Lord Keith identified the kinds of damage which defamatory words might be likely to cause to a trading corporation. He said (in *obiter*):

> The authorities cited above clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it.

Lord Keith's examples of the types of damage are not an exhaustive list.

***Were the Disputed Words defamatory?***

135 It is not disputed that the 16 November Letter and 8 December E-mail were referable to the Plaintiff and that they were published.

136 I begin with the Plaintiff's Closing Submissions which repeat the lynchpin of the Plaintiff's case which is the word "fraud" in the 16 November Letter. The word "fraud" in the 16 November Letter is said to be capable of the following imputations: the Plaintiff was dishonest (Meaning (1)), the Plaintiff was untrustworthy (Meaning (2)), and the Plaintiff had resorted to fraudulent means to avoid payment to the Defendant (Meaning (3)). In Reply Submissions, it is significant that the Plaintiff contends that the sting in the Disputed Words is the dishonest and fraudulent conduct, and not the Plaintiff's impecuniosity [note: 85]. In other words, the Plaintiff is not alleging that the Disputed Words carry the imputations of insolvency or lack of creditworthiness.

137 The Plaintiff has to satisfy the court that the disparagement argued for by the Plaintiff would be capable of lowering the Plaintiff by way of its business reputation in the minds of right thinking members of society generally. The Plaintiff says this legal requirement is satisfied because the sting is in the allegation of dishonesty and fraudulent conduct (Meaning (1) and Meaning (3)). However, the Plaintiff's submissions stop short of explaining how or in what way the disparagement would have a tendency to damage the Plaintiff in the way of its business or trade reputation in the eyes of reasonable readers of the words complained of (see Eady J's test at [133] above). As Greer LJ said in *Tolley v J S Fry and Sons, Limited* [1930] 1 KB 467 (at 479):

> Words are not actionable as defamatory, however much they may damage a man in the eyes of a section of the community unless they also amount to disparagement of his reputation in the eyes

> of right thinking men generally. To write or say of a man something that will disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right thinking man, is not actionable within the law of defamation …

138 The court has to consider what meaning the words complained of is capable of imputing; not what an individual word means. I accept that in some contexts the word "fraud" can mean "dishonesty", but not in this context. Depending upon the context, the word "fraud" in this case may convey a range of possible meanings: dishonesty or untrustworthiness or an expression of frustration and disappointment. An instructive illustration of this point is the succinct explanation of Tugendhat J in *Euromoney Institutional Investor Plc v Aviation News Ltd and another* [2013] EWHC 1505 (QB) which I readily adopt. In considering an application to amend a claim in a defamation action, Tugendhat J said (at [49]):

> In my judgment dictionaries are of assistance in the exercise the court has to carry out in determining issues of meaning in a defamation action, but that assistance may be limited. What the court has to consider in the present application for permission to amend is what meaning the words complained of (taken together) are capable of having attributed to them: not what an individual word means. For example, the literal meaning of the word "kill" is commonly understood to be to put to death. But if a reader reads a report that a claimant has said "If you do that again I'll kill you", a dictionary definition of "kill" is of little help. Depending upon the context, the claimant may be conveying any of a range of possible meanings: eg a criminal threat to murder, an expression of frustration and disappointment, or an expression of excitement at losing a difficult point in a game with a friend. In the sentence "If you do that again I'll kill you" the literal meaning of "kill" is (in most circumstances) the meaning least likely to be the one that a reasonable reader could understand the speaker to mean.

139 Likewise, the word "fraud" taken together with the other words complained of and in context of the 16 November Letter cannot mean "dishonesty" (Meaning (1)), "untruthful" (Meaning (2)), or "fraudulent means" (Meaning (3)). The background to the 16 November Letter is the Plaintiff's letter of 8 November 2010 that gave notice to the Defendant to replace 14 signs that were outside of contract specification, and that payment would be withheld until the notice was complied with. On 15 November 2010, the Defendant wrote a long letter to the Plaintiff to explain why it was rejecting the Plaintiff's notice that very much told the Defendant that payment was being withheld until rectification works were done. Taken in its contextual entirety, in the 16 November Letter, the Defendant wrote about its financial hardship in its long wait for payment and made the further statement – "As a last resort, Longyuan Arkk had even resorted to using fraud to deny us any more payment by accusing our works of being 'defective', an allegation which is totally baseless and groundless" ("Statement 1"). In my view, Statement 1 was an expression of frustration and disappointment which conveyed the meaning that the Plaintiff was behaving in an unfair tactical way by timing the demand at a point of maximum financial disadvantage to the Defendant. It did not carry any imputation of dishonesty or untrustworthiness, nor did it convey the meaning that the Defendant was owed money fraudulently withheld by the Plaintiff. Significantly, Statement 1 is capable of a range of possible meanings. It is not enough that Statement 1 might be understood by some persons in a defamatory sense, for if a statement is capable of a number of other interpretations to the hypothetical reasonable reader, it is not reasonable to seize upon the only bad one in order to attribute a defamatory sense to it.

140 I now turn to the 8 December E-mail, which included the statement "Please find our reason for not attending to the RWS request for defects to be done as our main contractor LYA is not responding to our payment request which was promised on various occasions but not honoured" ("Statement 2"). The pleaded meaning of Statement 2 is that "the Plaintiff could not be relied upon to

honour its words (Meaning (4)). The Plaintiff also relies on Meanings (1) to (3) in its pleaded case. Leaving aside the attachment (*ie*, the 16 November Letter), the meanings ascribed to the words in Statement 2 is based on their natural and ordinary meaning and not put forward as innuendos. Statement 2 does not invite the reader to infer anything discreditable. Statement 2 does not state that the non-payment to date was because the Defendant was insolvent or because of other reasons that go to the credit of the Defendant.

141 In conclusion, the Disputed Words would not disparage the Plaintiff in the way of its business reputation and they were therefore not defamatory.

***Defence of justification***

142 I have concluded that the Disputed Words were not defamatory. For the sake of argument and completeness, assuming they were defamatory as alleged, the Defendant's contention (to which I now turn) is that the written communications were published in circumstances which attracted the defence of justification and qualified privilege.

143 As the Court of Appeal stated in *Arul Chandran v Chew Chin Aik Victor* [2001] 1 SLR(R) 86 at [28]–[29], once the plaintiff has proven that the disputed words are defamatory, the burden is on the defendant, if he wishes to rely on the defence of justification, to prove that defamatory words are true. The defendant need not prove the truth of every detail of the words published, but the justification must meet the sting of the charge.

144 In the present case, the Defendant argues that the Disputed Words were true in substance and fact because the Plaintiff had proposed payment schedules at least twice but had failed to meet them each time. Moreover, the defects allegations made by the Plaintiff were baseless and groundless, and the Plaintiff was not entitled to use the alleged defects as a basis to withhold payment of the Final Amount given that it could resort to the Retention Sum for that purpose. In contrast, the Plaintiff contended that it was entitled to withhold payment.

145 Assuming the sting was that the Defendant was owed money which the Plaintiff had fraudulently withheld, I have already held that there was no legal basis to withhold payment of the Final Amount having regard to the SFA and my further analysis on the absence of the defences of abatement and set-off in this case. Notably, cl 15(c) refers to withholding of all *payments due under the Sub-Contract* pending full rectification of defects (see [118] above for text of cl 15 (c)). [note: 86] I find that cl 15(c) does not assist the Plaintiff for the simple reason that the Final Amount that was withheld was *due under the SFA*, and not under the Sub-Contract.

146 There were other inaccuracies in the notice letter of 8 November 2010. First, the Plaintiff was withholding payment for all 14 signs when only 11 signs were defective, and this is arguably impermissible. Second, the seven day notice period was not contractual. In the notice, the Defendant was instructed to remove and re-install the non-compliant works "within seven (7) days from this letter" (see [118] above for text of cl 15 (c)). By cl 15 (b) of the Sub-Contract, the sub-contractor only has to respond to the notice rather than to complete the rectification works within seven days.

147 In my view, the defence of justification could have been successfully made out to meet the sting of the charge.

***Defence of qualified privilege***

148 The Defendant submits that the 16 November Letter and the 8 December E-mail were published

in circumstances which attracted the defence of qualified privilege. The nature and basis of the defence of qualified privilege was explained by the High Court in *Lim Eng Hock Peter v Lin Jian Wei and another* [2009] 2 SLR(R) 1004 as follows (at [163]–[164]):

> 163 Unlike the defence of absolute privilege, the focus of this defence is on the *communication* that contains the statement complained of that is privileged, not the entire *occasion* on which the statement was made. The rationale behind this defence is the law's recognition that there are circumstances where the law allows an individual to make statements which may be defamatory without incurring legal liability when there is a need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source (*Oei Hong Leong v Ban Song Long David* [2005] 3 SLR(R) 608). The authors of *Gatley on Libel and Slander* explain the rationale ([(Sweet & Maxwell, 10th Ed, 2004)] at para 14.4) as follows:
>
> > Statements published on an occasion of qualified privilege 'are protected for the common convenience and welfare of society'.
> >
> > 'It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest.'
> >
> > [*per* Bankes LJ in *Gerhold v Baker* [1918] WN 368 at 369]
> >
> > 'In such cases **no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury.'**
> >
> > [*per* Willes J in *Huntley v Ward* (1859) 6 CB (NS) 514 at 517]
> >
> > [emphasis added]
>
> 164 The categories enjoying qualified privilege include the following:
>
> > (a) statements made between parties who share a common or mutual interest in the subject matter of the communication;
> >
> > (b) statements made in the discharge of a legal, social or moral duty;
> >
> > (c) statements made in the protection of one's own self-interest; and
> >
> > (d) fair and accurate reports of certain proceedings.
>
> [emphasis in original]

149 The test for qualified privilege was succinctly stated by the House of Lords in *Adam v Ward* [1917] AC 309 as follows (at 334):

> ... [A] privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the

person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. ...

150 In the present case, the Defendant pleads that the 16 November Letter and the 8 December E-mail are covered by qualified privilege for the following reasons: [note: 87]

(a) RWS and Sentosa Leisure Group ("SLG") were involved in the project and shared a common interest with the Defendant in the subject matter of the communications.

(b) The Defendant had an interest in requesting direct payment from RWS so as to alleviate its severe cash flow problem caused by the Plaintiff's non-payment. This would in turn enable the Defendant to attend to the defects alleged by the Plaintiff.

(c) RWS should be informed of why the Defendant was not attending to the defects lists given by the Plaintiff and that the Defendant had not been paid by the Plaintiff.

(d) RWS should be informed that if alternative contractors were indeed engaged to rectify the alleged defects, the warranties and indemnities provided by the Defendant may be rendered null and void.

151 In my judgment, the defence of qualified privilege is *prima facie* made out here. Given that the Plaintiff had not paid the Defendant the Final Amount, the Defendant had an interest in going further up the chain and requesting for direct payment for the work it had performed. As noted in *Gatley on Libel and Slander* (Patrick Milmo & WVH Rogers eds) (Sweet & Maxwell, 11th Ed, 2008) at para 14.53:

**Redress of grievances.** Where a person believes that he has suffered a grievance at the hands of another, he is entitled to bring his grievance to the notice of the person or body whose power or duty it is to grant redress or to punish or reprimand the offender, or merely to inquire into the subject-matter of the complaint, and any statement so made is privileged, if made in good faith and not for the purpose of defaming the claimant.

152 Correspondingly, SLG, RWS and CJY had an interest in being informed that the Defendant was not rectifying the defective signs at Universal Studios because it was not being paid by the Plaintiff, and that the engagement of third parties to rectify the signs might void the warranties and indemnities provided by the Defendant.

153 The Plaintiff makes two submissions against the defence of qualified privilege:

(a) RWS, and not SLG, was the employer and owner of the Project. SLG was not part of the contractual hierarchy and thus did not have a common and/or corresponding interest in the subject matter of the 16 November Letter.

(b) The Disputed Words were actuated by malice because the Defendant had used unnecessarily strong language and published them recklessly without any basis whatsoever. The Defendant had further refused to apologise for and/or retract the Disputed Words when given an opportunity to do so by way of the Plaintiff's letter on 11 December 2010.

154 With respect to the Plaintiff's first submission, I disagree that SLG did not have a common interest in the subject matter of the 16 November Letter. It is not disputed by the parties that SLG is part of RWS. [note: 88] The Plaintiffs admitted in pleadings that SLG "is part of RWS the owner". According to Jason, Ben Yee, a director of RWS and SLG, was known to the Plaintiff and the

Defendant from their involvement in the Project. The fact that SLG was not part of the contractual hierarchy does not preclude it from having an interest in the Universal Studios project, given that Universal Studios was going to be a key attraction at Sentosa. As Higgins J noted in *Howe v Lees* (1910) 11 CLR 361 at 398:

> The truth seems to be that the word "interest," as used in the cases, is not used in any technical sense. It is used in the broadest popular sense, as when we say that a man is "interested" in knowing a fact—not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news.

Indeed, it is not necessary for the recipient of a communication to have a direct or substantial interest in it for the defence of qualified privilege to succeed. This was held by the Court of Appeal in *Price Waterhouse Intrust Ltd v Wee Choo Keong and others* [1994] 2 SLR(R) 1070 ("*Price Waterhouse*") at [30]:

> The defence of qualified privilege in this case turns essentially on the question whether the fourth to the ninth respondents had any interest in the affairs of Quality Oil, such that the occasion in which the letter was written was privileged. *They had no direct interest in that company: they were not directors, nor were they shareholders.* But, they were shareholders of a company called Concrete Engineering Products Sdn Bhd ("CEPCO") which through its subsidiary, Quality Oil Sdn Bhd, held 1,739,500 shares in Quality Oil. *In that sense, they had an interest, albeit* ***an indirect interest*** *, in Quality Oil and thus in the disposal of the assets of that company by the appellants as receivers and managers. Their interest might not be very substantial, but it was by no means so minuscule as the appellants sought to make it out.* ***In any case, it is not the law that for an occasion to be privileged the interest in question must be substantial.*** The Official Receiver and the bank each also had an interest in the affairs of Quality Oil and in particular in the disposal of its assets by the appellants as receivers and managers. Accordingly, the letter was written on behalf of the fourth to the ninth respondents for the protection or in furtherance of their interest and communicated to the Official Receiver and the bank information in which both of them had an interest in receiving it. There was therefore a reciprocity of interest which was essential to found the privilege. ... [emphasis added in italics and bold italics]

155 With regards to the Plaintiff's second submission on malice, it is trite that the defence of qualified privilege is defeated if the defendant was actuated by malice. The law in this area was set out by Lord Diplock in *Horrocks v Lowe* [1975] AC 135 as follows (at 149–150) (quoted with approval in *Price Waterhouse* at [42]–[43]):

> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. *Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.*
>
> The motive with which a person published a defamatory matter can only be inferred from what he did or said or knew. *If it be proved that he did not believe that what he published was true this is*

*generally conclusive evidence of express malice*, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, *what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'.* If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. *But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true.* The freedom of speech protected by the law of qualified privilege may be availed by all sorts and conditions of men. In affording them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. *In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is, a positive belief that the conclusions they have reached are true. The law demands no more.*

[emphasis added]

156 In my judgment, the Plaintiff has failed to prove that the Defendant had a dominant improper motive for publishing the Disputed Words, and in particular Statement 1. The Plaintiff's pleaded case is that Statement 1 is malicious.

157 Reading the 16 November Letter and the 8 December E-mail in context, I am persuaded that the dominant purpose of those communications was not to injure the Plaintiff's reputation, but to inform SLG, RWS and CJY of the Defendant's financial predicament and request direct payment from them so that the Defendant could continue to perform its obligations during the DLP. It is worth bearing in mind that when the Defendant wrote the 16 November Letter, it had been repeatedly let down by the Plaintiff – the Plaintiff had not only failed to keep to its proposed payment schedules on 1 March 2010 and 13 March 2010, but had also failed to pay the Final Amount in the SFA that was signed on 24 September 2010. In the past, non-payment was not on account of defective works. Hence the Defendant's frustration on receipt of the Plaintiff's notice that the Defendant was not going to be paid until rectification works were completed within seven days. In the light of these circumstances, I have no doubt that the Defendant felt genuinely frustrated and aggrieved by the Plaintiff's actions and sincerely believed that the Plaintiff was acting in bad faith.

158 For these reasons, the Defendant would have been entitled to rely on the defence of qualified privilege, and the claim in defamation would have been dismissed even if the Disputed Words were defamatory.

**Conclusion**

159 To summarise, I allowed the Defendant's counterclaim for $489,681.03 in Suit 81 and its claim for the Retention Sum in Suit 592. I allowed part of the Plaintiff's claim in Suit 81. This corresponds to

part of the Plaintiff's Counterclaim in Suit 592. I held that the Plaintiff had no right of equitable set-off and was thus wrong to have withheld the sum of $489,681.03 and the Retention Sum. In relation to the Plaintiff's claims that are allowed in Suit 81, they are for the rectification of defects including the replacement of Non-compliant Signs carried out by Seiho. Accordingly, the net position, after taking into account the sums each party has to pay to the other, is as follows:

| Item | Amount (after GST) |
|---|---|
| Final Amount | $489,681.03 |
| Retention Sum | $62,500 |
| Less: Costs of hiring Seiho to replace 11 Non-compliant Signs | $342,988.50 |
| Less: Costs of hiring Seiho to rectify other defects | $103,625.98 |
| **Net amount in favour of Defendant** | $105,566.55 |

162 In the premises, judgment is entered for the Defendant in the sum of $105,566.55 with interest thereon at the rate of 5.33% per annum from the date of the Plaintiff's writ of summons in Suit 81 to the date of payment.

163 In relation to the Plaintiff's defamation claim in Suit 81, the claim is dismissed.

164 Although the overall successful party is the Defendant for Suit 81 and Suit 592, a fair number of the trial days were taken up for the Galvanisation Issue which encompassed the Non-compliant Signs and the Plaintiff won on this aspect of the dispute. It must also be remembered that in early days, the Plaintiff's pleaded case was that the SFA was void for the Defendant's fraudulent misrepresentations that the works were completed when they were not. This averment that the works were not completed surfaced as the Plaintiff's response to the defences of justification and qualified privilege. The conduct of the case was thus shaped to meet this plea until it was suddenly abandoned completely at the trial proper. The defamation claim added to the costs of the action in Suit 81. The Plaintiff's decision not to participate in Neutral Evaluation of the defamation claim when it was given the opportunity to do so after the first tranche of the trial contributed to the overall length and costs of litigation. With all these matters in mind on the issue of costs, I order that the Defendant shall have 50% of the costs of both Suit 81 and 592 to be taxed if not agreed.

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[note: 1] Transcripts of Evidence dated 15.5.2012 at pp 17-18.

[note: 2] 1AB 184.

[note: 3] 3AB 795.

[note: 4] 1AB 210.

[note: 5] 1AB 226.

[note: 6] Suit 81 Defence and Counterclaim (Amendment No 2) at para 11b.

[note: 7] Defendant’s Closing Submission at para 3.7.

[note: 8] 1AB 228–232.

[note: 9] 1AB 225.

[note: 10] 1AB 231.

[note: 11] 1AB 235-238.

[note: 12] Transcripts of Evidence dated 15.5.2012 at pp 17-18.

[note: 13] 1AB 249.

[note: 14] 1AB 250.

[note: 15] 2AB 327.

[note: 16] 2AB 335–338.

[note: 17] 2AB 339–340.

[note: 18] Transcripts of Evidence dated 31.10.2012 at p 3.

[note: 19] 2AB 354A.

[note: 20] 2AB 361.

[note: 21] 2AB 365.

[note: 22] 2AB 364.

[note: 23] 2AB 366.

[note: 24] Suit 81 Defence and Counterclaim at para 12, and Further and Better Particulars to para 12 of Suit 81 Defence and Counterclaim.

[note: 25] Suit 592 Reply and Defence to Counterclaim at para 5.

[note: 26] 1AB 249.

[note: 27] Defendant’s Closing Submissions at para 8.40.

[note: 28] Transcripts of Evidence dated 31.10.2012 at p 38.

[note: 29] Suit 81 Defence and Counterclaim at para 11e.

[note: 30] 2AB 326.

[note: 31] Transcripts of Evidence dated 11.9.2012 at p 104.

[note: 32] Plaintiff's Closing Submissions at para 67.

[note: 33] Transcripts of Evidence dated 4.9.2012 at p 35.

[note: 34] Transcripts of Evidence dated 7.9.2012 at p 69.

[note: 35] Suit 81 Defence and Counterclaim (Amendment No 2) at para 14.

[note: 36] Suit 81 Reply and Defence to Counterclaim at para 38.

[note: 37] Defendant's Opening Statement at para 25(6).

[note: 38] Defendant's Closing Submissions at para 8.43.

[note: 39] 2AB 361.

[note: 40] 2AB 361.

[note: 41] 1AB 361.

[note: 42] Transcripts of Evidence dated 16.5.2012 at p 42.

[note: 43] Transcripts of Evidence dated 4.9.2012 at pp 97–98.

[note: 44] 3AB 707.

[note: 45] Transcripts of Evidence dated 10.9.2012 at p 35.

[note: 46] Transcripts of Evidence dated 10.9.2012 at pp 70-72.

[note: 47] 2DB 887

[note: 48] 3AB 812, item 26.

[note: 49] Transcripts of Evidence dated 11.9.2012 at pp 91–93.

[note: 50] Ibid, p 108.

[note: 51] 1AB 81.

[note: 52] Plaintiff's Bundle of AEICs vol 1, tab 3, pp 3–4 and 6.

[note: 53] Para 1(g) of the Defendant's Further and Better Particulars.

[note: 54] Transcripts of Evidence dated 11.9.2012 at pp 119-120.

[note: 55] Plaintiff's Bundle of AEICs vol 1, tab 1, p 2.

[note: 56] Transcripts of Evidence dated 11.9.2012 at p 26.

[note: 57] Ibid, p 32.

[note: 58] Ibid, p 139.

[note: 59] Ibid, p 145.

[note: 60] Ibid, p 137.

[note: 61] Ibid, p 140.

[note: 62] Plaintiff's closing submissions, para 159.

[note: 63] 1 AB 182.

[note: 64] 1 AB 183.

[note: 65] Defendant's Bundle of AEIC vol 1, p 9, para 27.

[note: 66] Transcripts of Evidence dated 30.10.2012 at pp 67–68.

[note: 67] Transcripts of Evidence dated 18.5.2012 at pp 67–69.

[note: 68] 1AB 254–257.

[note: 69] Plaintiff's Bundle of AEICs vol 1, tab 5, p 70.

[note: 70] 1DB 409–412.

[note: 71] 1AB 190–198.

[note: 72] Defendant's Bundle of AEICs vol 2, pp 315–319.

[note: 73] Transcripts of Evidence dated 30.10.2012 at pp 96–98.

[note: 74] Transcripts of Evidence dated 16.5.2012 at p 55.

[note: 75] 1AB 274.

[note: 76] 3AB 809.

[note: 77] Plaintiff's closing submissions, paras 210-213.

[note: 78] 1AB 149.

[note: 79] Transcripts of Evidence dated 30.10.2012 at pp 100–101.

[note: 80] Suit 81 Defence and Counterclaim (Amendment no 2) at para 26.

[note: 81] Plaintiff's Closing Submissions at para 196.

[note: 82] Suit 81 Statement of Claim at para 22.

[note: 83] Suit 81 Statement of Claim at para 26.

[note: 84] Suit 81 Defence and Counterclaim (Amendment no 2) at para 22.6.

[note: 85] Plaintiff's Reply Submissions at para 98b.

[note: 86] 1AB 186.

[note: 87] Suit 81 Defence and Counterclaim (Amendment No 2) at para 14.

[note: 88] See Suit 81 Defence and Counterclaim (Amendment No 2) at para 2; Suit 81 Reply and Defence to Counterclaim (Amendment No 2) at para 20.