IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 09

Suit No 100 of 2018

Between

(1) BMI Tax Services Pte Ltd

… Plaintiff

And

(1) Heng Keok Meng
(2) KM Heng Women's Clinic Pte Ltd
(3) KM Heng Clinic & Surgery Pte Ltd
(4) The Medical and Aesthetic Clinic Pte Ltd

… Defendants

GROUNDS OF DECISION

[Civil Procedure] — [Striking out]
[Civil Procedure] — [Approbation and Reprobation]
[Civil Procedure] — [Abuse of Process]

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BMI Tax Services Pte Ltd
v
Heng Keok Meng and others

[2019] SGHC 09

High Court — Suit No 100 of 2018 (Registrar's Appeal No 160 of 2018)
Mavis Chionh Sze Chyi JC
25 July, 10 August 2018

18 January 2019

Mavis Chionh JC:

1 The dispute in this case concerns a claim for work allegedly done by the Plaintiff company (BMI Tax Services Pte Ltd or "BMI Tax") for all four Defendants, in relation to certain actions taken by the Inland Revenue Authority of Singapore ("IRAS") against the four Defendants. The Defendants deny any liability to pay the Plaintiff. In addition, they have brought a counter-claim against the Plaintiff and three other parties for breach of duty in the management of the accounts and tax affairs of the four Defendants, as well as alleged fraudulent misrepresentation by one of these other parties (one Kam You Kin or "Kam"). The present two appeals arise from the Defendants' application in SUM 2085/2018 to strike out the entire Statement of Claim. The Defendants were unsuccessful in obtaining a striking-out before the Assistant Registrar ("AR"), who ordered instead that the Plaintiff make a number of amendments, as specified by the AR, to its Statement of Claim. The Defendants appealed

against the AR's decision. They succeeded partially in the appeal, which I heard. I ordered certain portions of the amended Statement of Claim to be struck out, but declined to order that the entire claim be struck out. Both the Plaintiff and the Defendants have appealed against my decision.

2 There is an error in the Plaintiff's Notice of Appeal in CA 179/2018 in that it refers to my decision "on 30 August 2018". There was no hearing before me on 30 August 2018. The Defendants' appeal against the AR's decision (RA 160/2018) was heard before me on 25 July 2018; and at the end of that hearing, I ordered that the Plaintiff be given leave to file and serve an amended Statement of Claim within 7 days and that parties appear before me again to submit on whether the Statement of Claim was saved by the amendments made. At the further hearing on 10 August 2018, the Defendants contended that the Statement of Claim (Amendment No. 3) should still be struck out in its entirety. After hearing submissions, I declined to strike out the entire claim but ordered instead that the following portions of the Statement of Claim (Amendment No. 3) be struck out:

(a) Paragraph 10, insofar as this paragraph purported to plead an oral agreement between the Plaintiff on the one hand and the 2nd to 4th Defendants on the other;

(b) (Consequential to the striking-out of paragraph 10) The words "Further and/or alternatively" at the start of paragraph 12;

(c) Paragraph 19, which purported to plead waiver and/or estoppel;

(d) Paragraph 19A, which purported to plead an alternative claim of restitutionary *quantum meruit*;

(e) (Consequential to the striking-out of paragraph 19A) The references in the prayers numbered (1) to (4) on the last two pages of the Statement of Claim (Amendment No. 3) to alternative claims for "such sums as may be assessed by this Honourable Court on a *quantum meruit* basis".

3 The Defendants requested a further hearing, as they claimed the Plaintiff had included "prohibited amendments" in the Statement of Claim (Amendment No. 4) filed on 17 August 2018. Following some clarifications by the Plaintiff's then counsel at the hearing on 10 September 2018, the Statement of Claim (Amendment No. 5) was filed on 11 September 2018. The Defence & Counterclaim (Amendment No. 1) was filed on 25 September 2018.

4 Another hearing took place on 1 October 2018 pursuant to parties' request. At this further hearing, the Defendants' counsel informed that they had only recently noticed the reference to "estoppel" in what was previously paragraph 18A of the Statement of Claim (Amendment No. 3) (renumbered as paragraph 19 in the Statement of Claim (Amendment No. 5)). The Defendants' counsel submitted that the Plaintiff's assertion of an estoppel, having been previously struck out, the reference to "estoppel" in paragraph 19 of the Statement of Claim (Amendment No. 5) could not stand. I ordered that paragraph 19 of the Statement of Claim (Amendment No. 5) be struck out.

5 At the hearing on 1 October 2018 the Plaintiff's then counsel had requested time to file the re-amended Statement of Claim and to take instructions on an application to include fresh amendments alleging a "different kind of estoppel". However, the Plaintiff proceeded to file an appeal on the same day (CA 179/2018) against the striking-out of certain portions of its

Statement of Claim and against the costs awarded against it in RA 160/2018. The Defendants filed a cross-appeal (CA 182/2018) on the same day. I understand the Defendants to be appealing against my refusal to strike out the entire claim or to order that it be struck out at least against the 1st Defendant.

6 For ease of reference, the original Statement of Claim is appended as Annex A. The Statement of Claim (Amendment No. 2) – which incorporated the amendments directed by the AR during the hearing of the Defendants' striking-out application – is appended as Annex B. The Statement of Claim (Amendment No. 3) and the Statement of Claim (Amendment No. 5) are appended as Annex C and Annex D respectively. The original Defence and Counterclaim is appended as Annex E and the Defence and Counterclaim (Amendment No. 1) as Annex F.

Facts

The parties

7 Before I set out the reasons for my decision, I will summarise whom the parties are in these proceedings as well as the undisputed facts and the competing claims.

8 The Plaintiff (also the 2nd Defendant in Counterclaim), the 3rd Defendant in the Counterclaim (Corporatebuilders Consultancy Pte Ltd or "Corporatebuilders") and the 4th Defendant in the Counterclaim (BMI Accounting Services Pte Ltd or "BMI Accounting") are private limited companies incorporated in Singapore. The Plaintiff and Corporatebuilders provide general business and management consultancy services. BMI Accounting is a provider of book-keeping services. The 1st Defendant in the

Counterclaim – Kam – is the General Manager of the Plaintiff (also the 2nd Defendant in the Counterclaim).[1] He is an accountant and is also a director of, *inter alia*, BMI Accounting.[2]

9 The 1st Defendant (also the 1st Plaintiff in the Counterclaim) is Dr Heng Keok Meng ("Dr Heng"), a medical doctor registered in Singapore. The 2nd Defendant (also the 2nd Plaintiff in the Counterclaim, KM Heng Women's Clinic Pte Ltd or "KMHWCPL"), the 3rd Defendant (also the 3rd Plaintiff in Counterclaim, KM Heng Clinic & Surgery Pte Ltd or "KMHCSPL") and the 4th Defendant (also the 4th Plaintiff in Counterclaim, The Medical & Aesthetic Clinic Pte Ltd or "TMaACPL") are private limited companies incorporated in Singapore. They will be collectively referred to in these grounds of decision as "the Three Companies", although I will also refer to the Three Companies and Dr Heng collectively as "the four Defendants" from time to time. Dr Heng is the sole director of the Three Companies. He is also the sole shareholder of TMaACPL and holds 99% of the shares in KHMWCPL and KMHCSPL.

The undisputed facts and the competing claims

10 Dr Heng and Kam got to know each other in 2002. The Three Companies' accounts and tax affairs were managed by Corporatebuilders from their respective date of incorporation until Income Tax Year of Assessment ("YA") 2009. For YA 2010 and YA 2011, their accounts were managed by BMI Accounting; and their tax affairs by the Plaintiff, BMI Tax.

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[1] [1] of Kam's 3rd affidavit of 21 May 2018, at Tab 3 of the Defendants' Bundle of Cause Papers ("DBCOP").

[2] [6] of Dr Heng's 1st affidavit of 4 May 2018, at Tab 2 DBCOP.

11 On 7 April 2010, the Three Companies each signed a "Tax Retainer Service Agreement" ("TRSA") confirming their engagement of the Plaintiff to assist with the companies' tax affairs. Copies of the three TRSAs are exhibited in Dr Heng's 1st affidavit of 4 May 2018.[3] The terms of the three TRSAs are identical. The first page of each TRSA sets out a number of services under the heading "*Our scope of services*". On the next page, a number of other services are set out under the heading "*Other services offered*". The TRSA then sets out other matters under the headings "*Taxpayer's responsibility pursuant to the engagement*", "*Limitation of liability*", "*Professional indemnity*", "*Ethical guidelines*" and "*Retention of records*". On the last page, under the heading "*Fees*", it is stated:

> Our fees shall be invoiced as work progresses and shall include all disbursement, Goods and Services Tax ("GST") and out-of-pocket expenses. Our fees are based on the degree of responsibility and skill involved and time spent.
>
> Our fees are payable upon presentation.

12 I will refer to the above clause as the "Fees Clause" in these written grounds.

13 Dr Heng claims that BMI (and before that, Corporatebuilders) also assisted him and his sister, Vivian Heng (who took care of the Three Companies' book-keeping functions), with filing their income tax returns. Dr Heng claims this assistance was rendered as "part of the work done for the Three Companies".[4]

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[3] p 11-25 of Dr Heng's 1st affidavit.

[4] [7] of Dr Heng's 1st affidavit.

14 Sometime between late 2011 and January 2012, Dr Heng and the Three Companies came under investigation by IRAS. The investigations culminated in amended and/or additional Notices of Assessment being issued to all four of them by IRAS on 19 April 2012 ("the 19 April 2012 NAs"). Dr Heng also executed an agreement, on behalf of all four of them, to pay IRAS a total sum of $1,069,056.15 in full and final settlement of additional taxes and penalties.

15 The four Defendants blame Kam for their misfortune, as they claim he advised Dr Heng on various aspects of operating his medical practice and on the incorporation of the Three Companies – which IRAS allegedly found to be an illicit "tax planning scheme" which sought to "exploit" a "loophole in the tax system".[5] Kam disavows any responsibility.

16 In the present suit, it is asserted on behalf of the Plaintiff, BMI Tax, that in a telephone conversation on 5 January 2012, Dr Heng had informed Kam of the action taken by IRAS; and that in the same conversation, Dr Heng had engaged the Plaintiff to carry out the following work on behalf of all four Defendants:[6]

> (a) To "compute and assess the tax affairs" of [Dr Heng and the Three Companies] for the following years of assessment that were under investigation by IRAS, namely: -

S/No.	Party making payment	Year of Assessment
1.	Dr Heng	2003 to 2004
2.	KMHWCPL	2005 to 2011
3.	KMHCSPL	2003 to 2008
4.	TMaACPL	2008 to 2011

[5] [29] to [30] of the Defence and Counterclaim (Amendment No. 1).

[6] [9] to [14] of the Statement of Claim (Amendment No. 3).

(b) To "provide advice on the tax implications" as well as "attending to all queries from the IRAS in relation to the Notices of Amended/Additional Assessment" for [Dr Heng and the Three Companies] to IRAS.

17 I will refer to the above items collectively as "the Work". In the Statement of Claim (Amendment No. 5), the Plaintiff has pleaded that insofar as Dr Heng was concerned, the agreement it had with him to carry out the above work was an oral agreement entered into during the telephone conversation of 5 January 2012; and that pursuant to this oral agreement, he was to pay the Plaintiff a "reasonable sum" for the said work, to be "computed on the basis of the degree of responsibility and skill involved and time spent by [BMI Tax] and/or its representatives".[7] As for the Three Companies, it is alleged that the Plaintiff was engaged in the same telephone conversation to carry out the said work for them "pursuant to the '*Other services offered*' clause of the [TRSAs] with [the Three Companies]"; and that pursuant to the '*Other services offered*' clause "read in line with the '*Fees*' Clause", the three Companies were to pay the Plaintiff "fees for the time spent to be computed on the basis of the degree of responsibility and skill involved of [BMI Tax] and/or its representatives".[8]

18 Dr Heng denies having a telephone conversation with Kam on 5 January 2012. He admits that he did have a telephone conversation with Kam on 6 January 2012 in which he told Kam about the punitive action taken by IRAS – but denies that he had during this telephone call requested Kam or the Plaintiff

[7] [11] of the Statement of Claim (Amendment No. 5).

[8] [11] of the Statement of Claim (Amendment No. 5).

to carry out work as claimed by the Plaintiff in its Statement of Claim. It should be added that despite this denial, Dr Heng and the Three Companies do not appear to dispute that Kam and the Plaintiff *did* provide some advice and that they *did* carry out some work for all four Defendants in relation to the issue of a potential challenge to IRAS' decision. Thus, for example, there are various references to such advice and work in the Defence and Counterclaim.[9]

19 On 2 March 2015 and 16 June 2015, two invoices[10] were issued to the 2nd Defendant, KMHWCPL, for the sums of $25,000 and $20,000 respectively. These invoices were issued by a company named Matrico SG Advisory Pte Ltd ("Matrico") and stated to be for the attention of Dr Heng. The invoice of 2 March 2015 (numbered "M00415") states, under the heading "Particulars":

> Being professional fee for attendance to Board of Review as following companies:
>
> 1. Dr Heng Keok Meng (YA 2003 – 2004)
> 2. KM Heng Women's Clinic Pte Ltd (YA 2005 – 2011)
> 3. KM Heng Clinic & Surgery Pte Ltd (YA 2003 – 2008)
> 4. The Medical & Aesthetic Clinic (YA 2008 – 2011)

20 The invoice of 16 June 2015 (numbered M00458) states, under the heading "Particulars":

> Being professional fee for attendance to Judicial Review of Appeal for Notice of Assessment as following companies:
>
> 5. Dr Heng Keok Meng (YA 2003 – 2004)
> 6. KM Heng Women's Clinic Pte Ltd (YA 2005 – 2011)
> 7. KM Heng Clinic & Surgery Pte Ltd (YA 2003 – 2008)

[9] See for example [38] to [39[, [41], [43], [45] to [48] of the Defence and Counterclaim.

[10] p 83 to 84 of Dr Heng's 1st affidavit.

8. The Medical & Aesthetic Clinic (YA 2008 – 2011)

21 The Plaintiff claims that both these invoices were "interim invoices" which it "caused" Matrico to issue on its behalf, "together with the respective time sheet indicating the number of hours and charge-out rate of various staff".[11] I will refer to these two invoices as "the 2015 Invoices". According to Kam, he presented the 2015 Invoices to Dr Heng, and explained to the latter the work done by BMI Tax, the time-sheets and the staff's charge-out rates.[12] Dr Heng and the Three Companies deny that any time sheet or any explanation was given to them. However, they stated in the original Defence and Counterclaim that it "was understood between Mr Kam and Dr Heng" that the 2015 Matrico invoices were "for work done for the Three Companies prior to the date of [each] invoice".[13] Following the service of the Statement of Claim (Amendment No. 5), the Defence and Counterclaim was amended to plead that in respect of the 2015 Invoices, it was understood between Kam and Dr Heng that these invoices were "for work done for the Three Companies and Dr Heng prior to the date of [each] invoice"[14]. It is not disputed that these two Matrico invoices were paid in full via cheques drawn on KMHWCPL's account.

22 Prior to the issuance and payment of the 2015 Invoices, IRAS had responded to letters sent by the Plaintiff on behalf of the four Defendants, rejecting their objections to the 19 April 2012 NAs. On 12 February 2015, IRAS also rejected their request that a Notice of Refusal to Amend the 19 April 2012 NAs be provided. On 23 February 2015, the Plaintiff wrote to IRAS stating that

[11] [19] of the Statement of Claim (Amendment No. 1).

[12] [22] of Kam's 3rd affidavit.

[13] [52] and [53] of the Defence and Counterclaim.

[14] [52] and [53] of the Defence and Counterclaim (Amendment No. 1).

a direct appeal to the Income Tax Board of Review ("Board of Review") would be pursued. Further correspondence followed in the period of March to mid-June 2015 between Dr Heng and the Chairman of the Board of Review.[15]

23 On 15 October 2015, a meeting was held at the office of Justicius Law Corporation, a law firm which the four Defendants claim was "appointed by, or on the advice of Mr Kam and/or the Plaintiff, to advise on the merits of and to prepare an application for judicial review for an order that the Comptroller of Income Tax be compelled to issue a Notice of Refusal to Amend" the 19 April 2012 NAs. Kam says the four Defendants never reverted on whether they intended to proceed with the judicial review.[16] The Defendants say that Dr Heng was "not confident that the judicial review application would succeed"; and "no further action was taken in respect of the judicial review application".[17]

24 On 30 May 2016, one of Kam's colleagues received an email[18] from another firm – Highlight Business Services ("HBS") – stating that HBS had been "appointed" by Dr Heng to "handle the accounting function" for KMHWCPL and TMaACPL. Kam texted Dr Heng to say:

> Hi doc, received some emails regarding your company accounts, call me when possible on this
>
> Anyway will sort out the tax case billing now before proceeding to the next stage

25 On 7 June 2016, four invoices[19] were issued by Matrico as follows:

[15] Dr Heng and the Three Companies claim that it was Kam and/or BMI Tax who drafted all the letters sent by Dr Heng.

[16] [31] of Kam's 3rd affidavit.

[17] [51] of the Defence and Counterclaim (Amendment No. 1).

[18] p 55 of Kam's 3rd affidavit.

S/N	Invoice No.	Party to whom invoice was addressed	Invoice amount	Description of work invoiced
1.	M00579	Dr Heng	S$15,000.00	"Being professional fee charged for tax queries attendance for the Year of Assessments 2002 to 2011."
2.	M00580	KMHWCPL	S$22,500.00	"Being professional fee charged for tax queries attendance for the Year of Assessments 2004 to 2011."
3.	M00581	KMHCSPL	S$10,000.00	"Being professional fee charged for tax queries attendance for the Year of Assessments 2003 to 2011."
4.	M00582	TMaACPL	S$12,500.00	"Being professional fee charged for tax queries attendance for the Year of Assessments 2008 to 2011."

26 The Plaintiff claims that it "caused" Matrico to issue the above invoices on its behalf, and that these were also "interim invoices" in respect of the Work. I will refer to the above invoices as "the 2016 Invoices". Shortly after these were issued, Kam texted Dr Heng to say:[20]

> Hi doc, I have review the invoices for the tax case, have given the best discounts for the work done over 5 years with iras for 3 companies and yourself. Its needs to be paid to move forward.

27 Kam received no response. On 30 August 2016 he texted Dr Heng again:[21]

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[19] p 78 to 81 of Dr Heng's 1st affidavit.

[20] p 68 of Kam's 3rd affidavit.

[21] p 69 of Kam's 3rd affidavit.

> Just met Vivian, she mentioned that the new accountant will also take over tax and corp sec work from next year. You need to confirm so that arrangement can be made.
>
> Also, there are the invoices still need to be paid asap… able to send to us before end Aug?

28 Dr Heng replied on the same day to confirm that "the new accountant will be taking over",[22] but said nothing about the payment of the 2016 Invoices. Kam then chased Vivian Heng about payment, but no payment was made. Nor does it appear that Dr Heng contacted Kam to discuss the invoices. On 3 July 2017 (nearly a year later), Kam sent both Dr Heng and Vivian a text message saying:

> Hi doc, still have not received the payments for my invoices. If we do not received by end July 2017, we will be destroying all records of your companies with us. In such event, there is no way we can retrieve any documents for iras.

29 On 31 July 2017,[23] Vivian Heng sent Kam a text message stating:

> Hi, you kim, dr heng asking whether can grant him till mid Aug because he needs to ask his son, and his son will be back mid Aug from London. Please.

30 Kam replied that it was "ok to revert in mid Aug". It appears nothing further was heard from Dr Heng. On 21 September 2017 Kam texted Vivian Heng to say:[24]

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[22] p 69 of Kam's 3rd affidavit.

[23] p 61 of Kam's 3rd affidavit.

[24] p 61 of Kam's 3rd affidavit.

> I have not received anything... I will reissue invoice as original amount as agreed with Dr heng once the case start. And will do the necessary to collect the fees

31 On 22 September 2017, Matrico issued the following invoices:[25]

S/N	Invoice No.	Party to whom invoice was addressed	Invoiced mount	Description of work invoiced
1.	M00739	Dr Heng	S$30,000.00	"Being our professional fee charged for attendance to tax queries in respect of "Dr Heng Keok Meng for" YA 2003 and YA 2004.
2.	M00742	KMHWCPL	S$105,000.00	"Being our professional fee charged for attendance to tax queries in respect of "K M HENG WOMEN'S CLINIC PTE. LTD" for" YA 2005 and YA 2011.
3.	M00740	KMHCSPL	S$90,000.00	"Being our professional fee charged for attendance to tax queries in respect of "K M HENG CLINIC & SURGERY PTE. LTD" for" YA 2003 and YA 2008.
4.	M00741	TMaACPL	S$60,000.00	"Being our professional fee charged for attendance to tax queries in respect of "K M HENG CLINIC & SURGERY PTE. LTD" for" YA 2008 and YA 2011.

32 The Plaintiff claims that it "caused" Matrico to issue the above invoices on its behalf, and that these invoices were "revised from the 2016 Invoices and were intended to supersede the 2016 Invoices".[26] I will refer to these invoices

[25] p 89 to 92 of Dr Heng's 1st affidavit.

as "the 2017 Invoices". It appears that Dr Heng again did not respond to Kam on payment of these invoices. On 13 October 2017, Kam texted Vivian Heng again:[27]

> Hi Vivian, tell Dr heng and his son that if I do not receive full payment by end October, I will pass the collection to my debt collection agent to collect… These agent may visit you and stay in the clinic until payments are received.

33 On 23 October 2017, Dr Heng sent Kam a text message stating that he would be responding to him by letter; and that he would call the police and the relevant authorities if the debt collectors were to do as "threatened" by Kam in his text message to Vivian.[28] This led to the following reply from Kam:

> OK, you finally revert, I will do the needful, and you can call the police if you need to, if by calling police debtors need not pay money, police will be very busy. You know what you agreed when the work is done. I have all evidence. Debtor collector are all licences. Maybe you can ask your son.
>
> Oh, I don't threaten, I do what I say

34 On the same day (23 October 2017), Dr Heng sent Kam a letter.[29] The letter referred to the 2017 Invoices (as well as another separate set of invoices), and stated:

> We did not agree on any works which are the subject of the above Invoices. Please explain and/or provide:
>
> Nature of alleged work
>
> When the work was purported to have been undertaken and by whom

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[26] [18] of the Statement of Claim (Amendment No. 3).

[27] p 62 of Kam's 3rd affidavit.

[28] p 70 of Kam's 3rd affidavit.

[29] p 99 of Dr Heng's 1st affidavit.

> Time spent on work
>
> Signed terms of engagement relating to the invoices
>
> I completely do not understand and dispute the invoices presented to me.

35 On 17 November 2017, the Plaintiff, BMI Tax, responded, enclosing *inter alia* a "List Of Work Done And Period Of Work".[30] There followed further correspondence[31] between the parties before BMI Tax filed this suit on 14 March 2018.

CA 179/2018: The Plaintiff's appeal

36 I will address CA 179/2018 first. This was the Plaintiff's appeal against the striking-out of the following portions of their claim:

(a) Paragraph 18A of the old Statement of Claim (Amendment No. 3), since renumbered as paragraph 19 of the Statement of Claim (Amendment No. 5);

(b) Paragraphs 19 and 19A of the Statement of Claim (Amendment No. 3), which had pleaded waiver and/or estoppel and an alternative claim of restitutionary *quantum meruit* respectively;

(c) The consequential references in the prayers numbered (1) to (4) on the last two pages of the old Statement of Claim (Amendment No. 3) to alternative claims for "such sums as may be assessed by this Honourable Court on a *quantum meruit* basis".

[30] p 100-103 of Dr Heng's 1st affidavit.

[31] p 104-159 of Dr Heng's 1st affidavit.

On the striking-out of paragraph 19 of the Statement of Claim (Amendment No. 3)

37 I will first deal with the striking-out of paragraph 19 of the Statement of Claim (Amendment No. 3). It will be recalled that the Plaintiff claimed that it had an Oral Agreement with Dr Heng to do the work set out in paragraph 10(1) and (2) of the Statement of Claim (Amendment No. 3); and that in relation to the 2nd to the 4th Defendants, it had been engaged pursuant to the "*Other services offered*" clause of the TRSAs, to do the work specified in paragraph 12 of the same Statement of Claim. Paragraph 19 of the Statement of Claim (Amendment No. 3) purported to plead that insofar as the Oral Agreement and/or the TRSAs "provided that any invoice was to be issued by the Plaintiff" (which the Plaintiff denied), the Defendants "had, by their conduct, waived this condition and/or is estopped from relying on the same":

> 19. If, which is denied, the Oral Agreement and/or the Tax Retainer Service Agreements provided that any invoice was to be issued by the Plaintiff, the Plaintiff avers that the Defendants had, by their conduct, waived this condition and/or is estopped from relying on the same.
>
> Particulars
>
> (1) The 1st Defendant, in his personal capacity as well as in his capacity as the sole director of the 2nd to 4th Defendants, had accepted the Interim Invoices and made payment via cheques issued by the 2nd Defendant which were signed by him.
>
> (2) The Defendants, through the 1st Defendant and/or Ms Vivian Heng, acknowledged the 2016 Invoices and accepted, either expressly or implicitly, the Defendants' liability to make payment on the 2016 Invoices. At no time did any of the Defendants take issue with the fact that the 2016 Invoices were issued by Matrico and not the Plaintiff.
>
> (3) The Defendants had, by their conduct as stated herein, waived and/or are estopped from relying on the condition

> (which is denied) that any invoice was to be issued by the Plaintiff and not a third party on behalf of the Plaintiff.

38 As can be seen from above, the Plaintiff relies on the payment of the 2015 Invoices and the alleged "acceptance" of the 2016 Invoices as the basis for contending that in respect of the 2017 Invoices which are the subject of the present claim, the Defendants have waived any contractual requirement for invoices to be issued by the Plaintiff, and/or are estopped from invoking any such contractual requirement. Paragraph 19 of the Statement of Claim (Amendment No. 3) did not state what the Plaintiff meant by the assertion that the Defendants had "through the 1st Defendant and/or Ms Vivian Heng, acknowledged the 2016 Invoices and accepted, either expressly or implicitly, the Defendants' liability to make payment on the 2016 Invoices". However, in oral submissions on 10 August 2018, the Plaintiff's counsel stated that this referred to the text messages between the parties, in which Vivian Heng had asked Kam for "more time" and during which neither Dr Heng nor Vivian had objected to the 2016 Invoices being issued by Matrico.[32]

39 Regrettably, the arguments by the Plaintiff's counsel in respect of the basis for pleading "waiver and/or estoppel" were fractured and incoherent. In respect of the pleading of waiver, it appeared from his oral submissions that be believed the Plaintiff to be relying on the doctrine of waiver by election – but he admitted that he had "no authorities" to support an argument that a pleading of waiver by election could be upheld on the facts pleaded. He then purported to rely on the judgement of the Court of Appeal ("CA") in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("***Audi Construction***"),[33] an authority cited by the Defendants' counsel. However, in

[32] p 11 at lines 28 to 32 and p 12 at lines 1 to 8 of the Notes of Evidence from 10 August 2018.

Audi Construction, the CA made it clear that a waiver by election involved a party "communicating his choice whether to exercise *a right which has become available to him*". As the Defendants' counsel has pointed out (citing the authors of *The Law of Waiver, Variation and Estoppel (Sean Wilken QC and Karim Ghaly)*(Oxford University Press, 3rd Ed. 2012),[34] as between two contracting parties X and Y, "waiver cannot permanently alter X and Y's future obligations under the contract": waiver by election relates "to X's accrued remedies where there is a pre-existing breach of the primary obligations under the contract".[35]

40 Applying the above principles, if we assume that a contractual requirement exists for all invoices to be issued by the Plaintiff, then the most that can be said of the evidence of payment of the 2015 Invoices is that the Defendants have waived any remedies they have against the Plaintiff for breaching this contractual requirement *in relation to the 2015 Invoices*. The doctrine of waiver by election does not permit the Defendants to argue that payment of the 2015 Invoices constitutes waiver of the contractual requirement in relation to *future invoices such as the 2017 Invoices*.

41 As for the Defendant's alleged "acceptance" of the 2016 Invoices, even making the generous assumption that Vivian's request to Kam for "more time" and Dr Heng's failure to query Matrico's issuance of these Invoices can amount to an "unequivocal representation" (*Audi Construction* at [59]) that the Defendants waived any contractual requirement for invoices to be issued by the Plaintiffs, such waiver only operates in respect of the 2016 Invoices – and has no effect vis-à-vis the 2017 Invoices which are the subject of the present suit.

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[33] Tab 3 of the Defendants' Supplemental Bundle of Authorities ("DSBOA").

[34] Tab 17 DSBOA.

[35] [5.02] and [5.05] of Tab 17 DSBOA.

42 As to the pleading of "estoppel", the Plaintiff's counsel stated in oral submissions that he was relying on "promissory estoppel"[36] – or what the CA in *Audi Construction* referred to as "waiver by estoppel" or an "equitable estoppel". In *Audi Construction* at [57], the CA explained that the doctrine of equitable or promissory estoppel "requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation… (A) party to an equitable estoppel is representing that he will in future forbear to enforce his legal rights… *(T)his doctrine is premised on inequity, not choice, hence the requirement of reliance*".

43 I emphasize in particular the italicised words – because this is where the Plaintiff's case on "promissory estoppel" falls apart. According to its counsel, its case is that the Defendants had – by paying the 2015 Invoices and by failing to object to Matrico's issuance of the 2016 Invoices – represented that they would not enforce the contractual requirement for invoices to be issued by the Plaintiff, and the Plaintiff had relied on this representation by not complying with such requirement in issuing the 2017 Invoices.[37] However, even assuming that the payment of the 2015 Invoices and the lack of objections to Matrico's issuance of the 2016 Invoices constitute an "unequivocal representation" by the Defendants that they will in future forbear to enforce the contractual requirement for issuance of invoices by the Plaintiff, the element of reliance needed to establish promissory estoppel cannot be satisfied merely by the Plaintiff's non-compliance thereafter with this contractual requirement. To

[36] p 12 of the Notes of Evidence from 10 August 2018 at lines 8 to 18.

[37] p 12 of the Notes of Evidence from 10 August 2018 at lines 14 to 25.

quote the learned editors of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 4.078:

> (I)f a promisor has given an assurance that he will not enforce a particular contractual obligation, the promisee's consequent failure to perform that obligation is not itself a sufficient change of position. Something more has to be demonstrated. The reason for this requirement is found in Viscount Simond's oft-cited dicta in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*
>
> > [T]he gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights…

44 When the above principles were brought to the attention of the Plaintiff's counsel, his only response was:[38]

> On the basis of pleadings, I cannot say there is something more.

45 For the reasons stated in [37] to [44] above, I struck out the pleading of "waiver and/or estoppel" in paragraph 19 of the Statement of Claim (Amendment No. 3).

On the striking-out of paragraph 18A of the Statement of Claim (Amendment No. 3) (renumbered as paragraph 19 in the Statement of Claim (Amendment No. 5))

46 At the further hearing on 1 October 2018, the Defendants' counsel submitted that the Plaintiff's assertion of an estoppel in paragraph 19 of the Statement of Claim (Amendment No. 3) having been struck out, the reference

[38] p 13 of the Notes of Evidence from 10 August 2018 at line 1.

to "estoppel" in paragraph 18A of the same statement of claim (renumbered as paragraph 19 in the Statement of Claim (Amendment No. 5)) similarly could not stand. Paragraph 19 of the Statement of Claim (Amendment No. 5) states that "the Defendants, by their conduct, are estopped from denying their liability to make payment on the Invoices (save for disputing the amounts in the Invoices)".

47 The Plaintiff's counsel initially sought to argue[39] that the "estoppel" in paragraph 19 of the Statement of Claim (Amendment No. 5) referred to "estoppel by convention" and was "a different kind of estoppel" from that pleaded in the struck-out paragraph 19 of the Statement of Claim (Amendment No. 3). However, after parties were given a short break to check the legal position, I was informed that both sides were "on the same page": if the Plaintiff did indeed intend to put forward further arguments on why it should be permitted to plead "a different kind of estoppel", it was out of time for requesting further arguments.

48 In any event, contrary to the initial submission of the Plaintiff's counsel (which came regrettably out of the blue and unsupported by any authority or evidence), it appeared to me that paragraph 18A of the Statement of Claim (Amendment No. 3) was concerned with the same promissory estoppel pleaded in the struck-out paragraph 19. This was because paragraph 18A also made reference to paragraph 17B (which asserts that the Defendants failed to object to Matrico's issuance of the 2016 Invoices) and paragraph 18 (which sets out the particulars of the 2017 Invoices). It appeared to me therefore that paragraph 18A should have been struck out for the same reasons that paragraph 19 was struck out.

[39] p 2 of the Notes of Evidence from 1 October 2018 at lines 28 to 35.

49 For the reasons stated in [46] to [48] above, I ordered that paragraph 18A of the Statement of Claim (Amendment No. 3) (renumbered as paragraph 19 in the Statement of Claim (Amendment No. 5)) should also be struck out.

On the striking-out of paragraph 19A of the Statement of Claim (Amendment No. 3)

50 I will next deal with the striking-out of paragraph 19A of the Statement of Claim (Amendment No. 3). This read as follows:

> 19A. Further and/or alternatively, in the event that the Court finds that the Plaintiff was not engaged to carry out the Work pursuant to the Oral Agreement and/or the Tax Retainer Service Agreements, or that there was no express and/or implied remuneration clause, the Plaintiff claims the sum of S$285,000.00 (or such sum as may be assessed) as reasonable remuneration on the basis of quantum meruit for the Work done at the request and/or knowledge and/or acquiescence of the Defendants. The Plaintiff avers that the Defendants were unjustly enriched by the Work that was carried out by the Plaintiff, and therefore ought to compensate the Plaintiff for a reasonable amount.

51 At the hearing on 10 August 2018, the Plaintiff's counsel confirmed that paragraph 19A was intended to plead a claim in restitutionary *quantum meruit*.[40] It was then pointed out to counsel that the law required a party's claim in restitutionary *quantum meruit* to be premised on its contract with the opposing party having been "terminated prematurely as a result of a breach of that [opposing] party": counsel was referred to the CA's judgement in *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 3 SLR(R) 386 at [37] ("***Lee Siong Kee***") [41] and also at [35], where the CA noted the

[40] p 13 of the Notes of Evidence from 10 August 2018 at line 2.

appellant's reliance on the following passage from Goff & Jones, *The Law of Restitution* (Sweet & Maxwell, 5th Ed., 1998 at p 531):

> [I]f the innocent party has rendered services or has supplied goods under a contract, which has not been substantially performed and which has been determined by him because of the other party's breach, he may recover the value of the services rendered or the goods supplied, on a *quantum meruit* or a *quantum valebat* respectively, rather than sue for damages for loss arising from the breach. The party in breach cannot deny that he has received a benefit. It is said that because the contract is an end, he cannot keep the innocent party to the contract price.

52 Counsel initially stated that he did "not read *Lee Siong Kee* as saying there must be premature termination for a restitutionary *quantum meruit* claim". There appeared to be no support whatsoever for this startling statement, nor did counsel attempt to substantiate it. Indeed, in virtually the next instant, he conceded that "there must be a breach, and the contract is rescinded, then the party becomes entitled to a claim in partial compensation".[42] When pressed to explain where or how the Plaintiff had pleaded the elements necessary for a claim in restitutionary *quantum meruit*, counsel conceded that "(w)e have not pleaded breach here".[43] His only other response on this issue was a *non sequitur*:[44]

> I would say Mr Kam has explained in the affidavit why he issued 2017 invoice. Defendants did not respond whether to proceed with Judicial Review, so he issued the 2017 invoice. This is the basis of our claim in restitutionary *quantum meruit*. That is all I have.

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[41] Tab 12 DBOA.

[42] p 13 of the Notes of Evidence from 10 August 2018 at lines 27 to 29.

[43] p 13 of the Notes of Evidence from 10 August 2018 at lines 28 to 29.

[44] p 14 of the Notes of Evidence from 10 August 2018 at lines 1 to 4.

53 In any event, insofar as "the juridical basis for recovery under a claim in restitutionary *quantum meruit* is the doctrine of unjust enrichment", the following elements of unjust enrichment should have been pleaded: "(a) a benefit had been received or the defendants had been enriched; (b) this benefit or enrichment was at [the plaintiff's] expense; and (c) the enrichment was "unjust": *Higgins, Danial Patrick v Mulacek, Philippe Emanuel & others* [2016] 5 SLR 848 ("***Higgins***") at [54].[45] Even were I to assume that the references to work done for the Defendants scattered throughout the Statement of Claim (Amendment No. 3) sufficed to constitute a pleading of the first element of benefit or enrichment, it was not clear to me – nor did counsel attempt to elucidate – where or how the second and third elements of unjust enrichment had been pleaded. In the circumstances, I agreed with the Defendants that what the Plaintiff had pleaded was insufficient to support a claim in unjust enrichment.

54 For the reasons stated in [50] to [53] above, I ordered that paragraph 19A of the Statement of Claim (Amendment No. 3) should also be struck out. The Plaintiff's claim in restitutionary *quantum meruit* having been struck out, it followed that the consequential references in the prayers numbered (1) to (4) on the last two pages of the statement of claim to alternative claims for "such sums as may be assessed by this Honourable Court on a *quantum meruit* basis" also had to be struck out.

On the costs awarded against the Plaintiff in RA 160/2018

[45] Tab 9 DSBOA.

55 In CA 179/2018, the Plaintiff is also appealing against the costs awarded against it in RA 160/2018, which were fixed at $18,000 (plus disbursements of $1,732.64).

56 Since the outcome of RA 160/2018 was the striking-out of a fairly substantial portion of the Plaintiff's Statement of Claim (and this after it had been given the opportunity to make any amendments it thought necessary to save the pleadings), I do not think it can be disputed that costs should follow the event – and the Defendants should be awarded the costs of the appeal. The Appendix G Cost Guidelines indicate a figure of $10,000 for each full day's hearing of an appeal before a High Court Judge in Chambers. In the present case, both hearings of the appeal on 25 July 2018[46] and 10 August 2018 took the equivalent of slightly over 1.5 days. I also factored in the costs of any amendments which the Defendants would have to make to their defence and counterclaim following the filing and service of the re-amended statement of claim. All in, I assessed that $18,000 was a reasonable figure for the costs of and arising from RA 160/2018. It should be noted that the Plaintiff's counsel himself had suggested a figure of $16,000 (excluding disbursements – which he did not challenge).[47]

CA 182/2018: The Defendants' appeal

57 I turn next to the Defendants' appeal in CA 182/2018. The Defendants have not stated in their Notice of Appeal the orders they are appealing, but given the nature of the relief they were seeking in RA 160/2018, I understand them to

[46] The hearing on 25 July 2018 was fixed for a half-day in the morning, but in fact stretched over the lunch hour without any break taken for lunch, and eventually concluded at 1445 hours.

[47] p 18 of the Notes of Evidence from 10 August 2018 at line 21.

be appealing against my refusal to strike out the entire Statement of Claim, or alternatively to order that the Statement of Claim be struck out in entirety against the 1st Defendant Dr Heng. I will address below the main arguments raised by the Defendants in RA 160/2018.

On the Defendants' argument that there has been "fatal" procedural non-compliance with the Fees Clause of the TRSAs

58 The Defendants have argued that the Fees Clause of the TRSAs sets out the following procedural requirements:

(a) Invoices must be issued only by the Plaintiff BMI Tax;

(b) Invoices must be issued "progressively" or sequentially, "as work progresses". In this connection, I understand the Defendants to mean, for example, that if an invoice has already been issued for work done on a specific date (say Date *X*), the Plaintiff cannot then issue a later invoice claiming for work done prior to Date *X*;

(c) Fees charged in the invoices must be based on "the degree of responsibility and skill involved and time spent"; and

(d) Fees are "payable upon presentation" and not earlier.

59 It is the Defendants' case that the Plaintiff's right to bring an action for its fees only arises when these lleged procedural requirements have been complied with; and that in this case, the Plaintiff has no right to bring an action because it has failed to comply with these procedural requirements.[48] The

[48] [24] to [55] of the Defendants' written submissions of 23 July 2018.

Defendants have cited *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd* [2014] 2 SLR 318 ("***Fairview***")[49] and *Ice Architects v Empowering People Inspiring Communities* [2018] EWHC 281 (QB) ("***Ice Architects***")[50] in support of this argument.

60 In *Ice Architects*, the appellant ("ICE") was an architectural practice, while the respondent ("EPIC") was a registered provider of social housing. Pursuant to a letter dated 10 July 2007 sent by EPIC's project manager, ICE was appointed as the architects for a housing project being developed by EPIC. This letter included the following passage under the heading "Basis of Payment":

> You will invoice EPIC on a monthly basis for work completed to date. The basis of payment proposed in the appendix to the document described above is acceptable. EPIC will endeavour to make payment within 30 days of receipt (unless otherwise stated).

61 A dispute arose over an invoice issued by ICE on 23 April 2009 for the sum of £42,375 (plus VAT) for services provided under the terms of the contract. Following an adjudication process, ICE was awarded £24,033.85. ICE then commenced civil proceedings on 21 May 2015 to recover the balance of the invoice sum. The central argument advanced by EPIC at the first-instance hearing was that ICE's cause of action arose when the relevant design work (for which payment was claimed in the invoice) was completed – which was sometime in 2008; and that ICE's claim was accordingly time-barred under section 5 of the Limitation Act 1980 of the United Kingdom ("UK"), the civil proceedings having been commenced more than 6 years after the accrual of the cause of action. ICE, for its part, argued that the cause of action did not accrue

[49] Tab 6 DBOA.

[50] Tab 11 DBOA.

until 30 days after receipt of the invoice issued on 23 April 2009. The first-instance judge found in EPIC's favour; and on appeal, his decision was upheld by Lambert J. In gist, Lambert J upheld the following propositions:

(a) In the absence of agreement to the contrary, the starting point is that a provider of services is entitled to be paid once the work has been done and so its cause of action for payment arises at that time.

(b) Clear words are needed if the timing of the accrual of the cause of action in an action for work or services is to be displaced.

(c) In the present case, based on an objective plain reading of the relevant paragraph of the 10 July 2007 letter, "(n)othing in the language of the relevant paragraph, viewed in isolation or in the context of the letter as a whole… suggests that the parties were intending that ICE's entitlement to payment did not arise when the work was done" (see at [22] – [23]). A reasonable person in the position of the parties would have understood the relevant words to be an agreement concerning only the process of billing and payment, namely the monthly provision of an invoice with payment within 30 days thereafter. Further, in the context of the 10 July 2007 letter and having regard to the circumstances in this case, it was "common sense" that both parties would have wished to reach some agreement concerning the billing and payment arrangement: on an objective construction of the parties' intention, the payment terms in the letter reflected just such an arrangement. Given the nature of the design work and the budgetary constraints faced by EPIC, monthly invoicing would have been important, certainly for EPIC, as a means of keeping a running check on the financial outlay on design services.

(d) More generally, whether the cause of action accrues on completion of the work or at some other time is a matter of construction of the relevant contractual term or other statutory provision. Thus, two of the cases cited to the first-instance judge – *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814 ("***Boot***") and *Legal Services Commission v Henthorn* [2011] EWCA Civ 1415 ("***Henthorn***") – were both examples of the court undertaking such an exercise in objective construction; and the outcome of the construction exercise in each case was bolstered by common sense and logic. In neither case could the quantum of the debt have been identified at the completion of the work in question. In *Boot*, the entitlement was not to the true value of the work completed but the value attributed to that work by the engineer. In *Henthorn*, which concerned fees paid by the Legal Services Commission "on account" to counsel in a civil legal aid case, the extent of the Commission's recoupment of the sums paid on account could only be known following taxation of the costs. No such difficulty arose in respect of the ICE invoices which required no further analysis or assessment.

62 In *Fairview*, it can be seen that the CA was undertaking the same "objective construction exercise" spoken of by Lambert J. In that case, the appellant ("Fairview") was the developer of a plot of land. Fairview had engaged Ong & Ong Architects ("OOA") to be the architect for the development of this plot of land in the 1970s, OOA being subsequently succeeded by Ong & Ong Pte Ltd ("OOPL"). In 2009, Fairview terminated OOPL's services. Proceedings ensued in which the trial judge dismissed OOPL's claim for wrongful termination of its services but allowed its claim for fees for abortive works on a *quantum meruit* basis. On appeal, Fairview argued *inter alia* that

even if OOPL were entitled to claim for fees for the abortive works, such a claim had been time-barred under the Limitation Act. The CA therefore considered the question of when OOPL's right to payment and corresponding cause of action to sue upon such right arose. It held at [87] – [88] that in this case, the terms in the SIA Conditions 1985 pertaining to the mode and time of payment applied; and that reading the opening paragraph of condition 6.1 and note (a) of the said terms –

> …(I)t was evident that while an architect became entitled to progress payments upon the completion of the various stages, such progress payment only became 'due and payable' upon the issuance of the relevant invoice(s). Accordingly, while an architect's entitlement to payment accrues upon completion of various stages, no right and corresponding cause of action to sue upon such a right arises unless and until the relevant invoice(s) had been issued. To put it another way, the entitlement to fees crystallises into a right upon which a cause of action accrues only when the invoice is issued.
>
> Our interpretation in the preceding paragraph accords first, with the permissive and open manner in which it was stated in the opening paragraph of condition 6.1 that the architect "shall be entitled" to progress payments on completion of each stage, as opposed to words with a more mandatory effect such as "the client *shall* pay to the architect". Our interpretation also accords with the absence of any condition setting out a timeline within which the architect must render its invoice. Any concern that such an interpretation would result in developers being inundated by invoices relating to work completed an inordinately long time ago (possibly even beyond the six year limitation period for contractual claims) was, in our view, valid but in the final analysis, overstated. An architect would not (for obvious commercial reasons) want to be put out of pocket for too long. And so long as the working relationship between the parties is ongoing, the flexibility to decide when to bill… would be commercially beneficial to both the architect and its client, particularly where the construction project in question is a long and drawn-out one. The architect would be assured of its due entitlement to payment while, on the other hand, the client would have room to negotiate with the architect on when the invoice is to be issued and when the actual payment is to be made based on the parties' respective commercial considerations.

63 Having regard to the decisions in *Ice Architects* and *Fairview*, what the present Defendants had to show was that there were "clear words" in the Fees Clause of the TRSAs which provided for specific procedural requirements (*e.g.* issuance of invoices only in the Plaintiff's name and strictly in sequence according to the date when work was done) to be complied with *before the Plaintiff's right to bring an action for payment of its fees could arise*. The Fees Clause is reproduced in [11] above. On a plain reading of this clause, I was not persuaded that it had this effect. If anything, a plain reading of the Fees Clause suggested that it was intended simply to provide for a mechanism for billing and payment. To use the words of Lambert J in *Ice Architects*, nothing in the language of this clause – viewed in isolation or in the context of the TRSA as a whole – suggested that parties were intending that the Plaintiff's right to bring an action for its fees should not arise when the work was done and should, instead, only arise upon invoices being issued in its name, and issued moreover in strict chronology according to the sequence of work done. Nor was it clear to me why "common sense and logic" required that the Fees Clause be interpreted in this manner. This was not, for example, a case like *Boot* or *Henthorn* where the quantum of the debt was incapable of being ascertained upon the completion of the work in question.

64 To sum up: having reviewed the provisions of the Fees Clause, I did not accept that the clause provided for the Plaintiff's right to bring an action for its fees to arise only when specific procedural requirements (such as the sequential issuance of invoices in the Plaintiff's own name) had been complied with.

65 The Defendants also alleged in the course of the appeal[51] that Kam must have arranged for Matrico to issue the invoices so as to avoid the Plaintiff having to pay any Goods and Service Tax ("GST"), the Plaintiff being GST-registered while Matrico was not. Given my decision on the Defendants' proposed construction of the Fees Clause, I did not find it necessary to make any findings on these allegations.

On the Defendants' argument that the Plaintiff has approbated and reprobated the TRSAs

66 The Defendants' submissions on the "procedural requirements" of the Fees Clause and the Plaintiff 's "fatal" non-compliance with these requirements formed the lynchpin of their case that the Plaintiff's claim was "legally unsustainable".[52] I next deal with their submissions on the "factual unsustainability" of the Plaintiff's claim. In the main, these centred on the argument that the Plaintiff had "approbated and reprobated the TRSAs in a bid to evade striking-out".[53]

67 In *Treasure Valley Group Ltd v Saputra Teddy and another* [2006] 1 SLR(R) 358 ("***Treasure Valley***") at [31],[54] the doctrine of approbation and reprobation was explained by Belinda Ang J as follows:

> The doctrine of approbation and reprobation precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he has

[51] p 9 of the Notes of Evidence from 25 July 2018 at lines 26 to 30.

[52] [69] of the Defendants' written submissions of 23 July 2018.

[53] [71] to [80] of the Defendants' written submissions of 23 July 2018.

[54] Tab 26 DBOA.

> exercised. It entails, for instance, that a person "having accepted a benefit given him by a judgement cannot allege the invalidity of the judgement which conferred the benefit…
>
> (Citing *Halsbury's Laws of Australia vol 12* (*Butterworths, 1995*) at para 190-35) A person may not 'approbate and reprobate', meaning that a person, having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile once he or she has taken some benefit from the chosen course.

68 In *Lipkin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 ("***Lipkin***"),[55] Steven Chong J (as he then was) stated that there was "a wider dimension to the doctrine [of approbation and reprobation] which discourages the adoption of 'inconsistent attitudes' and warns that stark shifts in positions from previous proceedings would be viewed 'with some circumspection and scepticism". He added that even if the doctrine were strictly not applicable in *Lipkin*, he found it "simply fallacious" for the plaintiff to rely on the same single set of minutes of meetings to advance two different contracts against two different parties (see at [62]).

69 In the present case, the Defendants have drawn up in Annex A to their written submissions of 23 July 2018 a schedule of what they say represents the Plaintiff's approbation and reprobation of the TRSAs. They have also cited in their written submissions numerous examples of the Plaintiff's alleged approbation and reprobation of the TRSAs.[56]

70 I do not think it can be the case that whenever a plaintiff is said to have shifted its position in the course of proceedings, its claim must immediately and

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[55] Tab 16 DBOA, at [61].

[56] [72] to [80] of the Defendants' written submissions of 23 July 2018.

invariably be struck out at the interlocutory stage. I do not understand Steven Chong J to be espousing such a position in *Lipkin*, nor did I understand the Defendants' counsel to be advocating so sweeping an approach in the present case. It must surely be a question of degree as to how egregious the shifts in position are, and what reasons (if any) there may have been for the shifts in position. Thus, in *Lipkin* for example, the conduct which was held by Chong J to offend the spirit of the doctrine of approbation and reprobation was the plaintiff's adoption of two starkly different positions vis-à-vis a meeting between parties on 15 April 2009, firstly in its pleaded case in arbitration proceedings against the second defendant, and secondly in its pleaded case in a separate and later set of civil proceedings against both defendants. As Chong J put it at [59] of *Lipkin*:

> If we assume both the pleaded case in the arbitration and the plaintiff's present case on the Procurement Agreement to be true, the implications would simply be absurd. It would mean that, at the same meeting on 15 April 2009, the plaintiff did two things: first, it modified its earlier contract with the second defendant to bring into existence the Conquest Agreement; and second, it entered into a new contract with the first defendant (i.e. the Procurement Agreement). *Both* these contracts would be for the use of the *same* vessels (i.e. the *Swiber Concorde* or *Swiber Conquest*), which were to be made available by 20-22 May 2009, for the *same project* (i.e. the VSP project). If this was truly what happened, the plaintiff would be under separate contractual obligations towards both the first defendant and the second defendant to pay the rate of charter hire for the *Swiber Concorde* or the *Swiber Conquest* when either vessel is delivered to the plaintiff. There is no sensible reason why the plaintiff would have contracted with *two separate parties* for the charter of the *same vessel* for the same project and therefore expose itself to double liability for the charter hire.
>
> [emphasis in original]

71 In the present case, the "flip-flopping" on the Plaintiff's part which was decried by the Defendants related to the issue of whether the Plaintiff's

contractual relationship with each Defendant vis-à-vis the Work was based on the TRSAs, or whether such contractual relationship arose from some other agreement outside the TRSAs. It can be seen from Annex A to these written grounds that the Plaintiff's position on this issue was not stated clearly in the original Statement of Claim. In Kam's 3rd affidavit of 21 May 2018 which was filed in response to the Defendants' striking-out application in SUM 2085/2018, Kam had stated that "(t)he Work was outside of and separate to the terms of the [TRSAs]".[57] Somewhat confoundingly, as recounted in the Defendants' written submissions,[58] the Plaintiff's counsel took a series of differing positions on the issue during the hearing before the AR of SUM 2085/2018. It was only towards the tail-end of the hearing that counsel confirmed to the AR that the Plaintiff was "now saying" that in respect of the Three Companies, the Work fell within the "*Other services offered*" clause of the TRSAs; and that in respect of Dr Heng, the Work was undertaken pursuant to "an oral request".

72 At the first hearing of RA 160/2018 on 25 July 2018, the Plaintiff's counsel reiterated to me that his instructions from the Plaintiff were that the Work done for the Three Companies was pursuant to the "*Other services offered*" clause of the TRSAs whereas in relation to Dr Heng, there was a separate oral agreement.[59] Regrettably, when counsel filed the Statement of Claim (Amendment No. 3) on behalf of the Plaintiff on 1 August 2018, it included a pleading in the alternative of an oral agreement between the Plaintiff and the Three Companies.

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[57] [18] of Kam's 3rd affidavit at Tab 3 BOCP.

[58] [73] to [79] of the Defendants' written submissions of 23 July 2018.

[59] p 12 of the Notes of Evidence from 25 July 2018, lines 4 to 25.

73 I eventually ordered the striking-out of this alternative pleading of an oral agreement between the Plaintiff and the Three Companies, but I declined to strike out the entire Statement of Claim on the ground of the Plaintiff's alleged approbation and reprobation of the TRSAs. My reasons were as follows. It was clear to me, from a review of the notes of the hearing before the AR and from the various hearings before me, that much of the "flip-flopping" that had apparently occurred on the Plaintiff's part vis-à-vis the TRSAs was the result of what I can only describe as bizarre conduct on the part of its counsel. For one, as the Defendants' counsel pointed out, it appeared from the remarks made by the Plaintiff's counsel to the AR that he had only perused the terms of the TRSA for the first time during the lunch break on the day of the hearing on 4 June 2018. Indeed, just before the adjournment for the lunch break, he had informed the AR that "the Work falls outside the scope of the TRSA"[60] – but upon the hearing resuming after lunch, he had stated:[61]

> Looked through the TRSA. "Other Services offered" clause. We are now saying that the Work falls within the scope of the TRSA such that our client is entitled to rely on the terms of the TRSA.

74 That counsel should have informed the AR that he had only looked through the TRSA and noted the "Other services offered" clause on the day of the hearing was bizarre when he claimed – in the hearing before me on 25 July 2018 – that the Plaintiff's instructions to him "from the start" had been that the Work done for the Three Companies was under the "*Other services offered*" clause of the TRSAs whereas there was a separate oral agreement with Dr Heng, concluded in the telephone conversation of 5 January 2012.[62] I should add that

[60] p 13 of the Notes of Evidence from 6 June 2018, lines 4 to 7.

[61] p 14 of the Notes of Evidence from 6 June 2018, lines 2 to 4.

[62] p 12 of the Notes of Evidence from 25 July 2018, lines 4 to 25.

there *was* some evidence which suggested that this had in fact been the Plaintiff's position at the outset. On 17 November 2017, in responding to Dr Heng's letter of 23 October 2017 requesting *inter alia* the "signed terms of engagement relating to the [2017] Invoices", the Plaintiff had referred to the TRSAs in respect the Three Companies and expressly cited the "*Other services offered*" clause.[63] On 29 December 2017, counsel's own firm had written to Dr Heng in his personal capacity regarding the sum of $30,000 claimed in the 2017 Invoice addressed to him, and had referred in this letter to the Plaintiff being "engaged" by Dr Heng "(i)n or around 5 January 2012" to do the Work.[64] I should also add that at the hearing on 10 August 2018, counsel reiterated that his instructions on the Plaintiff's reliance on the "*Other services offered*" clause of the TRSAs vis-à-vis the Three Companies and on an oral agreement of 5 January 2012 vis-à-vis Dr Heng remained – but indicated that he had taken it upon himself to consider "whether, based on [the] phone conversation [of 5 January 2012], an alternative pleading [of an oral agreement] could be made vis-à-vis the Three Companies.[65] Counsel stated at one point that having had the "benefit of [the] Court's directions" at the hearing on 25 July 2018, he had "[spoken] to [the] Plaintiffs again to see how [the] pleadings could be improved"[66] – but he stopped short of saying that the Plaintiff had given him fresh instructions on an alternative case of an oral agreement with the Three Companies. In fact, he repeated more than once that the "Plaintiff's instructions to [him] *all along* have been, there was a phone conversation with 1st Defendant, and following from that conversation, work was carried out. 2nd to 4th

[63] p 100 to 101 of Dr Heng's 1st affidavit.

[64] p 116 to 117 of Dr Heng's 1st affidavit.

[65] p 8 of the Notes of Evidence from 10 August 2018, line 1, to p 10, line 22.

[66] p 10 of the Notes of Evidence from 10 August 2018, lines 1 to 3.

Defendants [the Three Companies] had existing TRSA with Plaintiff, and the requirement for work to be done for them was pursuant to the "Other services offered" clause".[67]

75 Having regard to the above circumstances, I decided that this was not a case where *the Plaintiff*'s conduct had so offended the doctrine of approbation and reprobation that it warranted the striking-out of the entire claim.

On the Defendants' argument that the entire Statement of Claim should be struck out because the Plaintiff is relying on "fabricated" time-sheets

76 The Defendants have also argued that even putting aside the Plaintiff's alleged approbation and reprobation of the TRSAs, the Statement of Claim should be struck out in entirety because the time-sheets relied on in support of the 2017 Invoices are "blatantly fabricated *ex post*" and demonstrate that the Plaintiff's claim is "bogus".[68] In this connection, the Defendants have made a number of submissions which I summarise and address as follows.

77 The Defendants have pointed out that the Plaintiff's 2015 Invoices were in respect of work done between 13 March 2015 and 1 December 2015, whereas the 2016 Invoices purported to bill for work done in an earlier period from 25 April 2012 and 23 February 2015. The Defendants argued that it is "commercially illogical" for the Plaintiff to bill for work done "in such a haphazard manner".[69] With respect, however, whilst it might be somewhat "haphazard" practice, to call it "commercially illogical" – or "incredible"[70] –

[67] p 10 of the Notes of Evidence from 10 August 2018, at lines 3 to 8.

[68] [91] of the Defendant's written submissions of 23 July 2018.

[69] [101] of the Defendant's written submissions of 23 July 2018.

[70] [98] of the Defendant's written submissions of 23 July 2018.

seemed to me to be overstating the case. Certainly I did not find this particular practice sinister in itself, or necessarily indicative of fraud.

78 The Defendants also reprised the argument that the Fees Clause of the TRSAs required work to be billed "sequentially" before the Plaintiff's cause of action to sue for its fees could arise.[71] I have earlier explained at [58] to [64] why I did not accept this argument. As Lambert J held in *Ice Architects* at [27], "whether the cause of action accrues on completion of the work, or at some other time, is a matter of construction of the relevant contractual term or other statutory provision". In the present case, I did not find that there were "clear words" in the Fees Clause which made sequential billing a strict "procedural bar" to the accrual of the Plaintiff's cause of action to sue for fees. I also did not find that the Fees Clause in this case was "akin" to the provisions considered by the High Court in *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR481 ("***Libra Building***").[72]

79 In *Libra Building*, the High Court considered the objective construction of s 10(1) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)("***the Act***") and clause 21(a) of the Contract between the parties before concluding that the language in these provisions prohibited the defendant sub-contractor from serving more than one payment claim in the same payment claim period even if they covered different reference periods (see [24] – [34], [70] – [72], [80] – [87] of *Libra Building*). The second of two payment claims served by the defendant within the month of December 2014 was accordingly held to be invalid. In so deciding, Kannan Ramesh JC (as he

[71] [102] of the Defendant's written submissions of 23 July 2018.

[72] Tab 15 DBOA.

then was) took pains to explain that given the nature of the construction industry – in particular, the need to facilitate cash flow versus the need to prevent abuse – there were good reasons why the relevant provisions should be understood as having "firmly shut" the door on the service of multiple payment claims in the same payment period. I was not persuaded that in the present case there existed a similar framework of considerations which would support the construction of the Fees Clause argued for by the Defendants.

80 The Defendants have also challenged the figures stated in the Schedule annexed to the Plaintiff's Statement of Claim.[73] They have argued that there are differences between the figures stated in this Schedule and the figures in the time-sheets which were forwarded *via* the Plaintiff's letter of 17 November 2017. They have also argued that the 2017 Invoices covers work already billed for and paid for; further, that in any event, the figures stated in the Schedule do not make sense because they purport to record the time spent on the Work by Kam and his colleague and their hourly rates, which "completely contradicts" the figures stated in the 2017 Invoices.

81 It is true that some differences exist between the Schedule annexed to the Statement of Claim (Amendment No. 3) and the time-sheets enclosed in the Plaintiff's letter of 17 November 2017. The time-sheets forwarded on 17 November 2017 purported to set out the work done – and the corresponding number of hours spent on the work by Kam and his colleague – for the period between 25 April 2012 and 1 December 2015. The Schedule, on the other hand, purports to particularise the work done - and the corresponding number of hours spent on the work by Kam and his colleague – for a shorter period between 25 April 2012 and 23 February 2015.

[73] [85] to [91] of the Defendants' written submissions of 23 July 2018.

82 It would appear that in preparing the Schedule, the Plaintiff removed the last eight items which previously appeared in the time-sheets of 17 November 2017. These were the eight items of work listed for the period between 13 March 2015 and 1 December 2015,[74] which were stated to relate to correspondence with the Income Tax Board of Review, the preparation of a Notice of Appeal under section 79(1) of the Income Tax Act, discussions with Justicius Law Corporation on a potential application for judicial review and drafting of various documents in relation to the potential judicial review. The description of these eight items approximates to the description of the work billed for in the 2015 Invoices. It will be recalled that the 2015 Invoices had stated the work billed for as being a "professional fee for attendance to Board of Review" on behalf of the four Defendants (in respect of Invoice No. M00415), and a "professional fee for attendance to Judicial Review of Appeal for Notice of Assessment" on behalf of the four Defendants (in respect of Invoice No. M00458).[75] The removal of these eight items from the Schedule would seem, therefore, to address one of the Defendants' complaints – namely, that at least part of the work the Plaintiff was claiming payment for in this suit had already been billed in the 2015 Invoices and paid.

83 The Defendants' other major complaint about the Schedule was that the figures stated therein for the time spent by Kam and his colleague, and their hourly charge-out rates, could not be reconciled with the figures stated in the 2017 Invoices. In gist, the Schedule sets out the number of hours spent by Kam and his colleague on various major items of work done in the period between 25 April 2012 and 23 February 2015, as well as their hourly charge-out rates,

[74] p 102 to 103 of Dr Heng's 1st affidavit.

[75] p 83 to 84 of Dr Heng's 1st affidavit.

before applying a discount to Kam's hourly rate so as to arrive at the concluding figures for the total fees claimed against each Defendant: $30,000 in respect of Dr Heng; $105,000 in respect of KMHWCPL; $90,000 in respect of KMHCSPL; and $60,000 in respect of TMaACPL. It should be noted that in setting out in the Schedule the number of hours spent by Kam and his colleague on major items of work, the Plaintiff has not given a breakdown of *the number of hours spent per each individual Defendant*. It should also be noted that in respect of each Defendant, work was – according to the Plaintiff – done in respect of a different number of Years of Assessment ("YAs"): two YAs for Dr Heng (YA 2003 and YA 2004); seven YAs for KMHWCPL (YA 2005 to YA 2011); six YAs for KMHCSPL (YA 2003 to YA 2008); and four YAs for TMaACPL (YAs 2008 to 2011). In the Schedule, the Plaintiff does not include a breakdown of *the number of hours spent in respect of each YA*.

84 In the 2017 Invoices, the same figures for total fees were stated in respect of each Defendant[76] ($30,000 for Dr Heng; $105,000 for KMHWCPL; $90,000 for KMHCSPL; and $60,000 for TMaACPL): what the Plaintiff then did was to divide the total fee figure for each Defendant by the number of YAs worked on for that Defendant, which resulted in what the Defendants' counsel has termed a "flat fee" of $15,000 per each YA per each Defendant.

85 It is true that the manner in which the number of hours worked and the hourly charge-out rates has been set out in the Schedule does not explain the apparent apportionment of a flat rate of $15,000 per each YA per each Defendant. The question, though, is whether the apparent inconsistencies in the Plaintiff's figures give rise – as the Defendants claim – to a clear inference of fraud warranting the striking-out of the claim in entirety. On balance, I did not

[76] p 89 to 92 of Dr Heng's 1st affidavit.

think that there was such clear evidence of fraud in this case, or that this was a plain and obvious case for striking-out. As I alluded to earlier, the Defendants in this case appear to concede that Kam and the Plaintiff *did* provide some advice and that they *did* carry out some work on behalf of all four Defendants in relation to the issue of a potential challenge to IRAS' decision. Nor – on the evidence adduced – is it clear that all of the work done was subsumed under the 2015 Invoices which were paid via KMHWCPL's cheques. Both the Defence and Counterclaim and the Defence and Counterclaim (Amendment No. 1) refer, for example, to advice given by Kam and letters drafted by Kam and/or the Plaintiff BMI Tax in April 2012, May 2013, and August 2013 – that is, in the period of time preceding the correspondence with the Income Tax Board of Review and the discussions regarding a potential judicial review application. It may be that the *total* fees claimed by the Plaintiff cannot at the end of the day be justified, whether on the basis of the amount of time spent, or on the amount of responsibility and skill involved – but that should be a matter left to be determined through the full process of trial. In this connection, I would add that I did not find the Defendants' reliance on several remarks made by Kam[77] to be helpful, as these remarks appeared to me to be either neutral in effect or ambiguous at best. Thus, for example, Kam's remark at his meeting with Dr Heng and the latter's son on 3 December 2016 – "*I think I deserve something*" – appeared to me to be at best (or I should say, at worst) a display of truculence by one of the parties to a broken business relationship: I certainly did not see it as evidence that Kam was "himself unsure of [the Plaintiff's] right to the sums claimed in the 22 September 2017 Matrico invoices".[78]

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[77] [93] to [97] of the Defendants' written submissions of 23 July 2018.

[78] [97] of the Defendants' written submissions of 23 July 2018.

86 On the material before me, I did not find that this was an obviously sustainable case where it would be "impossible, not just improbable, for the claim to succeed" (Foo Chee Hock (gen ed), *Singapore Civil Procedure 2018* (Sweet & Maxwell, 2018) at para 18/19/6).

On the Defendants' argument that the Plaintiff's claim constitutes an abuse of process

87 Next, the Defendants argued that the Plaintiff's claim constitutes an abuse of process: the claim was said to be "actuated by malice"; and vis-à-vis the 1st Defendant Dr Heng, it has been argued that the "sole reason for naming [him] as a defendant in this action is to use [his] alleged personal liability as a pressure point".[79]

88 The Defendants contended that the "timing" of the 2016 Invoices was "revealing":[80] they were issued one week after the receipt by Kam's colleague of the 30 May 2015 email from HBS which made it clear that the Plaintiff was to be replaced by HBS, and so clearly Kam must have been "unhappy about this, and wanted to make it as difficult as possible for the Defendants to replace him and uncover the full extent of his fraud".

89 It would appear that by "fraud", the Defendants were referring to their allegation that Kam had advised Dr Heng to set up his clinics in such a way as to amount to an illegal tax evasion scheme. In this connection, whilst the Defendants were indubitably subjected to investigation and punitive action by IRAS, there was no evidence before me of IRAS' actual findings, and certainly

[79] [110] of the Defendants' written submissions of 23 July 2018.

[80] [106] of the Defendants' written submissions of 23 July 2018.

no evidence on which I could infer at this stage that Kam was responsible for advising the Defendants to act illegally.

90 As for the timing of the 2016 Invoices, the evidence of the contemporaneous text messages between parties indicated that Kam had in fact been informed by Vivian Heng *on 16 May 2016* of plans for another accounting firm to take over the accounts of the clinics, and that he had not appeared unduly enraged or distraught at the prospect of this coming to pass. His text messages to Dr Heng on 16 May 2016[81] were mainly concerned with follow-up action in respect of feedback from Vivian about "some issues and fines in gst filing" which he said the Plaintiff had not been aware of, and his text message the following day actually spoke quite matter-of-factly about handing over:

> 16 May 2016
>
> Vivian just call to say that there are some issues and fines in gst filing, and says that the accounts to be pass to another accountant to do. Those fines, which we are not aware, were not filed by us. And there were no fines since we start doing in 1 April 2013.
>
> Anyway, had instructed to follow up accordingly until accounts are due for filing on Nov 2016, to avoid any late filings and fines. Call me to discuss when ready.
>
> 17 May 2016
>
> Hi doc, spoken to Vivian, your son's friend wants to do up the accounts for your clinic, need to update the status before handling [sic] over as there are still issues and filings to fill up and Vivian is not sure as well. Just to make sure everything is ok. Call me when possible.

[81] p 67 of Kam's 3rd affidavit.

91 The above text messages appear to have gone unanswered by Dr Heng. Nevertheless, even on 30 May 2016 and in the several months thereafter, Kam's text messages to Dr Heng (reproduced above) did not disclose any signs of rage or distress despite his continuing to receive no reply from the latter. I would add that having seen Kam's exchange of text messages with Dr Heng on 30 August 2016,[82] it appeared to me the evidence did indicate that he had genuinely believed in May 2016 that HBS would only be taking over the "accounting function" in relation to the clinics (as per HBS' email), and had only been informed by Vivian on *30 August 2016* that HBS would "also take over *tax* and corp sec work from next year". This would appear to militate against the Defendants' suggestion that by 30 May 2016, Kam had started stewing about the possibility of the Defendants "uncovering" his "fraudulent" *tax* advice and had issued the 2016 Invoices on 7 June 2016 in a malicious attempt to "make it as difficult as possible for [them] to replace him".

92 By the second half of 2017, the tone of Kam's text messages to Vivian and Dr Heng had become noticeably more strident. On the other hand, considering that Dr Heng had apparently failed to answer most of Kam's text messages and also refrained from responding to queries about the payment of the 2016 Invoices, it was perhaps unsurprising – if not at all commendable – that Kam's stated concern about the need to "sort out the tax case billing" and "move forward" had boiled over into ire which manifested itself at times in pugnacious behaviour (such as the dispatch of debt collection agents to the Defendants' clinic premises). This did not necessarily warrant the inference, however, that the 2017 Invoices and the present suit represented a bogus claim

[82] p 68 of Kam's 3rd affidavit.

launched solely to pressure the Defendants into paying the Plaintiff monies it was not entitled to.

93 In particular, vis-à-vis Dr Heng, I did not find the evidence adequate to support an inference that he was named as a defendant solely as a *mala fide* tactic to force capitulation by all the Defendants. *Inter alia*, I would reiterate my observation that the Defendants did not appear to deny that the Plaintiff had given advice and done work in relation to the potential challenge to IRAS; and that not all of this work was covered in the 2015 Invoices (see [85] above). I also noted that whilst the Defendants argued before me that it was unprecedented and highly irregular for an invoice to be addressed to Dr Heng *personally* in June 2016,[83] there was no evidence of any queries or protests by Dr Heng – and this despite a number of chasers from Kam regarding payment of the 2016 Invoices. It may well be that Dr Heng has a reasonable explanation for these aspects of his behaviour. My point is, the determination of the credibility of Kam's and Dr Heng's opposing narratives should lie with the trial judge: on the material before me, there was simply insufficient evidence at this interlocutory stage to find the Plaintiff's claim *mala fide* and/or an abuse of process.

On the Defendants' argument that the Plaintiff's pleading of "alternative statements of facts" should not be permitted

94 As a final point, I address the Defendants' argument that the Plaintiff should not be permitted to plead "alternative statements of facts". This appeared to be an argument raised chiefly in respect of the pleading in [11] of the

[83] [113] of the Defendants' written submissions of 23 July 2018.

Statement of Claim that it "was *an express, or alternatively, an implied term* of the Oral Agreement that the 1st Defendant [*i.e.* Dr Heng] would pay to the Plaintiff a reasonable sum for the 1st Defendant's Work and that such work would be computed on the basis of the responsibility and skill involved and time spent by the Plaintiff and/or its representatives".[84] In support of their arguments on this point, the Defendants cited *inter alia* the following passage from *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 ("***Ng Chee Weng***"):[85]

> While the pleader should be free to plead inconsistent causes of action in the alternative, the inconsistency cannot – particularly in relation to the facts pleaded – offend common sense. One obvious example of an inconsistency that will offend common sense is when the pleader has actual knowledge of which alternative is true…

95 *Pollmann, Christian Joachim v Ye Xianrong* [2017] SGHC 229 ("***Pollman***") is an example of a case where a party was held to have put forward inconsistent alternative cases that offended common sense. In *Pollman*, the defendant (the driver of the accident vehicle) admitted he had been negligent in colliding into the plaintiff's bicycle but asserted that the plaintiff was partly to blame for the collision. In so asserting, he put forward two alternative cases. The first was that the plaintiff had been travelling at or near the double yellow lines, out of the defendant's way, but had suddenly swerved to the right and into the defendant's path in the split second before impact. The second was that the plaintiff had failed to keep to the left of the lane and had instead been riding near the middle of the lane, thereby obstructing the defendant's path and riding in a manner which contravened rule 8 of the Road Traffic (Bicycles) Rules (Cap

[84] [11] of the Statement of Claim (Amendment No. 4) and [11] of the Statement of Claim (Amendment No. 5).

[85] Tab 10 DSBOA, at [37].

276, R 3, 1990 Rev Ed). Not surprisingly, the trial judge held that where the plaintiff had been cycling before the impact was a fact within the defendant's own knowledge; and that accordingly these alternative cases were inconsistent and offended common sense (see [91] – [92] of *Pollman*).

96 Conversely, in *Higgins*,[86] the trial judge rejected the defendants' submission that the plaintiff's alternative case of a claim in restitution was inconsistent with his pleaded claim in contract. Referring to *Ng Chee Weng*, the trial judge stated at [53]:

> It is settled law that parties may plead inconsistent causes of action in the alternative as long as the inconsistency does not, on the facts, offend common sense… I see no inconsistency of this nature here. Mr Higgins' [the plaintiff's] case is that in the event that the court finds that there is no contract, he claims a sum in restitution. There is no fatal inconsistency here…

97 In the present case, the Plaintiff's case is that in the event the court does not find that the remuneration terms it has pleaded formed an express term of the alleged oral agreement with Dr Heng, it claims in the alternative an implied term to the same effect. I did not find these pleadings to be fatally inconsistent and/or to offend common sense. This was not a case of a party – like the defendant in *Pollmann* – deliberately putting forward two inconsistent versions of the material facts when the truth or otherwise of the alternative sets of facts was well within his own knowledge.

98 The Defendants have further argued that the particulars pleaded by the Plaintiff in [11] of the Statement of Claim fail to "support the implication of a term in that [the Plaintiff] has not pleaded: (a) how there is a gap in the alleged

[86] Tab 9 DSBOA.

contracts between [the Plaintiff] and the Defendants; (b) how the term is necessary for business efficacy; and (c) facts which establish how the "officious bystander" test is fulfilled": *Sembcorp Marine Ltd v PPL Holdings Pte and anor* [2013] 4 SLR 193 ("***Sembcorp Marine***")[87] at [101]. The particulars stated in [11] were as follows:

> Particulars
>
> (1) The 1st Defendant was and is, at all material times, the sole director of the 2nd to 4th Defendants.
>
> (2) The 1st Defendant was, at all material times, aware that pursuant to the Tax Retainer Service Agreements executed by him as the sole director of the 2nd to 4th Defendants, the amount of remuneration due to the Plaintiff was based on the degree of responsibility and skill involved and time spent by its staff and/or representatives for the work carried out by the Plaintiff.

99 From the CA's judgement in *Sembcorp Marine* at [109] – [128],[88] it is clear that whilst a party has to particularise in its pleadings the material facts it proposes to rely on in arguing for the implication of a contractual term, much of the detailed explanation as to how the proposed implied term addresses a gap in the existing contract, how it is "necessary for business efficacy", and how the "officious bystander" test is satisfied is a matter of submission. For present purposes, I did not find that the particulars pleaded were so inadequate and/or inapt as to provide no basis for the pleading of the implied term.

Conclusion

100 The various iterations of the Plaintiff's Statement of Claim in this case have not been well-drafted; and regrettably, as I have indicated, a major cause

[87] Tab 12 DSBOA.

[88] Tab 12 DSBOA.

appears to me to have been the manner in which the case was conducted by the Plaintiff's counsel. I have struck out what appeared to me to be those aspects of the claim which were plainly and obviously unsustainable, but for the reasons I have explained, I did not agree with the Defendants that this was a case where the entire claim must be struck out. Nor did I agree that the amendments which have been allowed would be "unfair" and "prejudicial" to the Defendants: *EA Apartments Pte Ltd v Tan Bek and others* [2017] 3 SLR 559 ("***EA Apartments***").[89] Conversely, given the evidence available, it would have been unfair to the Plaintiff to accept wholesale at this interlocutory stage the Defendants' allegations of fraud, fabrication and malice on the Plaintiff's part.

Mavis Chionh Sze Chyi
Judicial Commissioner

Choo Ching Yeow Collin and Nigel Hoe (Tan Peng Chin LLC) for the plaintiff;
Calvin Liang (Essex Courts Chambers Duxton) & Eugene Jedidah Low Yeow Chin, Aditi Ravi and Sean Zhen Wei Paul (Tan Kok Quan Partnership) for the first defendant, second, third and fourth defendants.

[89] Tab 5 DBOA.