Compact Metal Industries Ltd *v* PPG Industries (Singapore) Pte Ltd [2012] SGHC 91

Case Number	: Suit No 442 of 2005 (Registrar's Appeal Nos 43 and 49 of 2010)
Decision Date	: 30 April 2012
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Michael Por (Michael Por Law Corporation) for the plaintiff; Nicholas Narayanan (Nicholas & Tan Partnership LLP) for the defendant
Parties	: Compact Metal Industries Ltd — PPG Industries (Singapore) Pte Ltd

Contracts – Building contracts

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 125 of 2011 was allowed in part by the Court of Appeal on 14 March 2013. See [2013] SGCA 23.]

30 April 2012

Lai Siu Chiu J:

1 This was a construction dispute that was tried in two tranches in 2006 after which the court awarded interlocutory judgment in favour of Compact Metal Industries Ltd ("the plaintiff") and ordered damages to be assessed against PPG Industries (Singapore) Pte Ltd ("the defendant") in the plaintiff's favour. Damages were subsequently assessed by an Assistant Registrar ("the AR") for the plaintiff's claim. The parties were subcontractors in a project of which Taisei Corporation ('Taisei") was the main contractor.

2 The defendant appealed in Registrar's Appeal No 43 of 2010 ("the defendant's appeal") to set aside and/or reverse various awards of damages made by the AR while the plaintiff cross-appealed in Registrar's Appeal No 49 of 2010 ("the plaintiff's appeal") against the AR's decision in refusing to order that the defendant indemnify the plaintiff against any liquidated damages that may be payable by the plaintiff to Taisei.

3 The two Appeals came up for hearing before me. At their conclusion, I dismissed the defendant's appeal but allowed the plaintiff's appeal. I held that the plaintiff was entitled to be reimbursed by the defendant for any liquidated damages recovered by Taisei from the plaintiff. As the defendant has appealed against the whole of my decision (in Civil Appeal No 125 of 2011), I shall now set out my reasons.

The facts

4 The parties were involved in the refurbishment of the Monetary Authority of Singapore ("MAS") Building in 2004 ("the project"). As stated earlier, the project's main contractor was Taisei. A company known as Facade Master Pte Ltd ("Facade") was appointed as the nominated subcontractor for the supply and installation of the external cladding. Facade is a subsidiary of the plaintiff. Facade appointed the plaintiff to paint the aluminium panels to be used in the external cladding. The plaintiff in turn engaged another subsidiary Compact Metal Industries Sdn Bhd ("Compact Malaysia") to carry out the painting work. Facade also contracted with yet another subsidiary of the plaintiff called

Aluform Marketing Singapore Pte Ltd to fabricate the facade fins. It further contracted with Rotol Singapore Pte Ltd ("Rotol") to do the coating works for the facade fins. Finally, Facade subcontracted out to Citiwall Installer Pte Ltd ("Citiwall") the external cladding works *viz* installation of the panels and facade fins.

5 The paint for the aluminium panels was to be supplied by the defendant. However, th**e** paint was not an ordinary paint. It was a customised paint that was featured in the defendant's standard colour charts. It emerged during the course of the trial that the composition of the paint that was initially supplied was unique and had not previously been used. The defendant would only sell such paints to those it had approved as applicators. Compact Malaysia had been such an approved applicator.

6 Considerable difficulties were encountered by the defendant in achieving an acceptable and consistent finish with the paint that it initially supplied to the plaintiff. That paint was known as 'Redwood Metallic' ("the original paint"). This resulted in the parties seeking the approval of the project's architects (RSP Architects, Planners & Engineers (Pte) Ltd) ("RSP") to change the formulation of the paint, which approval was secured. Even then, it was only after many months of trial, error and adjustment that **s**atisfactory quality of the paint was achieved. The plaintiff's first attempt to replace the original paint with 'Redwood Metallic II' ("the second paint") during the period October to December 2004 was similarly rejected. The paint that was eventually accepted and used for the panels was called 'Redwood Metallic III' ("the new paint"). Not surprisingly, due to the paint problem, the original completion date of 13 October 2004 was not met. The project was only completed 9 months or 273 days later on 13 July 2005.

7 The central question for the trial judge was, who should be responsible for the consequential loss and damages that resulted from the delayed completion of the project due to the difficulties involved in achieving an acceptable tonality for the paint applied to the panels?

8 After a 13 days' trial involving seven witnesses including an expert, the trial judge held that the original paint supplied by the defendant was not in accordance with the conditions of the sale contract between the parties and that the plaintiff was entitled to reject the same and treat the contract as discharged. However, it was open to the plaintiff to affirm the contract subject to the defendant remedying the breach in an acceptable manner. In either case, the plaintiff was entitled to damages for the defendant's breach of contract.

9 Accordingly, the trial judge awarded interlocutory judgment in favour of the plaintiff and costs with damages payable to the plaintiff to be assessed by the Assistant Registrar ("AR").

10 Assessment of damages due to the plaintiff took place in three tranches totalling 18 days:

(a) 15 to 26 September 2008;

(b) 28 October to 30 October 2008; and

(c) 9 to 12 December 2008.

At the end of the three tranches, the AR awarded $2,842,102.08 to the plaintiff in January 2010 comprising of:

(a) Total rectification costs $1,257,836.15

(b) Damages arising from delay $1,584,265.93

However, the AR disallowed the plaintiff's claim to an indemnity from the defendant should Taisei impose liquidated damages on the plaintiff. In arriving at her awards, the AR *inter alia* accepted the report of the plaintiff's expert Keith Pickavance ("Pickavance") in preference to that of the defendant's expert Richard H K Hardcastle ("Hardcastle").

The defendant's appeal

11 The defendant's appeal was against the following heads of claim awarded to the plaintiff for rectification costs:

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(a)	Excess labour charges	171,944.40
(b)	Recoating costs:	590,614.42
	(i) of Compact Malaysia	
	(Up to end-September 2004)	153,086.08
	(Between Oct and Dec 2004)	140,967.58
	(ii) of Rotol	
	(Between Oct and Dec 2004)	186,890.74
(c)	Abortive installation/dismantling/ reinstallation costs	495,277.33
	(i) Purchase Orders Works and Additional scaffolding	113,018.84
	(ii) Labour costs claimed by Citiwall	254,800.49
	(iii) Backcharges to Citiwall for labour costs/dismantling work not done	67,000.00
(d)	Site preliminaries	1,104,662.35
(e)	Compact Malaysia's site preliminaries	207,603.00
(f)	Compact Malaysia's overtime costs	108,415.00
(g)	Backcharges levied by Taisei for additional labour supplied	227,625.58

12 Besides appealing against the damages awarded for the various items above, the defendant also appealed against the costs awarded to the plaintiff on a standard basis (to be taxed if not agreed). The defendant argued that such costs should be paid by the plaintiff instead. The only items that the defendant did not appeal against were (i) Rotol's recoating costs of $109,670.02 and (ii) the plaintiff's transport costs of $60,458.00. At the hearing before me however, counsel for the defendant informed the court he was withdrawing his client's appeal in relation to purchase orders works and additional scaffolding costs of $113,018.84 at [11(c)(i)] above. Counsel added that he left it to the court to decide on labour costs at [11(c)(ii)] above.

13 For the assessment hearing, both parties called expert witnesses whose testimonies featured

prominently in their appeals. The plaintiff's experts on the issues of delay and quantum were Pickavance and Anand Jude Anthony ("Anthony") respectively while the defendant's experts on the same issues were Thomas Anthony Harker ("Harker") and Hardcastle respectively. The factual witnesses who appeared for the plaintiff were: (i) Tan Hua Joo ("Tan") the plaintiff's executive director who is also Compact's managing-director; (ii) Ling King Hwa ("Ling"), the general manager of Compact; and (iii) Eric Lo Shek Sum ("Lo"), Facade's former general manager. I should add that both for the trial on liability as well as the assessment hearings, the plaintiff and its subsidiaries were treated by the court collectively as a single entity under the plaintiff's umbrella although (at the assessment stage) the defendant took a contrary stand.

The submissions

The defendant's appeal

14 At this juncture, it would be appropriate to look at the lengthy arguments that were presented by the parties for their respective appeals. I start first with the submissions for the defendant's appeal, which correspond chronologically with the respective heads of claims listed at [11] above.

(a) The award of $171,944.40 for excess labour charges

15 The defendant pointed out that the AR had made this award on the basis that the quantum was attributable to the need to produce newly coated panels. The defendant argued that Anthony had computed the excess labour charges as wasted costs whereas Hardcastle had considered such costs as the plaintiff's costs incurred in rectifying the rejected panels and they should not include the cost of producing the original rejected panels. Consequently, the defendant submitted that the plaintiff should not have been given this award.

16 The defendant submitted that Hardcastle's proposition was correct at law and should be accepted, citing *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd* [1992] 2 SLR(R) 834 ("*Hong Fok Realty*"). As Facade and Compact Malaysia would be paid their contractual dues for fabrication of panels and application of paint, the plaintiff should not be paid for the same items. Hardcastle had given due regard to rectification costs incurred by the plaintiff.

17 The plaintiff on the other hand submitted that the AR had accepted Anthony's assessment that 16,704.47 sq m of coated panels were delivered as of December 2004 followed by 4,788.58 sq m delivered between January and July 2005. Based on the (undisputed) labour charge of both Compact Malaysia and Rotol of $8 per sq m, the total labour cost was therefore $171,944.40 [(16,704.47 + 4,788.58 = 21,493.05 sq m x $8)]. Anthony's assessment was supported by invoices and delivery orders (which the AR had accepted) and was also based on Citiwall's progress claims. The evidence showed that there were substantial excess quantities of panels that the plaintiff had to recoat due to the defendant's original defective paint. Consequently, this item of claim was clearly within the contemplation of the parties as coming within the first limb of recovery under the seminal English case of *Hadley v Baxendale* (1854) 9 Exch 341 ("*Hadley v Baxendale*"). The plaintiff pointed out that Hardcastle in his evidence did not dispute the plaintiff's entitlement to the claim but only the quantum assessed by Anthony. The plaintiff accused Hardcastle of having been selective in looking at source documents by relying only on certain invoices and the final accounts between the plaintiff and Taisei. In so doing, Hardcastle arrived at a minimal quantity reflecting recoating works. According to the plaintiff, Hardcastle's approach was seriously flawed. The plaintiff also relied on the case cited by the defendant – *Hong Fok Realty* at [16] for its opposite contention that the plaintiff was entitled to claim all wasted expenditure relating to the abortive costs of applying the original paint.

(b) Recoating costs of $590,614.42

(b) Recoating costs of $590,014.42

(i) Compact Malaysia's recoating costs of $153,086.08

18 The defendant heavily criticised Anthony's testimony as being riddled with inconsistencies and contended his analysis was flawed while his claims were unsubstantiated and amounted to double-counting. The defendant complained that apart from 741.2 sq m (which was accepted by Hardcastle), the plaintiff had not produced any corroborative evidence to support the figure of 5,887.93 sq m as the quantity of panels that Compact Malaysia had sanded down and recoated. Hardcastle's figure for rectification costs was $16,204.65. In any case, the defendant argued that Facade and Compact Malaysia had arrived at a commercial settlement on the paint application works. The final accounts between Facade and Compact Malaysia were binding on the plaintiff and there was no claim therein by Compact Malaysia for recoating works. Compact Malaysia's unit rate of $26 per sq m was also incorrect; it should be Rotol's rate of $15.40 per sq m. The AR therefore had no evidence to arrive at the award of $153,086.08 in favour of Compact Malaysia for recoating costs.

19 The plaintiff countered the defendant's arguments by again criticising Hardcastle's reports as selectively using the final accounts of Compact Malaysia in his finding that there could only be minimal quantity of recoating works undertaken since Compact Malaysia did not claim for recoating costs. However, Hardcastle then looked at a few invoices to substantiate the small quantity of recoating works (3,153.4 sq m) he had assessed. Had Hardcastle looked at all the source documents *viz* the invoices and the endorsed delivery orders, it would have become immediately apparent to him that the quantities of recoating he had assessed could not stand. Despite his concession that those source documents were not suspicious, Hardcastle did not accept them (unlike the AR) notwithstanding his claim that he had 'processed' them to allow him to have an idea of how the application works had progressed.

20 The plaintiff raised a pertinent point – it would be pointless to deliver panels to site unless they were coated. Consequently, all panels delivered to site must have been coated. Hence, the panels delivered must reflect the total quantity of panels that were coated and delivered to site. The plaintiff also pointed out that progress claims would only reflect installed panels as opposed to coated and delivered panels. The plaintiff added that Tan (see above at [13]) had testified that recoating costs would not be found in the final accounts between Compact Malaysia and Facade because Compact Malaysia would not be claiming recoating costs from Facade. Logically, the claim would be made against the plaintiff who had supplied the original paint.

21 As for the recoating rates, the plaintiff explained that initially it was Compact Malaysia that undertook the recoating works and invoiced Facade at $26 per sq m for the work. It was only in March 2005 when Compact was occupied with coating panels with the new paint that Facade decided to subcontract the recoating of internal panels to Rotol at a lower rate of $15.40 per sq m. Anthony adopted (after verification) the actual rates charged for recoating by Compact Malaysia and Rotol and they were accepted by the AR.

(ii) Compact Malaysia's recoating costs of $140,967.58 (between Oct-Dec 2004)

22 The defendant repeated its foregoing submissions based on Hardcastle's testimony. It was argued that the AR had no definitive material to arrive at the plaintiff's claim.

23 The plaintiff explained that this was a period when there were numerous trials conducted by the defendant with the new paint to ensure it would achieve a consistent finish. The consistent finish was only achieved in mid-November 2004 through the efforts of Compact Malaysia but there were still colour issues until December 2004, due primarily to the defendant's breach of the "single batch

requirement" dealt with and accepted by the trial judge. The recoating cost of $140,967.58 (*ie*, $26 x 5,421.83) was for panels that were recoated during the trial period as the second paint was still unacceptable.

(iii) Rotol's recoating cost of $186,890.74

24 The defendant complained that Anthony in his AEIC did not explain why the defendant must bear this charge for re-fabrication and recoating of panels based on a unit price of $89 per sq m for 2,099.89 sq m. It submitted that Anthony's explanation in re-examination was wholly unconvincing. The defendant argued that the tonality issue was resolved by mid-November 2004 after which the plaintiff was able to achieve consistency in its paint application. Yet, Anthony had testified that 2,099.89 sq m of panels were sent by Compact Malaysia to Rotol for recoating. The defendant submitted that there was nothing in Anthony's evidence which supported the plaintiff's contention that those costs arose from the use of the original paint. Anthony's assessment was at best speculative and as there was no adequate evidence to support this claim, the plaintiff should only be awarded nominal damages.

25 The plaintiff pointed out that Rotol's recoating costs charged to the defendant were based on the contractual rate and that Anthony did not include subsequent recoating costs incurred by Rotol for the defendant. Accordingly, there was no basis for the defendant's complaint. The plaintiff referred to a letter dated 20 October 2004 from the plaintiff to Taisei attempting to persuade the latter to retain the internal panels coated with the original paint as dismantling those panels would cause previously installed panels to be damaged beyond repair and deprive the plaintiff of the opportunity to recoat those panels. The plaintiff's request, however, was rejected.

26 Additionally, the plaintiff pointed out that Hardcastle had confirmed seeing proof of damaged panels. As such, if the damage to the panels was attributable to the dismantling process and dismantling was necessitated by the rejection of the original paint applied to the panels, the cost of fabricating and recoating replacement panels must be borne by the defendant. Hardcastle (who, according to the plaintiff, ignored contemporaneous evidence or used them selectively when it suited his purpose) was thus in no position to challenge Anthony's findings which were based on verification of fabrication records. There were also the testimonies of Tan and Ling from Compact Malaysia in relation to the different ways in which the claims of a fabricator, a paint applicator and/or a panel installer were to be assessed.

(c) Abortive installation/dismantling/reinstallation costs of $495,277.33

(i) Purchase order works ("PO works") and additional scaffolding costs of $113,018.84

27 Relying heavily again on Hardcastle's testimony, the defendant criticised Anthony's evidence. First, Anthony had conceded that a sum of $127,481.98 should be deducted from his quantum for dismantling and reinstatement costs for fins because the sum was due to a late variation order. Anthony allegedly made the concession in response to Hardcastle's comment that no fins of significant quantities were coated until November 2004. That also meant that no coated fins were dismantled or available for erection on site until November 2004. Hardcastle's view was that the panelling works should have stopped after Taisei's notifications of 25 and 26 June 2004 of the tonality problems. Second, Taisei had emailed the plaintiff on 11 August 2004 to stop installation works pending resolution of the tonality issue. Facade had also informed Taisei on 17 September 2004 that the internal panels on the 30th floor needed replacements for which 15 weeks were required for completion.

28 The defendant submitted that Hardcastle had assessed the dismantling and reinstallation costs as $43,018.84 which was the exact same sum that Citiwall had claimed as variation works (or PO Works) in its final accounts with Facade. Hardcastle had also made a concession of $70,000 for scaffolding erected by a company called Citiwall Façade, an award to the plaintiff which the defendant did not dispute.

29 The plaintiff countered the above arguments by pointing out that the AR had accepted the final accounts of Citiwall and had allowed the sum therein of $43,018.84, a figure both Anthony and Hardcastle accepted. Since the defendant did not dispute the scaffolding cost of $70,000, the total sum came to $113,018.84 ($43,018.84 + $70,000) which was what the AR had awarded. (The defendant only seemed to realise its mistake at the hearing – that it should not have appealed against this item).

(ii) Citiwall's additional labour costs of $254,800.49

30 Once again, Anthony's assessment of this item came in for heavy criticism by the defendant. The defendant contended that Anthony's computation of this item was false as the defendant's computation (based on 15,459 sq m x $17) came to $262,803.00.

31 The plaintiff explained that the figure $254,800.49 appeared in Citiwall's final accounts as "labour claim". Hardcastle had rejected this claim as he said it was a revision of the contract rate for installation. Again, the plaintiff attributed Hardcastle's opinion to his lack of diligence in reviewing the source documents and/or his biasness.

32 The plaintiff pointed out that the PO Works mentioned at [11](c)(i) above were not exhaustive of all abortive installation works undertaken by Citiwall. Rather, they were for works carried out in September 2004 whereas Citiwall's additional labour costs were for works on the internal panels that stretched into 2005. As of March 2005, approximately 7,500 sq m of panels had been dismantled, recoated and reinstalled which quantity exceeded the figure mentioned at [11](c)(i) above. Citiwall could not be expected to do all this work for free. Hardcastle had no answer to this question and merely repeated his self-serving contention that Citiwall's additional labour costs must relate solely to a revision of the contract rate for installation from $17 per sq m to $23 per sq m even though he did not see any documentary proof of acceptance of the revised rate by Facade. Indeed, his purported reliance in this regard on Citiwall's written requests to Facade dated 28 July 2004 and 20 September 2005 was misconceived as he had not seen evidence that Facade accepted Citiwall's requests for change in rates.

33 Unlike Hardcastle, Anthony had undertaken a rigorous review of Citiwall's progress claims and cross-referenced them to his verification of quantities of coated panels delivered to site. Indeed, Anthony had arrived at the same figure ($262,803) as the defendant, based on 15,459 sq m charged at the contract rate of $17 per sq m. However, he reduced the figure to $254,800.49 as a compromise and in so doing, he had excluded the claims for installation of the contract quantities to avoid double-counting for both the original and new paints.

34 The plaintiff submitted that Hardcastle's report on quantum did not say he had examined Citiwall's progress claims as part of the due diligence process to ascertain the basis of this claim. He had merely hazarded a guess of the basis when he was unable to identify the source. Lo, Facade's general manager had testified that extensive work had to be carried out on-site due to the need to dismantle and reinstall panels as a result of the paint issue. Consequently, it was correct of the AR to allow this item of claim.

(iii) Backcharges of $67,000 against Citiwall for labour costs and dismantling work not done

35 The defendant complained that this charge should have been credited to the defendant as Anthony did in his first report. It was argued that Anthony had not given a cogent explanation why the defendant should bear this purported cost. Taisei had supplied workers to Facade when there was insufficient manpower on site. The sum of $67,000 was deducted from Facade's account for the labour supplied by Taisei. There was no reason for the same claim to be made against the defendant as it amounted to double-counting.

36 The plaintiff explained that Facade's back-charging of this sum in turn to Citiwall was not disputed by the latter. The back-charge included dismantling work not done. Anthony had assessed there was about 4,000 sq m of excess panels that were not dismantled and for which Citiwall did not make a claim. It was also not disputed that Taisei required extra labour to be deployed by Facade on site to expedite the subcontract works. Indeed, Harker, the defendant's expert on the delay issue had relied on this fact. It was not unreasonable of Facade to assist Citiwall (with its agreement) with extra manpower for installation of the panels. There was no double-counting involved as the defendant had assumed (without basis) that this item was the exact same backcharge for labour supplied by Taisei to Facade which it was not, although the figure was identical.

(d) Site preliminaries of $1,040,662.35

37 The AR had allowed $1,040,662.35 for additional site preliminaries incurred by the plaintiff as part of the delay costs incurred for late installation of panels. The defendant argued that the claim for increased preliminaries should be of the actual additional costs incurred.

38 However, the AR had accepted the computation of Anthony (using a broad brush approach) of an average running cost per day of $3,811.95 x 273 days. The cost allowed included staff costs, administrative and general expenses, financing charges, depreciation, selling and travelling expenses. Anthony had taken the preliminaries claimed of $2,794,157.66 for the entire duration of the works, divided that by the actual construction period multiplied by the number of days of delay. The defendant argued that the claim should be of the actual additional costs incurred (citing Stephen Furst, *Keating on Construction Contracts* (Sweet & Maxwell, 8th Ed, 2006) which the plaintiff ought to have known and was capable of proving. These would cover items like utilities, scaffolding, plant, small tools and site supervision. Moreover, Anthony had overlooked the fact that Facade had provided a budget of $1,802,165.00 for preliminaries as against an actual sum of $2,794,157.66. The defendant should therefore only be liable for the difference of $991,992.66 ($2,794,157.66 - $1,802,165.00).

39 The defendant disagreed with Anthony's evaluation for other reasons. It pointed out that Anthony had admitted that some items in his computation were likely to have been incurred during the original contract period rather than during the extended period – *ie*, he had used the dates when the items were paid for regardless of when the work was carried out. The defendant cited as an example the use of the gondola. A sum of $53,802.52 was incurred for gondola usage during the contract period as against $320,811.85 for the extended period. Similarly, a sum of $52,326.36 was incurred for the cost of general workers during the contract period as opposed to $380,694.55 during the extended period. The defendant added that Facade had contracted with Taisei on the basis that it would not be claiming prolongation costs in the event of delay. Consequently, Facade could not look to the defendant to recoup prolongation costs as that would be tantamount to re-writing the contract between Facade and Taisei where the former had made a bad bargain.

(i) Compact Malaysia's site preliminaries of $207,603.00

40 The defendant pointed out that Anthony had used a "weighted" approach based on the square metre of coated materials for the project and weighted that against the entire square metre coating production every month for the coating factory for all the other jobs for 2004 and 2005. Anthony had opined that the defendant was liable for $173,409 (at $500 per day) for 2004 and $34,194 for 2005 (at $278 per day x 123 days). He proceeded on the basis that all coated panels in 2004 were rejected and therefore the work was abortive. For his 2005 assessment, Anthony had relied on Pickavance's opinion that the defendant was responsible for 123 days of delay.

41 The defendant pointed out that Anthony's computation failed to take into account that Facade had applied to Taisei twice for extensions of time ("EOT") to complete the project for reasons other than the paint issue; the first EOT application was for 139 days followed by a second application for 147.5 days. Lo had admitted in cross-examination that Facade's EOT applications were still pending consideration by the architect. Consequently, the defendant argued, even if there was no issue with the paint, the project would still have been delayed for the reasons set out in Facade's EOT applications and Facade would have incurred resultant prolongation costs.

42 The defendant alleged that Anthony had confessed during cross-examination that the subcontract between Compact Malaysia and Facade had incorporated the cost of preliminaries in the unit rate of $89 per sq m for coating the panels. Similarly Rotol's unit rate of $26 per sq m for recoating the panels included the cost of preliminaries. Hence, the plaintiff was not entitled to claim preliminaries from the defendant in any event.

43 It was also argued that there was also no evidence that Compact Malaysia had incurred additional costs to cope with the paint issue. On this basis alone, the defendant submitted that the plaintiff's claim should fail.

44 The defendant conceded however that Hardcastle had recognised that the defendant should be responsible for some productivity loss by Compact Malaysia during the months July to August and November 2004 (in the sum of $46,826.60). There was also confusion on the quantities of panels that Compact Malaysia had coated and/or rectified. The parties did not dispute that internal panels approximating 7,000 sq m were recoated by Rotol but there were no records or invoices evidencing the works purportedly carried out by Compact Malaysia except for 741.2 sq m identified by Hardcastle in his AEIC. The plaintiff had failed to explain why only some and not all invoices evidencing the coating works had been produced.

45 The plaintiff on the other hand contended that Anthony's approach in his computation was entirely reasonable and hence it was accepted by the AR. The plaintiff pointed out that Anthony's average running cost per day of $3,811.95 was lower than Facade's budgeted running cost of $3,917.75 per day (based on its budgeted figure of $1,802,165).

46 In the alternative, if the court accepted Hardcastle's contention that there ought to be specific classification of items of costs as he alleged (despite not undertaking the exercise himself), one should then take into account the actual additional preliminaries incurred by Facade as against the budgeted sum of $1,802,165. This would be $991,992.66 using the defendant's figure. The difference between the award ($1,040,662.35) and $991,992.66 was not large – a sum of $48,669.69.

47 However, the plaintiff contended, as Hardcastle did not verify from the source documents the basis and/or accuracy of Anthony's assessment, he was in no position to challenge Anthony's figures. That being the case, the AR had to accept Anthony's and reject Hardcastle's assessment. The plaintiff contended that Hardcastle's sweeping challenge on approach was baseless. Hardcastle himself had admitted during cross-examination that Anthony's weighted approach was a fair basis.

Anthony had only taken into account those portions of Compact Malaysia's preliminaries that could logically be attributable to the project based on overall output. Moreover, Anthony had only allowed preliminaries for the 273 days of delay the plaintiff would have to bear in completing the project.

48 The plaintiff submitted it was an irrelevant consideration whether Facade would have been entitled to claim prolongation costs from Taisei. There was no breach on the part of Taisei. Similarly, the fact that Facade may have entered into a bad bargain was also irrelevant. The plaintiff confirmed that no EOT had been granted to-date to the plaintiff notwithstanding that Taisei may have been granted EOT by the employer. It was the plaintiff's case based on Pickavance's evidence (which the AR accepted) that it was the defendant's breaches which had caused critical delay to completion.

49 The plaintiff agreed that Facade's rate of $89 per sq m for fabricating and coating the panels may have included the cost of preliminaries but this was not the case for Rotol's rate of $26 per sq m for recoating. It pointed out that essentially all the coating works carried out in 2004 were abortive since an acceptable new paint was only applied from January 2005 onwards. Consequently, the time taken for the abortive works could have been utilised for other projects for profit where the cost of preliminaries incurred could have been recovered. As a result of the abortive works, Compact Malaysia was effectively deprived of recovering the cost of preliminaries for the project in 2004. Accordingly, the defendant ought to bear the costs mentioned.

50 The plaintiff explained that the delay of 123 days determined by Pickavance was due to the switch from double-sided to single-sided spraying of the panels. This resulted in a longer time being required for the coating works which again deprived Compact Malaysia of recovering the cost of preliminaries from such prolonged disruption period when the same could have been recovered by Compact Malaysia undertaking other projects. The AR had accepted the evidence on single-sided spraying. The defendant should therefore bear the cost of delay arising therefrom.

51 The plaintiff noted that Hardcastle had allowed for loss of productivity in the sum of $43,826.60. In making his assessment, Hardcastle had adopted the same weighted approach as Anthony and had relied on the actual costs Anthony used in his assessment. The plaintiff submitted that this must mean that Hardcastle had endorsed Anthony's approach.

52 The plaintiff submitted that accepting Anthony's approach did not amount to double counting/recovery. Anthony had not included any cost of preliminaries after the new paint was accepted in 2005 and applied to panels, as the cost of preliminaries would then be recovered from Facade in fabrication and coating works. Consequently, no deductions needed to be made as contended by Hardcastle.

(ii) Compact Malaysia's overtime costs of $108,415.00

53 The defendant contended that the claim for overtime would overlap with the plaintiff's claim for rectification costs. It noted that although Compact Malaysia did not fabricate or coat any panels in July and August 2004, the plaintiff had paid overtime costs of RM35,110 and RM28,868 respectively and sought to recover those costs from the defendant.

54 The plaintiff explained that the overtime charges were again computed by Anthony using the weighted approach and based on actual overtime payments (even though according to the testimony of Ling, the time and effort taken up by the paint issue would appear to indicate Anthony's assessment was lower than actual time spent). Consequently, Anthony's assessment which was fair and reasonable was accepted by the AR for the award of $108,415.00.

55 The plaintiff gave the following breakdown for the overtime figure:

2004: $83,189.00

2005: $25,266.00

$108,415.00

As for the defendant's complaint that overtime was charged when no fabrication and coating works seemed to have been done in July and August 2004, the plaintiff explained that Anthony had used the labour claims presented by the subcontractor Shuang Lee for fabrication works while he computed coating charges based on delivery notes to site. Panels continued to be delivered to site in July and August 2004 for installation even if fabrication stopped on account of the paint problem.

56 The plaintiff submitted that Hardcastle's comments should be disregarded since he had admitted that he was unaware that there was supporting documentation provided by the plaintiff. Hardcastle clearly did not verify Anthony's figures or the quantum, his excuse being Harker had found that the defendant was not in critical delay and hence verification by him was not necessary. Hardcastle then contradicted himself by saying that if verification was required, he would need more information.

(iii) Taisei's backcharges for labour supplied of $227,625.58

57 The defendant pointed out this award was reduced from the plaintiff's original claim of $352,015.30. It sought to rely on paragraph 5.2.3.6 in Anthony's first report dated 15 February 2008 ("Anthony First Report") (where Anthony had admitted he could not independently verify and determine the claims) to point out that Anthony had relied on: (i) Lo's evidence; (ii) the records of Taisei on backcharges attributable to the defendant; and (iii) Taisei's files for this claim. The defendant then highlighted that in cross-examination Lo had admitted that Taisei's backcharge records did not describe the work done. The claims also did not sit well with Citiwall's claim for additional labour of $254,800.49 and acceleration claim of $93,000 and were, according to the defendant, duplicitous. Hardcastle had observed that Taisei had complained on three occasions about the lack of manpower on site and had supplied manpower to do Citiwall's work.

58 The plaintiff justified the claim on the basis that the additional manpower that Taisei insisted Facade provide was to accelerate the sub-contract works that had been substantially delayed due to the paint problem. This was evidenced by the correspondence from Taisei in the months prior to the actual date of completion even though Citiwall had deployed more manpower than contractually contemplated. The plaintiff explained that it did not charge to the defendant backcharges imposed by Taisei prior to the discovery of the paint problem or, after 13 July 2005, which was the date of practical completion. Hence, a deduction of $124,389.72 from the plaintiff's original claim of $352,015.30. It added that the bulk of the back charges were for the critical period April to July 2005 when Facade and Citiwall were trying to expedite the installation works on site as required by Taisei. The plaintiff pointed out that in 2005, apart from the cladding works, Facade did not undertake any other major works for the project. Consequently, an adverse impact on the coating process would have a similar effect on the cladding works and in turn, on completion of the project. Accordingly, the AR was correct to award this claim to the plaintiff.

59 The plaintiff added there was no double-counting as alleged by the defendant because Anthony's assessment of the claims for additional labour and acceleration cost of Citiwall related to costs directly incurred by Citiwall for its scope of work. Taisei's backcharges on the other hand were for additional labour provided by Taisei to Facade to expedite the subcontract works. Since

Hardcastle did not even review Citiwall's progress claims, he was in no position to state that Taisei's backcharges related to workers supplied to do Citiwall's work.

(f) Costs

60 Notwithstanding that the normal rule is that costs follow the event, the defendant sought to persuade the court that the AR's award of costs in favour of the plaintiff should be set aside for the following reasons:-

(a) The plaintiff did not succeed on all its claims including those for (i) liquidated damages; (ii) Citiwall's acceleration costs; (iii) some of Taisei's back charges; (iv) Facade's claim for overheads of its head office; (v) the plaintiff's claim for overheads of its head office; and (vi) the plaintiff's purported loss of goodwill;

(b) In terms of quantum, the plaintiff's original claim was for $6,862,439.80 (which included liquidated damages of $2,184,000). The figure was revised to $6,565,544.16 at the submission stage while the AR only awarded $2,842,102.08;

(c) The defendant's experts and lawyers spent considerable time dealing with the plaintiff's unsuccessful issues which should not have been put forth in the first place; and Anthony had to revise his opinions and figures several times during the assessment proceedings;

(d) The defendant's experts, Hardcastle and Harker, had criticised the amount of duplication in the appendices attached to the reports of Anthony and Pickavance; and Harker had to discard ten arch lever files as unnecessary duplication;

(e) The assessment proceeded on the basis no EOTs were granted but this premise was untrue, based on the late discovery of the letter dated 30 November 2007 from RSP to Taisei ("the RSP letter"). In that letter, Taisei was granted 168 days EOT by RSP from 13 October 2004 to 30 March 2005.

61 The defendant submitted that had the AR known of the RSP letter, she may well have made a different costs order. The defendant sought costs against the plaintiff for the assessment hearing as well as of the two appeals.

62 The plaintiff argued that as a general rule, costs should follow the event (citing the Court of Appeal's decision in *Tullio Planeta v Maoro Andrea G* [1994] SLR(R) 501 ("*Tullio Planeta v Maoro Andrea G*") and that of the UK appellate court *In Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207). The general rule would not cease to apply simply because the successful party raised issues or allegations that failed. However, the successful party could be deprived of his costs or part thereof where he raised issues or made allegations improperly or unreasonably. Here, the plaintiff had a valid basis for the various heads of claim put forward and its experts were of the same view. The plaintiff's failure on some of its claims was primarily due to its inability to discharge the burden to prove that those losses were actually incurred and attributable to the paint problem. That did not mean that the unsuccessful claims were either frivolous or vexatious in any way or that the plaintiff acted improperly or unreasonably and indeed, the AR did not so find.

63 In regard to its claim for liquidated damages, the plaintiff had always maintained that it would be based on the actual quantum of liquidated damages it incurred. Until that could be ascertained, the plaintiff was left to seek the full potential sum on an indemnity basis.

64 The plaintiff pointed out that the bulk of the experts' evidence pertained to quantum of rectification costs on which the plaintiff fully succeeded. The plaintiff had also succeeded on the issue of delay as the AR accepted Pickavance's findings in this regard. Consequently, it could not be said that the plaintiff had not succeeded substantially on its claim as not to be entitled to full costs.

65 It was also pointed out that the AR had opined (in her second grounds of decision, see below at [69]) that this was not a "run of the mill assessment of damages hearing", the implication being that the plaintiff's conduct did not contribute to the proceedings being protracted in anyway. In conclusion, the plaintiff submitted that costs ought not to be awarded by carrying out a mathematical apportionment of the sum awarded against the sum claimed.

66 As for the defendant's complaint of duplication, the plaintiff contended this was a bare assertion and the defendant had not furnished any evidence in support. The plaintiff was not aware of any duplication. While the plaintiff's evidence was indeed voluminous, it had a duty to give discovery within certain timelines and had handed to the defendant all the documents that were reviewed by the plaintiff's experts. The defendant discarded the plaintiff's documents at its peril as was evidenced in Hardcastle's lack of due diligence found by the AR.

The plaintiff's appeal

67 Before I move on to address the plaintiff's appeal, I should point out that the same was adjourned when it first came on for hearing (together with the defendant's appeal). The adjournment was necessitated by the plaintiff's application in Summons No 1461 of 2010 ("the plaintiff's application") which I heard and granted in August 2010.

68 The plaintiff's application was for leave to adduce further evidence for the plaintiff's appeal on the issue of liquidated damages imposed by Taisei on the plaintiff. In the affidavit filed in support thereof by its counsel, Mr Por, he pointed out that although the AR accepted that the defendant was liable for 273 days of critical delay to the project, she had disallowed the plaintiff's claim to recover from the defendant liquidated damages deducted by Taisei from the plaintiff's final account.

69 Mr Por deposed that prior to the commencement of the assessment hearing, the quantum of liquidated damages to be recovered by Taisei from the plaintiff had not yet crystallised even though Taisei had clearly indicated that it would be imposing liquidated damages on the plaintiff once the quantum had been agreed with the employer. Mr Por referred to his client's exchange of correspondence with Taisei commencing in August 2008. Although the assessment hearing concluded on 12 December 2008, the last set of submissions was only filed on 20 May 2009 and the AR delivered her second grounds of decision on 27 January 2010. The plaintiff received Taisei's Statement of Final Account dated 23 July 2009 ("Taisei's Statement of Final Account") on 24 July 2009 stating that delay was for 105 days amounting to $840,000. The plaintiff accepted the figure and paid the sum; it was significantly less than the 273 days of critical delay that the AR had found the defendant was liable for. On 24 July 2009, Mr Por wrote to inform the AR of Taisei's Statement of Final Account and sought leave to adduce the said evidence so that the court could take the same into consideration when deciding the quantum of liquidated damages. The defendant's solicitors by its letter dated 11 September 2009 objected to the admission of the said evidence.

70 In her first grounds of decision on 19 January 2010, the AR did not make a specific order on Taisei's Statement of Final Account but disallowed the plaintiff's claim for the liquidated damages of $840,000 it had paid to Taisei on the basis that no liquidated damages had been imposed on the plaintiff as at the time of the assessment.

71 The plaintiff pointed out that the said additional evidence on the issue of liquidated damages was not available during the assessment hearing as Taisei's Statement of Final Account was issued seven months after the trial on liability concluded.

72 Counsel for the defendant *inter alia* argued that as the AR had not awarded liquidated damages to the plaintiff, it would not be appropriate for such a claim to morph into one for an indemnity against future liquidated damages that may be imposed. He contended that the basis of the claim was also speculative and too remote as, at the time of the assessment, no EOT had been awarded by Taisei nor had liquidated damages been imposed. The claim was not in the nature of general damages. Even if liquidated damages were imposed, it could not be ascertained if the cause was due to delay occasioned by the paint problem. Anthony had conceded that he would have to see the reasons and breakdown of the events giving rise to the delay before he could express an opinion on the liquidated damages imposed.

73 The defendant claimed that it had established during the assessment hearing that the sole reason for Taisei's withholding monies from Facade was due to Taisei's exercising its right to recover the loan (principal sum and interest) it extended to Facade under the financing arrangement made between them. It added that Anthony himself had reasoned that liquidated damages should not be backcharged to the defendant. (Anthony had set aside $2,184,000 for any liquidated damages imposed by Taisei).

74 The plaintiff countered that those extracts from the transcripts should not be taken out of context. It was not in dispute that as at the assessment stage, neither Mr Por nor the plaintiff's representatives or their experts including Anthony were aware of the position *vis-a-vis* liquidated damages as neither Taisei nor RSP had kept them updated on the situation. Consequently, Anthony could only provide an estimate of the liquidated damages that may be imposed on the plaintiff.

75 The defendant on its part relied on Hardcastle's report and referred to the points he had raised that were relevant to the issue of liquidated damages. These were:

(a) Facade's applications to Taisei for EOTs;

(b) Taisei's applications to RSP for EOTs;

(c) The final accounts between Taisei and Facade; and

(d) Evidence that the delay to the project was attributable to the defendant and not to any other factors.

76 Hardcastle went on to explain that the defendant should not be liable for liquidated damages because:-

(a) The contract between the plaintiff and the defendant did not have a liquidated damages clause;

(b) The subcontracts between Facade and Compact similarly did not have a liquidated damages clause;

(c) While the subcontract between Taisei and Facade had a liquidated damages clause which expressly stated it was not a penalty, it did not state that it was a genuine pre-estimate of damages. The liquidated damages were fixed at $8,000 per day even though the MAS Building

was occupied during the duration of the works;

(d) The scale of the liquidated damages payable was not made known to the defendant until 25 December 2004, which was six months after the paint tonality problem had arisen; and

(e) There was a duty on Facade to prosecute its case for an EOT for the benefit of parties further down the subcontract chain, who may suffer from liquidated damages that may be imposed.

The defendant argued that on principle the plaintiff could not in any event claim liquidated damages in addition to its claim for general damages as that would amount to double recovery for the same breach. As a paint supplier, the defendant should not be worse off than the other contractors/subcontractors such as Facade who had expressly contracted on the basis of being liable for liquidated damages, which contract the defendant was not privy to. The first time the defendant was aware of the existence of liquidated damages in the project was when Taisei wrote to the defendant on 25 December 2004. Even then, there was only a fleeting mention of the potential exposure of $2m. Further, liquidated damages would be too remote in this case as the same was plainly unforeseeable by the defendant. Lo had testified that there was usually no liquidated damages clause in a paint applicator's contract as such work was "so straightforward". However, I should point out that Lo's remark applies to ordinary and/or standard but not customised paints.

77 Notwithstanding the objections raised by counsel for the defendant, I granted the plaintiff's application and allowed the plaintiff to adduce additional evidence on the issue of liquidated damages in relation to:-

(a) The RSP letter dated 30 November 2007 (see above at [60(e)]);

(b) RSP's letter dated 13 March 2009 to Taisei enclosing the final completion certificate;

(c) Taisei's letter dated 23 July 2009 to the plaintiff enclosing the Statement of Final Account showing a deduction of $840,000 for liquidated damages;

(d) RSP's letter dated 28 July 2009 to Taisei constituting Payment Certificate No 25 (final) and confirming liquidated damages amounting to $840,000 had been imposed for 105 days of delay;

(e) RSP's letter dated 28 July 2009 to MAS confirming the final net sum payable to Taisei;

(f) Taisei's tax invoice dated 30 July 2009 to MAS for payment under Payment Certificate No. 25; and

(g) Bank notification to Taisei dated 21 August 2009 confirming payment by MAS to Taisei of the stipulated sum at [77(f)] above.

78 I further directed the AR to determine the following issues:-

(a) Whether liquidated damages of $840,000 imposed by MAS on Taisei were related to the defective paint *viz* the paint tonality for the external aluminium cladding panels ("Further Issue 1");

(b) Why Taisei did not grant any EOT to Facade when it had been granted 168 days EOT in the RSP letter and why Taisei did not disclose the EOT it received in its letter dated 23 July 2009 to Façade ("Further Issue 2").

79 On 11 April 2011, at its behest, I granted the following additional orders to the plaintiff:

(a) RSP was to furnish a breakdown by affidavit of the liquidated damages of $840,000 imposed on Taisei as well as a breakdown of the 168 days EOT it granted to Taisei; and

(b) Taisei was to clarify on affidavit the questions raised in Further Issues 1 and 2.

80 In compliance with the above directions, an associate director of RSP who was the project's director, one Chionh Teow Hwee ("Chionh"), filed an affidavit on 26 April 2011. Chionh deposed the contractual completion date of the project was 13 October 2004 and the project was substantially completed on 13 July 2005. As Taisei had been granted EOT of 168 days up to 30 March 2005, the actual delay amounted to 105 days for which liquidated damages were charged at $8,000 per day or $840,000 for 105 days.

81 On its part, the architectural manager Subramaniayer Narayanan ('Narayanan") of Taisei affirmed an affidavit on 28 April 2011. Narayanan deposed Taisei did not know whether the liquidated damages of $840,000 imposed by the employer were strictly related to the defective paint, as neither the employer nor RSP provided a breakdown of that figure. Neither did Taisei receive a breakdown of the EOT of 168 days it was granted.

82 Narayanan deposed that Taisei did not grant any EOT to Facade or disclose to Facade that it received EOT of 168 days in the RSP letter because of Facade's delay in the cladding works. Taisei had also written to RSP who replied on 31 January 2011 confirming that none of the 168 days of EOT granted for the project related to the delay due to the cladding tonality issue.

83 Based on the two abovementioned affidavits, another hearing took place before the AR on 8 July 2011. After considering the two affidavits, the AR accepted the plaintiff's argument that although there was no contractual provision governing the imposition of liquidated damages by the plaintiff on the defendant, the plaintiff could be compensated for such loss by way of general damages if it was a foreseeable loss flowing from the defendant's breach (applying *Hadley v Baxendale*).

84 However, although the defendant must have known of the paint tonality problem, the AR did not think that the defendant could have reasonably foreseen that the employer would impose liquidated damages on the main contractor, the extent to which such liquidated damages would be imposed and that it would ultimately be passed down to Facade and then to the plaintiff. She opined that the facts in this case were too remote to support a claim for general damages. She noted that Taisei's request for EOT included the paint tonality problem as one of the delaying events. The AR reiterated that it would have been inappropriate for her to deal with the issues of EOT and liquidated damages at the assessment hearing as these issues had not yet crystallised on 8 July 2011.

85 Consequently, the AR answered Further Issue 1 in the negative (given she had insufficient evidence to find otherwise) and on Further Issue 2, she made no finding given that Taisei had filed an affidavit stating that it did not feel obliged to pass onto Facade any EOT that it received from RSP.

86 I disagreed with the AR's views. Consequently, I allowed the plaintiff's appeal, for reasons which are set out at [112] to [117] below.

The decision

The defendant's appeal

The defendant's appeal

87 At the hearing, I had commented to counsel for the defendant, Mr Narayanan, that while he continuously criticised Pickavance's (and more so Anthony's) evidence in his submissions and argued that the testimonies of the defendant's experts (Hardcastle and Harker) were to be preferred, that was *not* the view formed by the AR who had the advantage of seeing and hearing the witnesses unlike this court. Indeed, Mr Narayanan's submissions appeared to have completely disregarded the AR's assessment of the experts' testimony.

88 It would be appropriate at this juncture to turn to the AR's grounds of decision and refer to relevant extracts therefrom of her findings.

89 At pages 4 and 5 of her findings in her first grounds of decision (dated 19 January 2010), the AR had so observed:

> **Delay, Disruption and Prolongation**
>
> I do not think it reasonable on any account to suggest that the paint problem did not cause any critical delay in the completion of the project. By all accounts, the paint problem caused great difficulty and delay in the progress of the MAS project, for which the Defendant must be liable to some degree.
>
> On this area, the Plaintiff and Defendant called their respective experts to testify on the delay caused by the paint problem to the completion of the project. I accept that Mr Pickavance is a leading light in this field and that his methods, particularly the use of time impact analysis, are sound, logical and generally accepted in the construction industry. I do not think it is a tenable position for the Defendant's expert Mr Harker to maintain that the paint problem caused absolutely no delay to the project at all, such that no damages under this head should be payable to the Plaintiff. To my mind, this is clearly untenable and unrealistic position to take, in light of all the evidence led at the assessment hearing.
>
> At the assessment hearing itself, I note that Mr Pickavance was able to defend his methodology and findings, and came across as a fair and reasonable witness. He did not seek to embellish his testimony in favour of the Plaintiff, and his methods stood up to cross-examination. On the other hand, Mr Harker seemed to stand rigidly by his own unique method of analysis, which afforded no room for any sort of delay and deemed every event in the programme to be a critical one. It was evident to me that the completion of the project was delayed by a substantial period. According to Mr Harker, however, none of this delay was attributable to the paint problem. If every event under his programme was a critical one, surely then¸ this would have caused some days of delay.
>
> This analysis to my mind, defies logic and appears to be unduly inflexible. This also meant that it was also of little use in ascertaining the impact of the paint problem on the progress of the project.

90 Mr Por added that the AR had found Harker's approach to mean that *any* delay in works meant a delay in completion; this being in contrast to Pickavance's approach where "delay" was defined as that which *resulted* in a delay in completion. Consequently, if the AR had valid reasons for rejecting Harker's testimony (on which I heard no submissions to the contrary from the defendant) this court would have no basis to prefer the evidence of Harker over that of Pickavance, as the defendant sought to argue. The defendant's submissions which were premised on the acceptance of Harker's testimony were thus flawed. Similarly, if Hardcastle had relied on Harker's testimony (see above at [56]) for his own report, then Hardcastle's evidence was equally flawed.

91 It was also clear from her first grounds of decision (dated 19 January 2010) that the AR had accepted Anthony's testimony even though she did not expressly reject Hardcastle's evidence. Indeed, the AR affirmed her acceptance of Anthony's expertise on paint coverage at page 5 of her second grounds of decision (dated 27 January 2010) in relation to the defendant's counterclaim. If the quantum of the defendant's counterclaim allowed by the AR was also based on Anthony's assessment (on which there was no appeal by either party), it did not lie in the defendant's mouth to criticise Anthony's assessment of the plaintiff's claim – the defendant could not "blow hot and cold" simultaneously to suit its purpose. Consequently, this court could not fault the findings and awards made by the court below which were based on Anthony's assessments.

92 It bears noting that although Hardcastle criticised Anthony's approach, he did not offer an alternative method of quantification for the plaintiff's claims, given his excuse that he did not have adequate information. When pressed by counsel for the plaintiff, Hardcastle said he did not ask for additional evidence or information to enable him to undertake his own quantification. The omission, to say the least, did not reflect well on Hardcastle.

93 There were other aspects of Hardcastle's cross-examination that justifiably prompted the AR not to accept his testimony. I refer in particular to the statement of final accounts between Facade and the plaintiff ("Facade's statement of final accounts") which was as follows:-

(A)	Contract Scope of Work		$802,065.48
1	10m ht Wall	$86,139.00	
2	30th sty – staircase C & D	$4,182.00	
3	Column cladding	$2,550.00	
4	Beams	$45,876.88	
5	Wall cladding	$210,171.00	
6	Fins	$339,160.37	
7	Curtainwall	$24,959.73	
8	Box section louvers	$29,326.50	
9	Podium	$25,500.00	
10	Survey & setting out	$12,000.00	
11	Cleaning existing windows	$22,200.00	
	Total Contract Works	$802,065.48	
(B)	PO Works		$74,116.84
1	To install steel & aluminium trellis	$4,200.00	
2	Dismantle & re-installation at beam	$29,495.00	
3	To provide site dimension for 100 nos of fins	$8,000.00	
4a	Dismantle & reinstall panel at 10m ht wall	$4,400.00	
4b	Core	$5,021.52	

4c	10m	$4,102.32	
5	Dismantle & reinstall U-channel at shaft 3, 4, 7 & 8	$18,898.00	
	Total PO Works	$74,116.84	
(C)	Labour Claims		$254,800.49
1	Labour claim from Feb 04 to May 05	$254,800.49	
	Total Labour Work	$254,800.49	
(D)	Backcharges		**(**$84,300.00)
1	MAS/L/5721 to ATS Traffic Pte Ltd Repair to Traffic Light	($300.00)	
2	Labour supply by Facade Master	($60,000.00)	
3	Safety violation	($7,000.00)	
4	End piece at fins carried out by Zheng Hui	($10,000.00)	
5	Dismantling work not done	($7,000.00)	
	Total Back charges	($84,300.00)	
(E)	Revised Contract Value		$1,046,682.81
(F)	Acceleration Cost (Further deduction from $103,317.09 to $93,000.00)		$93,000.00
(G)	Revised Contract value		$1,139,682.81

94 Hardcastle had testified that dismantling and reinstallation works came under Section B – items 2, 4a and 4b of Façade's statement of final accounts. Indeed, his entire findings were based on this document while counsel for the defendant agreed that the plaintiff was entitled to $113,000. It is to be noted from Facade's statement of final accounts that no rates or quotations were given for the three items. The rates were to be found in the evaluation certificate of Facade ("Exhibit P-10") tendered in court below. It was noted from Exhibit P-10 that Hardcastle had accepted that the plaintiff dismantled and reinstalled 400 sq m of panels but it was at the plaintiff's contract rate of $17 per sq m and not at $21 or $23 as Hardcastle contended. Moreover, Exhibit P-10 did not state (as Hardcastle asserted) that the plaintiff's claim for labour of $254,800.49 must be at a rate higher than $17 per sq m; Hardcastle had no evidence to support his opinion. Exhibit P-10 states:

Item	**Description**	**Qty**	**Rate**	**Amount**
(A)	Final Claim ref: CITI/MAS /PC/1019/2005 dd 4.110.05 Contract Value			

1	10mht wall	5,067.00 m²	$ 17.00	$ 86,139.00
2	30th sty – staircase C & D	246.00 m²	$ 17.00	$ 4,182.00
3	Column cladding	150.00 m²	$ 17.00	$ 2,550.00
4	Beams	2,698.64 m²	$ 17.00	$ 45,876.88
5	Wall Cladding	12,363.00 m²	$ 17.00	$210,171.00
6	Fins	19,950.61 m²	$ 17.00	$339,160.37
7	Curtainwall	875.78 m²	$ 28.50	24,959.73
8	Box section louvers	1,029.00 m²	$ 28.50	$ 29,326.50
9	Podium	1,500.00 m²	$ 17.00	$ 25,500.00
10	Survey & setting out	LS		$ 12,000.00
11	Cleaning existing windows	11,100.00m²	$ 2.00	$ 22,200.00
			Total Contract work	$802,065.48

(B)	PO Works			
1	To install steel & alum trellis	LS		$ 4,200.00
2	Dismantle & re-installation at beams	2,681.36 m²	$ 11.00	$ 29,495.00
3	To provide site dimension for 100nos of fins			
4a	Dismantle & reinstall panel at 10mht wall Core	LS		$ 8,000.00
	10m	400.00 m²	$ 11.00	$ 4,400.00
4b	Dismantle & reinstall U-channel at shaft 3, 4, 7 & 8	418.46 m²	$ 12.00	$ 5,021.52
4c		341.86 m²	$ 12.00	$ 4,102.32
5				
	Labour Claims	1,718.00 m²	$ 11.00	$ 18,898.00
	Labour claim from Feb 04 to May 05		Total PO works	$ 74,116.84
(C)				
	Backcharge Item		Total Labour Work	$254,000.49
	MAS/L/5721 to ATS Traffic Pte Ltd			
	Repair to Traffic Light			$ 254,800.49
(D)	Labour supply by Facade Master			
1	Safety violation			$ (300.00)
2	End piece at fins carried out by Zheng Hui			$ (60,000.00)
3				$ (7,000.00)
4	Dismantling work not done			$(10,000.00)
	Acceleration Costs		Total Backcharge Work	
5				$ (7,000.00)
				$(84,300.00)
(E)				$103,317.19

95 Another aspect of Hardcastle's testimony that was unsatisfactory was his contention that the plaintiff had no evidence to substantiate its overtime claim. Counsel for the plaintiff had pointed out to Hardcastle at the assessment hearing that such evidence was disclosed in discovery in relation to Anthony's report. Hardcastle then admitted he had not considered such substantiation.

96 Further, Hardcastle had, at para 4.4 of his report dated 18 July 2008 (Hardcastle's Report") alleged that the plaintiff provided him with documents on the paints ordered, delivered and invoiced which were insufficient for his evaluation. He stated he was largely reliant on: (i) information contained in Anthony's First Report which was "generally unsupported evidentially; and (ii) information provided by the plaintiff which "in itself was of limited utility". He added that none of the cost calculations in Anthony's First Report were founded on any evidenced quantities or actual cost information.

97 In my opinion such sweeping (and unwarranted) criticism of Anthony's assessment/reports begs the question – if indeed Hardcastle thought Anthony's information was so unreliable, why did he not go to the source/primary documents himself to verify the accuracy of Anthony's information? As I understood it from counsel for the plaintiff, all the documents relied on by Anthony were discovered or discoverable to the defendant. In this regard, I note that Anthony's First Report totalled 705 pages; excluding Appendices F to H. Anthony had further prepared a second report dated 22 August 2008 ("Anthony's Second Report") in response to Hardcastle's Report. It was clear from Anthony's two reports (and the corrections dated 19 September 2008 made to his first report) that unlike Hardcastle, Anthony had taken great care in reviewing all the necessary and voluminous documents involved before arriving at his assessment.

98 At para 1.6 of his report, Hardcastle had opined that Appendices F, G and H in Anthony's First Report were either irrelevant or, that their relevance was unclear to him. Yet, Hardcastle's Report had, in assessing the plaintiff's labour charges and acceleration costs (at paras 10.17 to 10.24) referred to the information in Appendix G. Moreover, Appendix F contained financial documents and Appendix H contained all the work orders of Facade which were used to extract the number of panels that were found in delivery orders. Hardcastle could not have identified the number of coated panels had he not referred to Appendix H. Indeed, Anthony pinpointed 50 items of data in Appendix G of *Hardcastle's Report* that came from Appendix H of Anthony's First Report.

99 Some other shortcomings in Hardcastle's Report have been noted earlier at [19], [26], [31] and [34]. I would add that in para 6.8 of his report, Hardcastle had again stated that he relied for his calculations on Anthony's information in respect of preparing recoating works. He then analysed (with his colleague Lee Armstrong) the invoices selected by Harker and concluded that the total area of panels recoated by Compact Malaysia (at $26 per sq.m) and Rotol (at $15.40 per sq.m) were 741.20 sq.m and 6,952.10 sq m respectively. Hardcastle testified that he adopted those quantities for the purpose of his related evaluation, adding again that should further relevant records become available, he would be happy to undertake such review and analysis as the court may require. In my opinion, Hardcastle's repeated excuse was unacceptable – he knew very well that he was the defendant's expert on quantum for the assessment hearing. He could not expect the court to give him a second bite of the cherry and allow him/the defendant to render further reports for the court's determination of the amount of damages to be awarded to the plaintiff, when all the documents required for his evaluation were available to him but not reviewed.

100 The shortcomings in Hardcastle's report were highlighted in Anthony's Second Report, some of which are set out in [101] to [102] below. It would not be possible or practical for this court to repeat Anthony's many criticisms of Hardcastle's Report. Suffice it to say Anthony's criticisms were well founded. Consequently, I was of the view that the AR had valid reasons to prefer Anthony's evidence to that of Hardcastle. I should also point out that while Hardcastle was a quantity surveyor, Anthony's qualifications and credentials were far more varied. Besides being a civil engineer, Anthony holds two law degrees, has worked as a contracts administrator as well as a construction and project manager and more significantly, he has had experience in cladding works. Unlike Anthony, Hardcastle had never worked in Singapore and therefore had no knowledge of the local cladding industry.

101 Hardcastle's review of the plaintiff's documents was not only selective and cursory but his comments in relation thereto were occasionally misleading. Anthony noted that Hardcastle's statement in para 4.4 of his report (see above at [96]) on inadequate documentation failed to state that the alleged "missing documents" or gaps in the plaintiff's documentation were not critical or crucial to the formation of an expert opinion – they related to progress reports and some minutes of meetings.

102 It was Anthony's view (with which this court agreed) that the thrust of an expert's report for the assessment hearing should focus on three areas *viz*:-

(a) The process of the coating system;

(b) The overall impact of the paint tonality issue to the project as a whole; and

(c) The Singapore cladding industry.

In his second report, Anthony was mindful of the compensatory nature of the award of damages and that parties should be put into the position as if the contract had been properly performed. He referred to *Hadley v Baxendale* and prepared his computation of the plaintiff's damages on that basis. As that was indeed the correct approach at law, Hardcastle's disagreement with Anthony's approach and method of assessment has very little merit. I could not see how the Court of Appeal's decision in *Hong Fok Realty* cited by the defendant (see above at [16]) advanced its case or reinforced Hardcastle's position that the excess labour charges ($171,944.40) incurred by the plaintiff should not have been allowed by the AR. That case did not detract from the principles of recoverability spelled out in *Hadley v Baxendale*.

Recovery of damages in Hadley v Baxendale

103 It would be appropriate at this juncture to look at the law on recovery of damages as set out in *Hadley v Baxendale*. The two limbs of recovery in the case are best summed up in Alderson B's judgment (at 354-355):

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could be only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

104 The first limb of recovery stipulates that normal losses that occur in the usual course of events are recoverable without the need to prove special knowledge on the part of the defaulting party; this recovery would be for *general damages*. For recovery under the second limb in *Hadley v Baxendale* for abnormal losses, it depends on whether the exceptional/special circumstances were within the reasonable contemplation of both parties at the time of the contract; such recovery comes under *special damages*.

105 All the items assessed by Anthony and which formed the subject of the defendant's appeal were for general damages *ie*, direct losses under the first limb in *Hadley v Baxendale*. The plaintiff's appeal on liquidated damages would be consequential losses, *ie*, special damages (and not general damages as counsel for the defendant asserted) that came under the second limb in *Hadley v*

Baxendale. Consequently, the defendant's argument (see above at [76] that the award of liquidated damages would be tantamount to double recovery of general damages to the plaintiff for the breach, is a misconception.

106 In summary, the defendant's appeal on the following items was dismissed for the reasons stated:

(a) Excess labour charges of $171,944.40 (see above at [15] to [17]). This head of claim was for abortive labour costs incurred as a result of the plaintiff or its subcontractors having to recoat panels that were coated with the original paint and which could not be accepted after they were installed. Consequently, this claim was clearly within the contemplation of the parties.

(b) Recoating costs of $590,614.42 charged by Compact Malaysia and Rotol (see above at [18] to [26]). The AR clearly explained why she had made the award at page 2 of her first grounds of decision. I adopted her reasoning; in essence, the costs incurred were all attributable to the problem with the original paint supplied by the defendant. Consequently, those costs should be borne by the defendant. As for the quantum, the AR quite rightly accepted the plaintiff's argument that invoices and delivery orders would be a reasonable source to derive the total area of panels coated and delivered as it would be illogical for unpainted panels to be delivered to site.

(c) Citiwall's additional labour costs of $254,800.49 (see above at [30] to [34]). This item appeared in Facade's statement of final accounts (see above at [93]) which contained no rates. It had to be cross-referred to Exhibit P-10 (see above at [94]) for the rates. Hardcastle had rejected the claim because he (wrongly) assumed (without any supporting evidence) that Citiwall's proposed revised rate of $23 per sq m had been accepted and used in the computation instead of the contract rate of $17 per sq m. Anthony on the other hand had cross-referenced Citiwall's progress claims with quantities of coated panels delivered to site that he had verified. In fact he had arrived at the same figure of $262,803 as the defendant based on 15,459 sq m charged at $17 per sq m – a figure he reduced to $254,800.49 as a compromise. In so doing, Anthony excluded claims for installation of contractual quantities of panels to avoid double-counting of both the original and new paints.

(d) Backcharges of $67,000 against Citiwall for labour costs (see above at [35] to [36]). There was no reason for the defendant to be given the benefit of this item as Facade incurred the expense of providing extra labour that Citiwall failed to provide. Hardcastle mistakenly assumed that it was for the same labour that Taisei provided to Facade and then backcharged to the latter.

(e) Additional site preliminaries claim (see above at [47]). Hardcastle had agreed during cross-examination that Compact Malaysia was entitled to recover preliminaries costs when the production line was not in use due to paint trials. Hardcastle had assessed the preliminaries for Compact Malaysia at $46,000 by adopting the same weighted approach of Anthony, because he offered no alternatives to the court. Anthony had used actual overheads which were in fact lower than if he had adopted the *Emden* or *Hudson* formulae recommended in the textbooks.

(f) Compact Malaysia's overtime costs of $108,415 (see above at [55] to [56]). Anthony had calculated the claim based on actual overtime charges of the company. The defendant could not challenge the figures as Hardcastle was not even aware the figures were available for his verification until it was pointed out to him although he agreed that in principle the plaintiff was entitled to make such a claim.

(g) Taisei's backcharges of $227,625.58 (see above at [57] to [59]). The plaintiff had conceded before the AR that Taisei's total backcharges of $350,000 were not attributable to the defendant, hence the reduction by $122,374.42 to $227,625.58. $227,625.58 was for additional labour from April to July 2005 when Taisei was rushing to complete the project. Taisei had insisted on Facade providing additional labour and provided it when Facade failed to do so. The fact that Pickavance found there were 62 days of acceleration proved that the increased manpower contributed to earlier completion of the project and avoided the penalty of more liquidated damages being imposed by Taisei on the plaintiff and in turn on the defendant.

107 The *Hudson* formula (see Stephen Furst, *Keating on Construction Contracts* (Sweet & Maxwell, 9th Ed, 2012) at para 9-034) states:

> This is a formula for calculating claims for loss of overheads and profit taken together, although with suitable data a similar formula could be devised for either individually. It calculates the loss as the contractor's overhead and profit percentage based on a fair annual average multiplied by the contract sum and the period of delay and divided by the contract period.

108 *Hudson's Building and Engineering Contracts* (Nicholas Dennys, Mark Raeside & Robert Clay gen eds) (Sweet & Maxwell, 12th Ed, 2010) contains the following useful passage (at para 6-075):

> Site or job-related overheads include the non-productive costs which a Contractor will view as a necessary expenditure to carry out the works. These costs will include such items as supervision and site accommodation and will include elements of plant such as craneage and transport. It is obvious that, if these costs are time-related, any delay to the project will be likely to increase the cost to the Contractor of undertaking the work and should be reimbursed to the extent that the Employer has caused the overall delay to the project.

Based on the extracts from the authoritative textbooks, the AR was entitled to award damages for additional preliminaries incurred by the plaintiff. I was not satisfied that her reliance on Anthony's weighted approach was wrong.

The plaintiff's appeal

109 I now turn my attention to the plaintiff's appeal. In the light of the second limb in *Hadley v Baxendale*, the plaintiff must discharge the burden of proving that the possibility of paying liquidated damages was within the contemplation of the parties when the cladding contract was made.

110 It cannot be disputed that the spectre of liquidated damages is the bane of every contractor in Singapore and is part and parcel of the construction industry as a whole. Every contractor and subcontractor in Singapore is not only conscious but fearful of liquidated damages being imposed for late completion of a project, regardless of the nature of their work. How then, can it be said, as the defendant contended, that the possibility of being liable for liquidated damages for the project was not within the contemplation of the parties and was too remote?

111 To recapitulate, when the assessment hearings began in September 2008, the quantum of liquidated damages between Taisei and the plaintiff had not yet crystallised. The correspondence between Taisei and RSP (see above at [77]) all took place in 2009 well after the assessment hearing was concluded (in December 2008). The first inkling the plaintiff had of the imposition of liquidated damages on the plaintiff by Taisei was by its receipt of Taisei's Statement of Final Account (dated 23 July 2009) showing a deduction of $840,000 as liquidated damages for 105 days' delay in the project. Counsel for the plaintiff immediately informed the AR the following day of Taisei's statement

of final account and sought leave to adduce the said evidence. Unfortunately, the AR did not respond to counsel's request even though she did not render her decision until January 2010.

112 Pursuant to this court's directions, the affidavits filed by RSP and Taisei revealed that it was through no fault of the plaintiff that the issue of liquidated damages was not make known to the defendant earlier. In its letter dated 23 July 2009 forwarding Taisei's Statement of Final Account, Taisei had said:

> Please note that in accordance with the Sub-Contract, we impose you one hundred and five (105) days of Liquidated Damages (LD) amount of S$840,000 for which a rate of LD is stated in the Contract due to the recoating problem caused by the tonality of paint colour for the external aluminium cladding panels.

The reference to the subcontract by Taisei was to cl 9 of Taisei's letter of award to Facade dated 11 July 2003 which states:

> **Liquidated Damages**
>
> In the event of delays due to your default, you are required to reimburse us all losses, damages and expense including Liquidated Damages incurred by us as a result of your delays.

The AR had accepted that cl 9 allowed the plaintiff to recover general damages but opined the claim for liquidated damages was too remote; I disagree. It was clearly stated in Taisei's letter that the liquidated damages imposed on the plaintiff resulted from the delay in the cladding works and nothing else. Why would the defendant not be liable to indemnify the plaintiff's payment of $840,000 to Taisei?

113 There were other factors that I took into account in allowing the plaintiff's appeal:

> (a) First, the plaintiff's solicitors had put the defendant's solicitors on notice on 24 October 2008 (*before* the second tranche of the assessment hearing) that there was a likelihood of liquidated ascertained damages of at least four months being imposed on the plaintiff, due to Taisei's letter dated 10 October 2008 to Facade (which copy was enclosed with the letter). There was no substantive reply from the defendant's solicitors to the aforesaid letter.
>
> (b) Second, in accordance with my direction to the AR (see above at [78]), Taisei inquired of RSP who, by its letter dated 31 January 2011 to the former, confirmed that the 168 days of EOT that it granted for the project did not cover any delay due to the cladding tonality issue. (In its application for EOT, one of the reasons given by Taisei was "delay in cladding installation works due to inconsistent colour tonality of metal cladding panels", a reason RSP did not accept).
>
> (c) Third, it was the finding of the AR that the paint tonality problem caused a delay of 273 days with no concurrent causes of delay, based on Pickavance's expert testimony which she accepted in preference to Harker's evidence. Less the 168 days EOT granted by RSP to Taisei (see above at [80]), the actual delay was therefore 105 days attributable to the paint problem.
>
> (d) Finally, the defendant overlooked the fact that the contract between Taisei and MAS has no bearing on the contract between Taisei and the plaintiff as reflected in the letter of award (see above at [112]. Consequently, Taisei's entitlement to EOT under one ground in the main contract did not mean that the subcontractor/Facade was or was not entitled to EOT on another ground.

114 Granted, the claim by the plaintiff to be reimbursed the liquidated damages it paid to Taisei was not a contractual obligation of the defendant. However, the important fact to note was that the possibility of liquidated damages being imposed for the delay in cladding works was very much a live issue between the parties which the defendant, despite being forewarned by counsel for the plaintiff, chose to ignore for its own reasons. In a construction contract scenario, it cannot be said that the defendant's liability to compensate the plaintiff for liquidated damages the latter would have to pay to its main contractor (Taisei) could not have been within the contemplation of the parties under the second limb in *Hadley v Baexendale.*

115 It is to be borne in mind that a Registrar's Appeal operates by way of an actual rehearing before a judge in chambers. The judge hearing the appeal is exercising confirmatory not appellate jurisdiction (see *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR(R) 392) ("*Lassiter v To Keng Lam*"). Consequently, the court's exercise of its discretion is unfettered. This court was therefore entitled to relook the entire evidence tendered to the court below, subject to the caveat that it would not be able to assess the witnesses who testified before the AR and make a finding on their veracity. Hence, there is usually reluctance on the part of a judge dealing with Registrar's Appeals to depart from and disagree with the findings of facts made by a court below.

116 Here, this court did not depart from any factual findings made by the AR on the issue of liquidated damages. The AR declined to make an award of liquidated damages (even though she felt that it would come within the purview of general damages) because she felt it was too remote. As was pointed out (see above at [111]), the second tranche of the assessment had not even started when the defendant was put on notice by the plaintiff of the possibility of liquidated damages being imposed by Taisei and that the plaintiff would look to the defendant in turn for an indemnity against such payment. The AR was alerted by the plaintiff's solicitors to Taisei's Statement of Final Account dated 23 July 2009 showing a deduction of $840,000 as liquidated damages for 105 days' delay but failed to respond or give directions on the plaintiff's solicitors' request for further evidence to be adduced.

117 This was not a situation akin to *Lassiter v To Keng Lam* where the appellant in a Registrar's Appeal sought to adduce further affidavits of evidence in chief at that stage and the Court then had to decide on whether the principles for such admission of new evidence as spelt out in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") applied. Even if the principles in *Ladd v Marshall* applied in this case, the plaintiff's application would have been allowed – it could not have been faulted for the evidence it intended to adduce so late in the day, for the reasons set out above at [111]. At the very least, the plaintiff should have been given an opportunity to address the court below on the admissibility of the further evidence on liquidated damages, notwithstanding the defendant's objections.

118 Consequently, I allowed the plaintiff's appeal and directed that the defendant should reimburse the plaintiff the sum of $840,000 paid to Taisei as liquidated damages for 105 days of delay occasioned by the tonality problem of the panels used in the cladding works. At a further hearing (on 28 September 2011) to clarify the issue of interest, I awarded the plaintiff interest on the said sum from 23 July 2009 (the date Taisei deducted the sum from Facade's statement of final account) until payment.

119 Section 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) empowers a court to award interest on debts and damages "at such rate as it thinks fit on the whole of the or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment". If this court was minded to award interest to the plaintiff, counsel for the defendant had requested that the period 26 August 2010 (when this court remitted the matter

back to the AR for further evidence to be taken on the issue of liquidated damages) to 11 April 2011(when this court ordered Taisei and RSP to file affidavits on the issue of liquidated damages) be excluded because Taisei had given the defendant "the run around". When the court inquired of counsel for the defendant, he agreed that it was not the fault of the plaintiff that the defendant was given "the run around" by Taisei. Consequently, there was no reason for me to deprive the plaintiff of interest which had always been part of the reliefs it prayed for. Even so, I did not award interest from the date of the writ (17 June 2005) but only from the day the plaintiff was actually out of pocket by that substantial sum, which was more than 2 years ago.

Costs

120 The general rule on costs is that costs would follow the event. The plaintiff was awarded substantial damages totalling $2,842,102.08 notwithstanding that it did not succeed in obtaining the higher quantum that it sought or all the items of damages that it claimed. In the light of the Court of Appeal's ruling in *Tullio Planeta v Maoro Andrea G* (*supra*[62]) at [10], the defendant's submission that the plaintiff (and not the defendant) should bear the costs of the assessment hearing was not only misconceived but totally devoid of any merit.

121 In the result, I dismissed the defendant's appeal with costs and allowed the plaintiff's appeal with costs.