Poh Cheng Chew *v* K P Koh & Partners Pte Ltd and another
[2014] SGHC 20

Case Number : Suit No 682 of 2012

Decision Date : 30 January 2014

Tribunal/Court : High Court

Coram : Lionel Yee JC

Counsel Name(s) : Chew Yee Teck Eric (Archilex Law Corporation, formerly from JLim & Chew Law Corporation) for the plaintiff; Derek Kang Yu Hsien, Tan Jin Wang Ross and Alvin Liong Wei Kiat (Rodyk & Davidson LLP) for the defendants.

Parties : Poh Cheng Chew — K P Koh & Partners Pte Ltd and another

Building and construction law – Building and construction contracts – Renovation contracts and contracts for minor works

Building and construction law – Dispute resolution

Expert Determination

30 January 2014 Judgment reserved.

Lionel Yee JC:

1 This case raises issues relating to expert determination and breach of contract which arise out of a settlement agreement made between the parties on 12 March 2012 ("the Settlement Agreement") pursuant to a dispute over renovations works for a property at Sentosa Cove owned by the Plaintiff ("the Property").

Background facts

2 The First Defendant is an architecture and engineering firm, whereas the Second Defendant is a building contractor (collectively, "the Defendants"). Mr Koh Kok Peng ("Koh") is a professional engineer and the principal partner in the First Defendant; Koh also runs the Second Defendant.

3 On or about 8 April 2010, the Plaintiff engaged the Defendants to carry out additions and alterations ("the A&A Works") to the Property. The First Defendant provided consulting engineer services for the A&A Works whereas the Second Defendant carried out the A&A Works. A quotation issued on 21 June 2010 ("the 21 June Quotation") stated the contract price for the A&A Works as $367,800. [note: 1] Subsequent amendments to the scope of works in the 21 June Quotation were made in a revised quotation attached to a letter from the Second Defendant to the Plaintiff dated 20 August 2010 ("the Revised 21 June Quotation"). [note: 2] The contract price, however, remained unchanged and it is not disputed that the Plaintiff has made full payment of the contract price for the A&A Works. [note: 3]

4 A dispute arose between the parties regarding the A&A Works. The Plaintiff, alleging that the A&A Works were defective and incomplete, commissioned two companies to prepare reports on the A&A Works. The first report dated May 2011 was done by Building Appraisal Pte Ltd ("Building

Appraisal") and described defects in the A&A Works ("the Building Appraisal Report"). [note: 4] The second report dated January 2012 was done by Lee Consultants and identified the discrepancies between the actual "as-built" work on site and the approved plans for the A&A Works ("the Lee Consultants Report"). [note: 5] For ease of reference, I will refer to the Building Appraisal Report and the Lee Consultants Report collectively as "the Consultants' Reports".

5 On 8 February 2012, the Plaintiff through his solicitors issued a letter of demand to the First Defendant, claiming a sum of $111,330 as *inter alia* compensation for defective works done to the Property. [note: 6] On the same date, the Plaintiff's solicitors wrote to the Professional Engineers Board ("PEB"), making a complaint against the First Defendant and Koh and requesting the PEB to investigate the matter and take necessary action against Koh. [note: 7] It appears that the Plaintiff also wrote to the Building and Construction Authority ("BCA") on 20 February 2012 making a complaint against Koh. [note: 8]

6 The dispute was resolved through mediation on 12 March 2012 and the Settlement Agreement was entered into between the Plaintiff and the Defendants. Pursuant to the Settlement Agreement, a professional engineer was to be appointed to set out the scope and specifications of works required to rectify the defects ("the Rectification Works"), prepare and call for a tender for the said works, and evaluate the tenders and award the contract. The scope and specifications of the Rectification Works were to be "based on" the Consultants' Reports and were to be set out "on the basis of the most efficient manner to rectify the defects so as to ensure that the works comply with the required statutory regulations and are of a standard commensurate with the price paid by the [Plaintiff] for the original works". [note: 9]

7 Under the Settlement Agreement, the Defendants were to pay:

(a) the fees of the professional engineer;

(b) the costs of the Rectification Works;

(c) the costs of 2 "Somerset" service apartments of 3 bedrooms each (or equivalent) and the costs of storage of the Plaintiff's chattels for the duration of the Rectification Works; and

(d) $20,000 to the Plaintiff as compensation for moving and costs.

As for the Plaintiff, he was to refrain from filing any complaints (presumably against Koh or the Defendants) with the PEB.

8 Pursuant to the Settlement Agreement, the Defendants duly paid the Plaintiff $20,000 as compensation for moving and costs and Mr Chan Yaw Fai ("Chan") was appointed as the professional engineer.

9 Chan quoted a lump sum of $88,000 for his fees, which was to be paid progressively in instalments. [note: 10] Chan's appointment on these terms was confirmed in a letter from the Plaintiff's solicitors dated 19 March 2012. [note: 11] Subsequently there was some discussion between the parties regarding Chan's fees, which the Defendants felt were too high. Around the end of March 2012, the Defendants' solicitor at that time, Mr Low Chai Chong ("Low"), wrote to the Plaintiff's solicitors stating that Chan's quotation was far too high and seeking the Plaintiff's consent for Koh to contact Chan to see if Chan could "give a discount" and also to clarify Chan's scope of works. [note:

[12] The Plaintiff had no objections.

10 On 28 March 2012, Koh, together with Mr Freddie Chia ("Chia"), another partner in the First Defendant, met with Chan to discuss his fees ("the 28 March 2012 Meeting"). There is some disagreement as to what transpired at that meeting but what is not disputed is that after the meeting, Chan agreed to give Koh what was in effect a discount of $8,000 on his fees. [note: 13] The Defendants subsequently paid Chan $19,260, this sum being the first instalment of his fees, and Chan returned $8,000 in cash to the Defendants. [note: 14]

11 Chan conducted site visits to the Property on 3 and 4 April 2012. [note: 15] He produced a set of tender documents for the proposed Rectification Works ("the Tender Document"), which he forwarded to the parties for their comments. [note: 16] A few amendments were made to the Tender Document pursuant to some comments from the Plaintiff, to which the Defendants did not object. [note: 17] On 10 May 2012, Chan sent out invitations to tender to various contractors. A site show-round of the Property ("the First Site Show-round") was conducted by Chan on 17 May 2012. The first tender was opened on 31 May 2012 and four contractors submitted tenders based on the Tender Document as follows:

(a) Winning Flag Enterprise Pte Ltd ("Winning Flag") at $188,800;

(b) Builders Alliance Pte Ltd ("Builders Alliance") at $210,350;

(c) Effulgent Builder & Marketing Pte Ltd ("Effulgent") at $542,318; and

(d) Crystallite Construction & Engineering Pte Ltd ("Crystallite") at $623,500.

12 Initially, Chan called for a tender interview with only the two higher bidders, Effulgent and Crystallite. However, after objections from the Defendants, all four tenderers were invited for a tender interview. [note: 18] Three were interviewed on 19 June 2012 whereas one (Builders Alliance) failed to turn up for the tender interview. The three tenderers were then asked to go for another site show-round on 21 June 2012 ("the Second Site Show-round"). Either during the tender interview or the Second Site Show-round, Chan handed a two-page questionnaire relating to certain items in the Tender Document ("the Tender Questionnaire") to each contractor. [note: 19]

13 The second tender was then opened on 26 June 2012. The revised bids were as follows:

(a) Winning Flag at $498,000;

(b) Effulgent at $542,318;

(c) Crystallite at $566,200.

14 On 6 July 2012, Chan awarded the contract for the Rectification Works to Crystallite for $498,000. [note: 20] The Defendants were dissatisfied with Chan's decision and did not make any further payment to the Plaintiff under the Settlement Agreement. After unsuccessful further mediation, the Plaintiff commenced the present suit on 16 August 2012. On the same date, the Plaintiff filed a complaint to the PEB against Koh by way of a statutory declaration. [note: 21] It is not in dispute that the Rectification Works have never started.

The pleadings

15 The Plaintiff pleaded that he had suffered loss and damage as a result of the Defendants' breach of the Settlement Agreement and thus claimed the following sums from the Defendants: [note: 22]

(a) $718,476.80, made up as follows:

(i) $74,900 being Chan's outstanding fees (inclusive of goods and services tax ("GST"));

(ii) $532,860 being the costs of the Rectification Works (inclusive of GST);

(iii) $96,000 being the rental already incurred for two Sentosa Cove apartments for four months; [note: 23]

(iv) $14,716.80 being storage costs for four months;

(b) Rental of $24,000 per month (being the average rental for two "Somerset" service apartments) for four months being the duration of the Rectification Works to be carried out; [note: 24] and

(c) Storage costs of $3,679.20 per month from October 2012 until the completion of the Rectification Works.

16 The Defendants denied that the Plaintiff was entitled to any payment and prayed for orders that Chan's appointment as professional engineer under the Settlement Agreement and the award of the contract to Crystallite be set aside. [note: 25] The thrust of the Defendants' argument on this point was that Chan was not independent and was controlled by or acting under the influence of the Plaintiff and/or his agents, and had also materially departed from his instructions in awarding the tender to Crystallite. The Defendants further prayed for a declaration that the Settlement Agreement had been repudiated or terminated, alleging that the Plaintiff had breached: (1) the fundamental term that he refrain from filing a complaint to the PEB; and (2) the implied term that he (and/or his agents) would not interfere with or exert any influence over the professional engineer in the course of his work.

17 Alternatively, the Defendants' case was that the Plaintiff (by himself and/or through his agents) had conspired with Chan to *inter alia* fix Chan's fees at the unreasonable amount of $88,000, increase the scope and specifications of the Rectification Works beyond that prescribed in the Consultants' Reports, and award the contract to a higher bidder instead of to Winning Flag following the first tender on 31 May 2012. [note: 26]

18 The First Defendant therefore counterclaimed the sum of $35,260 from the Plaintiff, comprising: $20,000 paid to the Plaintiff as compensation for moving and costs under the Settlement Agreement; and $11,260 being the net amount paid to Chan for the first instalment of his fees. The First Defendant also counterclaimed $4,000 being the outstanding professional fees due in relation to additional works on the Property allegedly carried out by the Defendants between July 2010 and April 2011 ("the Additional Works"). The Second Defendant counterclaimed the sums of $136,650 and $9,565.50 (being GST on the sum of $136,650) for the Additional Works, as well as damages to be assessed in relation to the Plaintiff's complaint to the PEB.

19 The parties agreed to bifurcation of the counterclaim.

Issues

20 Briefly, the issues to be determined in this case are as follows:

(a) Whether Chan's appointment and the award to Crystallite should be set aside;

(b) Which party is in breach of the Settlement Agreement and what amount of damages is due to that party;

(c) Whether the Plaintiff and Chan had conspired to injure or cause loss to the Defendants; and

(d) Whether the Defendants are entitled to their respective counterclaims against the Plaintiff.

The witnesses

21 It is useful at the outset to introduce the witnesses and set out a few observations on the reliability of their oral testimonies.

22 There were five witnesses for the Plaintiff, comprising: (1) the Plaintiff; (2) the Plaintiff's wife, Madam Kok Lai Mooi ("Madam Kok"); the Plaintiff's two adult stepsons, (3) Dallan Cheah ("Dallan") and (4) Dallon Cheah ("Dallon"); and (5) Chan. At all material times, Madam Kok, Dallan, and Dallon lived in the Property with the Plaintiff, although Dallan and Dallon frequently travelled overseas.

23 The Plaintiff was generally unreliable as a witness and his testimony was not very useful. He frequently testified that he was ignorant of matters since he had left it to Madam Kok and his stepsons to deal with Koh and the A&A Works. [note: 27] Nevertheless, since the rest of the evidence was consistent with the Plaintiff's testimony that he had little personal involvement in matters relating to the A&A Works or the Settlement Agreement, I found no need to draw any adverse inference (as submitted by the Defendants) against the Plaintiff as a witness.

24 I found Madam Kok, Dallan, and Dallon to be generally forthright and credible witnesses. The testimonies of Madam Kok and Dallan were particularly relevant as they seemed to be the ones who were the most acquainted with Koh, Chan, and the works to be done on the Property. I noted however that Madam Kok occasionally had some difficulty recalling certain events that had taken place, for example in relation to what she had told or shown Chan during his site visits to the Property.

25 As for Chan, while I did not doubt his general honesty as a witness, his testimony should be treated with circumspection since he appeared to be rather confused and forgetful at times. For example, Chan gave several different explanations of how he had arrived at his professional fees of $88,000 but also candidly admitted that his explanations were not consistent with his affidavit of evidence-in-chief ("AEIC"). [note: 28]

26 There were six witnesses for the Defendants: (1) Koh; (2) Mr Abishek Murthy ("Murthy"), the Defendants' expert witness; (3) Mr Wee Yong Ping ("Wee"), a project manager of Winning Flag; (4) Ms Sim Mui Ling ("Mui Ling"), a director of the Second Defendant; (5) Low, the Defendants' former solicitor; and (6) Chia, a partner and director of the First Defendant.

27 Koh was the key witness for the Defendants and was generally forthright in his testimony. For instance, Koh admitted that the Second Defendant was related to and managed by him. [note: 29] He also readily admitted that the A&A Works had been defective and not up to standard. [note: 30] However, certain parts of his testimony were of doubtful credibility, in particular his testimony relating to his suspicions about Chan's partiality toward the Plaintiff at various junctures, which was not consistent with his surprisingly passive stance throughout the process.

28 Murthy, the Defendants' expert witness, was a professional engineer. He rendered an expert report on a number of matters relevant to the present dispute, including whether the quantification of the Rectification Works in the final tenders submitted by the tenderers took into account works which exceeded the scope of the rectification works covered by the Consultants' Reports and/or reflected the most efficient manner of rectification.

Whether Chan's appointment and the award to Crystallite should be set aside

29 The first issue is whether Chan's appointment under the Settlement Agreement and/or the award to Crystallite should be set aside.

30 Parties rightly agreed that Chan's appointment as the professional engineer under the Settlement Agreement was a form of expert determination. [note: 31] Expert determination as a mode of dispute resolution was explained by Chan Seng Onn J in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 ("*Oriental Insurance*") at [25] as follows:

> (d) Expert determination – parties appoint their own expert to consider the disputed issues and make a binding decision, without necessarily having to conduct a full enquiry following the usual adjudicatory rules, *eg*, rules of court in litigation, formal arbitration rules and general rules of natural justice. The role of the expert is to undertake an investigation of the facts and to determine a dispute using his own expertise. His power and jurisdiction is derived solely from the terms of the contract.

31 In this case, it was clearly envisaged by the parties in the Settlement Agreement that a professional engineer would be appointed as an expert to determine the scope and specifications of the Rectification Works as well as award the tender for the Rectification Works. The question, however, is when one is entitled to set aside the appointment of the expert or a decision of the expert. It should be noted that the setting aside of an expert's appointment is a distinct issue from the setting aside of the expert's decision or determination.

Setting aside of Chan's appointment as professional engineer

32 The foundation of expert determination is the law of contract. The starting point for ascertaining the validity of an expert's appointment is therefore the contract itself. In this case, the Settlement Agreement provided for the appointment of an expert as follows:

> 3. Both Parties shall endeavour to agree on the appointment of Lee Hon Leong as Professional Engineer (the "**PE**") by 5pm on 13 March 2012.
>
> 4. Failing the agreement in paragraph 3 above, each party shall identify 3 Professional Engineers and submit their names to the Mediator by 14 March 2012, who shall thereafter appoint the PE from amongst the 6 named Professional Engineers who are willing and able to act by 15 March 2012.

5. If none of the 6 named Professional Engineers are willing and able to act then, despite the failure of the Parties to agree to the appointment of Mr. Lee Hon Leong, Mr. Lee Hon Leong shall be appointed to act as the PE.

[emphasis in bold in original]

33 What happened in this case was that since Mr Lee Hon Leong was not available to act, the Plaintiff and the Defendants nominated six professional engineers. [note: 32] Out of these six names, the mediator, Mr Chow Kok Fong ("the Mediator"), chose to appoint Chan. [note: 33]

34 I do not see any reason for setting aside Chan's appointment in this case. The Defendants did not contend that Chan's appointment was not in accordance with the provisions of the Settlement Agreement. Nor did the Defendants contend that Chan was in a position of conflict of interest in that he had prior dealings with any interested party, as was the issue in *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 ("*HSBC v Toshin*"). Rather, the Defendants' case was that Chan's appointment should be set aside solely because he acted in a biased manner and chose to align his interests with those of the Plaintiff. [note: 34] To my mind, these concerns do not relate to the circumstances of Chan's appointment. They are more relevant to the issue of whether Chan acted properly in making his determinations under the Settlement Agreement.

Setting aside of Chan's award to Crystallite

35 I then consider the question of whether the Defendants are entitled to an order that Chan's award of the contract for the Rectification Works to Crystallite should be set aside on the grounds that: (1) Chan acted in bad faith or in a fraudulent or biased manner; or (2) Chan had materially departed from the scope of his instructions as set out in the Settlement Agreement. [note: 35]

36 As a general rule, the only grounds for challenge of an expert's determination are as follows:

(a) material departure from instructions;

(b) manifest error; or

(c) fraud, collusion, partiality and the like.

See *Oriental Insurance* ([30] *supra*) at [47].

37 It can thus be seen that the grounds for challenge of an expert's determination are narrow and the court will not interfere with the expert's decision save in situations where intervention is necessary to uphold the parties' contractual bargain. As stated by V K Rajah J (as he then was) in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 ("*Evergreat*") at [34]:

> … An expert's decision can be set aside on the basis of fraud or partiality. Beyond that it is probably correct to say that only a breach of an expert's terms of appointment would suffice to set aside his decision. Errors of fact or law will not vitiate an award if the expert acts within his contractual mandate. …

Material departure from instructions

38 I will start by considering the latter of the two bases relied upon by the Defendants to set aside Chan's award of the contract to Crystallite. On what constitutes a material departure from instructions, the following passage by Dillon LJ in *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 at 287 (cited with approval in *Oriental Insurance* at [48] and *Evergreat* at [40]) bears repeating:

> On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning M.R. said in *Campbell v. Edwards* [1976] 1W.L.R 403, 407G, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. **If the mistake made was that the expert departed from his instructions in a material respect** — e.g. if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (M.) v. Jones (R.R)* [1971] 1W.L.R 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that — either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do. [emphasis added in bold]

39 The first step is thus to ask: what did the parties agree to remit to Chan under the Settlement Agreement? Clauses 6 to 10 of the Settlement Agreement set out the duties of the professional engineer ("PE") as follows: [note: 36]

> 6. The PE shall conduct a joint site visit by 16 March 2012 and by 19 March 2012 set out the scope and specifications of the rectification works based on the 2 reports, namely the reports of Lee Consultants and Building Appraisal Pte Ltd, on the basis of the most efficient manner to rectify the defects so as to ensure that the works comply with the required statutory regulations and are of a standard commensurate with the price paid by the Claimants for the original works (the "**Rectification Works**").
>
> 7. The scope and specifications of works prepared by the PE will be reviewed by both Parties within 3 days of the presentation of the same to the Parties.
>
> 8. Any disagreement on the PE's scope and specification for the Rectification Works shall be referred back to Mr. Chow Kok Fong for an evaluation which shall be binding on the Parties.
>
> 9. The PE shall take into account the feedback of both Parties [*ie*, the Plaintiff and the Defendants] together with Mr. Chow Kok Fong's binding evaluation and produce a final set of specifications, drawings and all other contract documents necessary to call for a tender for the Rectification Works. The PE shall then proceed to call for tenders from at least 3 contractors.
>
> 10. The PE will evaluate the tenders and award the contract on the basis of the most reasonable quote received, taking into account all the circumstances and not just price alone.
>
> [emphasis in bold in original]

40 The excerpt above shows that the parties agreed to remit three major decisions to Chan as the professional engineer under the Settlement Agreement:

> (a) Determination of the scope and specifications of the Rectification Works. This was to be done based on the Consultants' Reports and on the basis of the most efficient manner to rectify the defects so as to ensure that the works complied with the required statutory regulations and were of a standard commensurate with the price paid by the Plaintiff for the A&A Works.

(b) Calling for tenders for the Rectification Works from at least 3 contractors.

(c) Evaluation and award of the contract for the Rectification Works. This was to be done on the basis of the most reasonable quote received, considering all the circumstances and not just price alone.

41 Chan was informed of his duties and the scope of his work through a letter from the Plaintiff's solicitors dated 16 March 2012 which was copied to the Defendants' solicitors. [note: 37] The scope of his work described in that letter was not the same as that stated in the Settlement Agreement. This, however, is immaterial because Chan confirmed that he was eventually furnished with a copy of the Settlement Agreement after the 28 March 2012 Meeting with between himself, Chia and Koh (see [10] *supra*) and before his site visits to the Property on 3 and 4 April 2012 [note: 38] and neither party contended that Chan was not bound to comply with the relevant provisions of the Settlement Agreement pertaining to his work.

42 Having established the instructions that were given to Chan under the Settlement Agreement, the second step is to inquire into the nature of the mistake. If the mistake made constitutes a material departure from instructions, then the expert's decision is not binding. As to the test of materiality, any departure from instructions must generally be regarded as material unless it can truly be characterised as trivial or *de minimis* in the sense of it being obvious that it could make no possible difference to either party; moreover, once a material departure from instructions is established, the court is not concerned with its effect on the result: *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] 1 All ER 703 at [26], cited with approval in *Oriental Insurance* at [57]. Put another way, a departure from instructions must be considered material unless the departure can be characterised as trivial or *de minimis* when analysed with respect to the instructions and that end result, even if shown not to be significantly different, must still be set aside as it is a nullity and not binding: *Oriental Insurance* at [84].

43 A distinction should be drawn between mistakes made by the expert and a departure from instructions. In *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103 ("*Nikko Hotels*"), Knox J expressed this distinction using the analogy of answering the right or wrong question (at 108):

> The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. **If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.** [emphasis added in bold]

4 4 *Nikko Hotels* was applied shortly thereafter by Paul Baker QC in *Pontsarn Investments Ltd v Kansallis-Osake-Pankki* [1992] 1 EGLR 148, where he stated at 151:

> … The fact that he may be patently wrong does not mean that he has not done what he was appointed to do nor that he has asked himself the wrong question. To take any other view would lead to the sort of refined arguments such as have been deployed here and go a long way to emasculate the requirement that the decision of the expert, as a matter of contract between the parties, be final and binding. Thus, the advantages of cost, speed and finality would be seriously diminished.

Therefore, where the expert has not departed from his instructions and has asked the right questions, his decision cannot be challenged on the ground that he made a mistake, even if he subsequently admitted the mistake.

45 I come now to the facts of the present case. The Defendants alleged that Chan materially departed from his instructions in the following ways:

(a) Chan did not base the scope and specifications of the Rectification Works solely on the Consultants' Reports. [note: 39]

(b) Chan expanded the scope and specifications of the Rectification Works after the Tender Document was finalised. [note: 40]

(c) Chan did not ensure that the defects would be rectified according to the most efficient manner. [note: 41]

(d) Chan failed to ensure that the standard of the Rectification Works was commensurate with the price paid by the Plaintiff for the original A&A Works. [note: 42]

46 The first point to consider is whether Chan was entitled to go beyond the scope of the Consultants' Reports in preparing the scope and specifications of the Rectification Works. The Plaintiff's position was that Chan was entitled to do so as clause 6 of the Settlement Agreement (see [39] *supra*) did not contain the terms "solely" or "only" and such terms should not be implied into the Settlement Agreement. [note: 43] The Defendants however contended that as a matter of contractual interpretation (as opposed to the implication of terms), the parties' objective intention was that clause 6 of the Settlement Agreement should be read as including the terms "solely" or "only". [note: 44]

47 The Defendants' main argument was that its interpretation of clause 6 of the Settlement Agreement was supported by the background facts leading up to the conclusion of the Settlement Agreement, namely that the Plaintiff's claims at the mediation on 12 March 2012 were based solely on the findings in the Consultants' Reports. [note: 45] The Defendants cited the following passage from *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [132]:

> The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context … However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. …

48 The Plaintiff however pointed out that *Zurich Insurance* also cautioned that extrinsic evidence should only be employed to illuminate the contractual language and not as a pretext to contradict, vary, add to, or subtract from the terms of a written contract, the applicable test being whether the alternative interpretation falls within the scope of meaning that the contractual words could bear (see *Zurich Insurance* at [122]–[123], [132]). The Plaintiff thus submitted that to ask the court to read the words "only" or "solely" into clause 6 would be to effectively re-write the Settlement Agreement and it was impermissible to rely on extrinsic evidence for such purposes. [note: 46]

49 The dispute here is primarily over the proper interpretation of the instructions given to the professional engineer in the Settlement Agreement. As such, there is a preliminary issue as to whether the court (instead of the expert) has jurisdiction to decide such questions of interpretation: see, *eg*, *Norwich Union Life Assurance Society v P&O Property Holdings Ltd* [1993] 1 EGLR 164; *Mercury Communications Ltd v Director General of Telecommunications and another* [1996] 1 WLR 48. While this issue was not raised by the parties, I consider this to be the applicable position in the present case in the absence of any indication that the parties intended to remit such questions to the professional engineer. In any case, the parties appeared to have proceeded on the basis that questions of interpretation should be decided by the court.

50 In my judgment, Chan's instructions under the Settlement Agreement did not restrict him to the scope of the Consultants' Reports in preparing the scope and specifications of the Rectification Works. The plain language of the clause 6 of the Settlement Agreement merely provided that Chan was to "set out the scope and specifications of the rectification works based on" the Consultants' Reports. Looking at the Settlement Agreement in its entirety, it appears that the parties intended to give the professional engineer a measure of discretion in preparing the scope of the Rectification Works. For example, as pointed out by the Plaintiff, clauses 7 and 8 of the Settlement Agreement provided that parties could review the scope and specifications prepared by the professional engineer and any disagreement would be referred back to the Mediator for a binding evaluation. [note: 47]

51 In fairness to the Defendants, there is some merit in the point that the Settlement Agreement was concluded in the context of the Plaintiff's letter of demand dated 8 February 2012 and the Plaintiff's summary of claim provided for the purposes of the mediation on 12 March 2012, both of which were based solely on the findings in the Consultants' Reports. [note: 48] While the Consultants' Reports were obviously intended to be the main reference point for the professional engineer in determining the scope of the Rectification Works, I nevertheless find that clause 6 of the Settlement Agreement cannot be given the restrictive interpretation that was suggested by the Defendants, given the nature of the professional engineer's role in the Settlement Agreement. Koh himself conceded in cross-examination that in certain circumstances, the professional engineer might be justified in going beyond what was specified in the Consultants' Reports: [note: 49]

> Witness …Technical works are very different from, er, legal works. Earlier question, "solely" and "only", **actually, technical work, certain time, there is reason to give ourself---to involve slightly more than what they specify.** It's perfectly correct. I think nobody should say it is not correct. Even though I'm a witness here, this may be prejudiced against me, I'm telling you the truth. [emphasis added in bold]

In a similar vein, Low, the Defendants' former solicitor, stated his understanding of the professional engineer's role under the Settlement Agreement as follows: [note: 50]

> A Your Honour, my recollection of the drafting of the settlement agreement was just---it became clear, after meeting both sides, to Mr Chow that it was not going to be possible to come to a settlement with a final figure. … And along the line, er, there was a suggestion that, "Let's leave it to an independent party to assess the works based on the two reports that have been submitted. And which form the basis of the claim and the mediation". So that proposal was agreed to in principle. … **[I]t was clear in my mind that the whole basis of the settlement was to use those two reports, give it to a PE and see what he comes**

up with. … [emphasis added in bold]

52 Following from the discussion above, I am of the opinion that Chan did not materially depart from his instructions by including in the scope and specifications for the Rectification Works other works which were not stated in the Consultants' Reports.

53 Similarly, I am not satisfied that Chan materially departed from his instructions by expanding the scope and specifications of the Rectification Works after the Tender Document was finalised. The Defendants submitted that Chan did so through the issuance of the Tender Questionnaire to the tenderers and that this was impermissible under the Settlement Agreement which did not envisage changes being made to the scope and specifications of the Rectification Works once the Tender Document was finalised. [note: 51] The Plaintiff, on the other hand, submitted that the Tender Questionnaire was part of the tender exercise that Chan was engaged to conduct and was merely intended to clarify the scope of works covered by the tenderers. [note: 52] While it is true that the Settlement Agreement did not expressly allow for changes to be made to the Tender Document once it was finalised, it also gave the professional engineer a measure of discretion and autonomy in preparing the relevant documents and conducting the tender process. In this context it cannot be said that Chan, by issuing the Tender Questionnaire in the course of the tender process, had not done what he was appointed to do.

54 As regards the Defendants' last two points that Chan failed to ensure that the defects would be rectified according to the most efficient manner and that the standard of the Rectification Works was commensurate with the price paid by the Plaintiff for the original A&A Works, these arguments were essentially based on the expert opinion of Murthy, the Defendants' expert witness, that Chan's method of rectification and scope of works in the Tender Document was neither the most efficient nor of a standard commensurate with the price of the A&A Works. The Defendants were essentially saying that Chan had answered the right question in the wrong way and not that he had answered the wrong question. According to the authorities cited above, while this may constitute an error on the part of the expert, it does not constitute a departure from instructions.

55 I should add that these conclusions do not, however, detract from the established principle that Chan, as a professional and as an expert, owes duties of reasonable skill and care to both parties and will be liable in damages should he be negligent in carrying out his duties: see *Campbell v Edwards* [1976] 1 WLR 403 ("*Campbell v Edwards*") at 407. This is the safeguard which the law gives to parties when they appoint an expert: *Holland House Property Investments Limited v Crabbe* [2008] CSIH 40 at [6]. But this is a separate issue from that of setting aside his expert determination.

Fraud, collusion, and partiality

56 I turn then to the other basis on which the Defendants challenged Chan's award, namely that he acted in bad faith or in a fraudulent or biased manner. Many authorities have made general statements to the effect that an expert's determination will not be binding in the event of fraud, collusion, partiality, and so on. A classic example is Lord Denning MR's speech in *Campbell v Edwards* (see [55] *supra*) at 407: "If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything." In *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co* [1978] 1 Lloyd's Rep 175, Lawton J said at 181: "What is not acceptable is the risk of the expert being dishonest or corrupt." These last two statements were reviewed in *Evergreat*, where Rajah J opined at [29] that: "In the absence of fraud or any corrupt colouring of the [expert's] determination, there is neither liberty nor latitude to interfere with or rewrite the parties' solemn and considered contractual bargain". Perhaps the most comprehensive description of this category of vitiating factors was given in *Oriental Insurance* where Chan J referred at [47] to: "fraud, corruption, collusion,

dishonesty, bad faith, bias or the like".

57 In this case, the parties were in agreement that Chan had the duty to act as an independent and impartial expert under the Settlement Agreement. [note: 53] The Defendants however submitted that the Plaintiff had influenced or interfered with Chan's work under the Settlement Agreement and/or that Chan was biased and partial towards the Plaintiff throughout the tender process, such that Chan and the Plaintiff were colluding to obtain the best possible outcome for the Plaintiff to the Defendants' detriment. [note: 54] The Defendants highlighted the following factors: [note: 55]

(a) Chan had inflated his fees;

(b) Chan considered the Plaintiff to be his client and saw himself as the Plaintiff's professional engineer;

(c) Chan was of the opinion that the Rectification Works had to be carried out to the Plaintiff's satisfaction;

(d) Chan had increased the scope of the Rectification Works on the instruction of the Plaintiff and/or his representatives;

(e) Chan advocated the Plaintiff's interpretation of the Settlement Agreement although he had no part in drafting it;

(f) Chan chastised the Defendants for not voicing out their objections to the scope and specifications of the Tender Document;

(g) Chan unfairly disfavoured Winning Flag and Builders Alliance just because they were the tenderers nominated by the Defendants.

58 Since one of the grounds of challenge raised by the Defendants is that of bias and partiality, I should say a few words about the applicable test for partiality in the context of an expert determination. In England, the test is one of actual bias and not apparent bias: see *Macro and others v Thompson and others (No. 3)* [1997] 2 BCLC 36 ("*Macro v Thompson*") at 65; *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWHC 977 (Comm) at [98]; John Kendall, Clive Freedman & James Farrell, *Expert Determination* (Sweet & Maxwell, 4th Ed, 2008) ("*Expert Determination*") at para 14.11.4. The rationale for this rule was articulated by Robert Walker J in *Macro v Thompson* at 65 as follows:

> … [W]hen the court is considering a decision reached by an expert valuer who is not an arbitrator performing a quasi-judicial function, **it is actual partiality, rather than the appearance of partiality that is the crucial test.** Otherwise auditors (like architects and actuaries) who have a long standing professional relationship with one party (or persons associated with one party) to a contract might be unduly inhibited in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality. … [emphasis added in bold]

59 In Singapore, however, it appears that this point is not yet settled. In *HSBC v Toshin* (see [34] *supra*), which concerned allegations of bias against licensed valuers appointed pursuant to the lease agreement between the landlord appellant and the tenant respondent, the respondent argued before the Court of Appeal that at law, actual bias (and not apparent bias) was required to challenge an expert's appointment (at [28]). The Court of Appeal did not express a final view on this question as it

decided that the issue of bias (whether actual or apparent) did not even arise in that case (*HSBC v Toshin* at [58]). It is similarly not necessary for me to decide this question since the parties did not raise it and in any event, the Defendants seemed to have proceeded on the basis of actual bias rather than apparent bias. This issue therefore remains to be decided in a future case with the benefit of submissions from counsel.

60 I now come to the Defendants' allegations of bias and collusion against Chan. Dealing first with the alleged inflation of Chan's fees, the Defendants' position was essentially that Chan's fees had been controlled by the Plaintiff. It was suggested that Chan seemed to have no idea as to how his fees were computed and that he had given a quote for his fees at $88,000 even before he had reviewed the Consultants' Reports or inspected the Property. [note: 56] More significantly, the Defendants alleged that at the 28 March 2012 Meeting between Koh, Chia and Chan (see [10] *supra*), Chan had admitted or agreed that: (1) he did not quote a fee of $88,000; (2) he had no control over his fees; (3) his fees were usually only between $15,000 and $18,000; and (4) the Plaintiff was out to "destroy" Koh. [note: 57]

61 Having considered the evidence before me, I was not persuaded that Chan's fees had been controlled by the Plaintiff. The Defendant's version of what transpired at the 28 March 2012 Meeting was supported by purely oral accounts from Koh and Chia which, on a closer examination, did not unequivocally point to the Plaintiff being in control of Chan's fees. For instance, both Koh and Chia stated that Chan did not say who had control over his fees. [note: 58] Chia also clarified that Chan did not specifically say that the Plaintiff told Chan that he was out to destroy Koh. [note: 59] I have also taken into account the fact that Koh's credibility as a witness was uneven (see [27] *supra*). As for Chia, his recollection of events has to be treated with some circumspection. He appeared to be unable to recall anything about the meeting other than the conversation he recounted in his affidavit [note: 60] (which would have taken only a few minutes) even though this meeting, according to him, lasted 45 minutes [note: 61]. Further, Koh and Chia's accounts were disputed by Chan, who denied that he had told Koh and Chia that the figure of $88,000 was not his or that the Plaintiff was out to destroy Koh; Chan also said that there had been no mention during the meeting of his usual fees being between $15,000 and $18,000. [note: 62] As for the basis of Chan's fees, Chan did admit that his fees of $88,000 were not based on the Consultants' Reports since he had only received them *after* he first gave his quote to the Plaintiff's solicitors. [note: 63] As highlighted by the Defendants, Chan also seemed unsure as to the breakdown of his fees. [note: 64] However, this is not sufficient to prove that the Plaintiff or his agents had manipulated Chan in the setting of his fees. The burden of proof that this had taken place lay with the Defendants and, in my judgment, they have not discharged it.

62 The Defendants' point that Chan considered the Plaintiff to be his client and saw himself as the Plaintiff's professional engineer is not, in and of itself, sufficient proof of bias on his part. Chan's role as the professional engineer under the Settlement Agreement is similar to that of a certifier under a construction contract whereby a contractor's entitlement to be paid is predicated on the issuance of a certificate by the certifier. It is settled that the fact that a certifier under a construction contract is appointed by the employer is an unavoidable potential incidence of the contractual relationship and does not disqualify him from making a decision under the contract: *Expert Determination* at para 14.11.2.

63 The case of *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] 1 WLR 2339 ("*Amec*") provides a good illustration of this. *Amec* concerned a dispute resolution clause in a construction contract which provided that any dispute or difference was to be referred to and settled by the engineer whose decision was to be final and binding subject to arbitration proceedings being

brought within a certain time. One of the issues before the court was whether the engineer's decision under the contract was vitiated for procedural unfairness because a parallel claim was also being brought by the respondent against the engineer in respect of the subject matter of his decision. The majority of the Court of Appeal held that in the circumstances, the engineer had considered the matter properly and sufficiently; the fact that an equivalent claim was brought against the engineer did not disqualify the engineer from giving a valid decision under the dispute resolution clause since such a conflict of interest was an unavoidable potential incidence of the contractual relationship between the parties: *Amec* at [52].

64 It has been observed that a certifier or professional consultant in a construction contract is often called upon to perform two different types of duties: (1) in issuing certificates which determine the contractor's entitlement to be paid or deciding controversial matters such as valuation, he must act fairly and exercise his own judgment objectively; (2) in other matters, he is the agent of the owner and must look after the interests of the owner in the project: see Chow Kok Fong, *Law and Practice of Construction Contracts Vol 1* (Sweet & Maxwell Asia, 4th Ed, 2012) at para 8.42; *Hudson's Building and Engineering Contracts* (Nicholas Dennys QC *et al* eds) (Sweet & Maxwell, 12th Ed, 2010) at para 4–037.

65 The dual function of an architect in a building contract was noted by Lord Reid in *Sutcliffe v Thackrah* [1974] AC 727 ("*Sutcliffe*") at 737:

> … It has often been said, I think rightly, that the architect has two different types of function to perform. **In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.**
>
> Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which the contractor gets. Under the R.I.B.A. contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance) or clause 34 (antiquities); whether he should be allowed extra time (clause 23); or when work ought reasonably to have been completed (clause 22). And, perhaps most important, he has to decide whether work is defective. These decisions will be reflected in the amounts contained in certificates issued by the architect.
>
> **The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner** and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also **reach such decisions fairly, holding the balance between his client and the contractor.**
>
> [emphasis added in bold]

66 In *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 1 SLR(R) 458, the Court of Appeal cited *Sutcliffe* with approval, making the following observations (at [15]–[16]):

> 15 It is settled law that an architect under a building contract is not an arbitrator. But he has a dual function. In the words of Lord Reid in *Sutcliffe v Thackrah* [1974] AC 727 at 737; [1974] 1 All ER 859 at 863:
>
> > In many matters he is bound to act on his client's instructions, whether he agrees with them

or not; but in many other matters requiring professional skill, he must form and act on his own opinion.

16 It is equally settled law that an owner and a contractor would have made their contract on the understanding that in all matters where the architect has to apply his professional skill and judgment, the architect will act in a fair and unbiased manner in applying the terms of the contract. Such matters will include the issue of certificates for payments and the grant of extension of time. While an architect under such a contract is the employer's agent, in the exercise of his functions requiring skill and judgment, he must act fairly and professionally and neither party should seek to unfairly or unduly influence him in the discharge of those functions.

67 I regard the above authorities to be applicable to the present case. Chan cannot be regarded as independent because he is employed by the Plaintiff. Chan's general function was to act on behalf of the Plaintiff, for example in supervising the Rectification Works and liaising with the relevant authorities to regularise all drawings, submissions and construction works on site. [note: 65] (While these functions were set out in the letter from the Plaintiff's solicitors dated 16 March 2012 and not the Settlement Agreement itself, I note that the Settlement Agreement did not prohibit Chan from undertaking such responsibilities and in any event, the letter from the Plaintiff's solicitors dated 16 March 2012 was copied to the Defendants' solicitors at that time and no objections to it were ever raised by the Defendants. [note: 66]) However, in those parts of Chan's duties which allocated decision-making functions to him, he was required to act professionally, honestly and impartially in discharging those functions as opposed to favouring the interests of the Plaintiff: see *Scheldebouw BV v St. James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC) at [34]–[35].

68 Chan's decision-making functions under the Settlement Agreement included setting out the scope and specifications of the Rectification Works, conducting a tender for the Rectification Works and evaluating and awarding the tender. The parties must have intended that Chan was to discharge these functions in a fair and unbiased manner, without preferring the interests of either the Plaintiff or the Defendants. Indeed, the entire purpose of Chan's appointment under the Settlement Agreement was to provide a fair and neutral way of rectifying the defective A&A Works.

69 The real question is therefore whether Chan acted impartially in drawing up the scope and specifications of the Rectification Works and in his conduct of the tender process, or whether he favoured the interest of the Plaintiff in doing so.

70 On the evidence before me, I consider that Chan did favour the interest of the Plaintiff in carrying out his duties under the Settlement Agreement and accordingly failed to act impartially in that regard. I agree with the Defendants that this was evident from the fact that: (1) Chan was of the mentality that the Rectification Works had to be carried out to the Plaintiff's satisfaction; and (2) Chan had increased the scope of the Rectification Works on the request of the Plaintiff and/or his representatives.

71 In my judgment, Chan acted in the way he did due to the mistaken view that he was to act as the Plaintiff's agent in setting out the scope and specifications of the Rectification Works and in conducting the tender for the Rectification Works.

72 That Chan had misdirected himself is evident from his understanding that the Rectification Works had to be carried in a manner which, in effect, only took into account the interests of the Plaintiff and did not take into account the Defendants' interests. In his AEIC, Chan repeatedly stated that as the professional engineer, he had to ensure that the Rectification Works were carried out "to

the satisfaction of the Plaintiff". [note: 67] Chan further explained in his AEIC that it was with this understanding that he had prepared the Tender Document "which provided a comprehensive list of rectification works that [he] deemed were necessary". [note: 68] Chan also explained that the Tender Questionnaire which reminded the contractors that their quotes should include the cost of full reinstatement in the event that the replacement works could not match the existing finishes was acceptable because it was the professional engineer's responsibility to "ensure that the Plaintiff is satisfied with the end product". [note: 69] Chan subsequently in cross-examination retracted his statements somewhat by saying that only some items had to be rectified to the Plaintiff's satisfaction while most of the other works had to be rectified to his own satisfaction. [note: 70] Nevertheless, it was clear from his testimony that he had confused his general function as the Plaintiff's professional engineer with his special function under the Settlement Agreement to act impartially and fairly in determining the scope of the Rectification Works and awarding the contract on the basis of the most reasonable quote received.

73 Chan's mistaken view of his role under the Settlement Agreement was also evident from the way that he allowed additional works to be included in the Rectification Works to be paid for by the Defendants on the instruction of the Plaintiff and/or his representatives. One example of this relates to an abrupt drop in the floor level at the entrance to the karaoke room on the third floor of the Property. Chan's finalised Tender Document required the contractor to "cut-down 50mm drop at entrance to [the karaoke room]" and Chan testified that he had envisaged that this would involve creating a ramp at the entrance. [note: 71] However, he did nothing when, during the Second Site Show-around, Madam Kok asked the contractors to adopt what was a significantly costlier remedy of removing the entire raised platform of the room. [note: 72] On the stand, he accepted that these were additional rectification works that had to be paid for separately by the Plaintiff but when he was questioned as to how he envisaged this would be done, he gave an unconvincing explanation that he would issue a variation order to remove this item and reduce the awarded contract sum subsequently. [note: 73] This explanation was probably an afterthought given the complete absence of any contemporaneous supporting documents and the fact that this intended course of action was never referred to in either his lengthy AEIC or the affidavits of any other witnesses.

74 The last point of note relates to the Defendants' submissions that Chan unfairly disfavoured Winning Flag and Builders Alliance simply because they were the tenderers nominated by the Defendants. It was not disputed that Winning Flag and Builders Alliance were the Defendants' nominated contractors. Chan's evidence was that he had found their quotations too low to carry out the job properly and that, after a telephone conversation with Koh, he had realised that Koh was behind their tenders since he had recommended them as contractors. [note: 74] Chan took this as a factor against their bids for the following reason: [note: 75]

> A So the---the purpose of that is---is, he---he want to submit a---a low tender so---because the money come out his pocket. So it will---he would probably do it as cheap as possible again.

75 In my judgment, if Chan's testimony is correct, he cannot be faulted for taking into account the fact that Winning Flag and Builders Alliance were contractors nominated by Koh as a factor against them, especially since Koh was clearly an interested party insofar as he was the one responsible for paying for the Rectification Works. Nevertheless, while Chan may be have been rightly suspicious of the competence and reliability of Winning Flag and Builders Alliance, his evaluation of the tenderers did not seem to have taken into account the interests of the Defendants at all but were based on the Plaintiff's interests as the building owner. In fact, under cross-examination, Chan admitted that his

first evaluation report dated 8 June 2012 which evaluated the tenders received from the first tender exercise was not objective [note: 76] and contained criticisms of Winning Flag and Builders Alliance that were not fair [note: 77].

76 In re-examination, Chan attempted to explain that he had not in fact understood the meaning of "not objective" and that he had only agreed with counsel for the Defendants, Mr Derek Kang ("Mr Kang"), that he was not objective because "I'm a bit confused". [note: 78] However, I found his claim of ignorance incredible. First, from what I observed to be his command of the English language in the witness box, it was highly unlikely that he did not understand the meaning of "not objective". Second, he had in fact answered other questions in the course of his oral testimony confirming his duty to be "objective" in preparing the Tender Document [note: 79] and in assessing the tenders [note: 80]. Third, at yet another point in his testimony, he had contrasted the objectivity with which he evaluated the second round of tenders with the lack of thereof in the first round: [note: 81]

> Q Would you agree with me that because of the way you had evaluated Winning Flag for the second tender, you were also not fully objective for the second tender?
>
> A I disagree.
>
> Q I put it to you that you were not fully objective for the two tenders and you were unfair to some of the contractors for the two tenders because you had allowed yourself to be influenced by the plaintiff or his representatives.
>
> A I disagree.
>
> Q Are you able today to give us the explanation that you were not able to give us on Friday as to why, by your own admission, you had not been objective for the first tender? If you maintain your position, you can tell us. But you can't explain, you can tell us.
>
> A I was not objective in the---on the first---first relation. In the second one, I think, er, I'm very fair.

77 I was also not convinced by the somewhat strained distinction sought to be made by counsel for the Plaintiff, Mr Eric Chew ("Mr Chew"), in re-examination (which Chan agreed with) that Chan had merely been "agreeing with Mr Kang's feeling that it's not fair" and was "not saying that [Chan] had not been fair". [note: 82]

78 Therefore, having concluded that Chan failed to act impartially and fairly as between the parties due to his own mistaken notion of his functions under the Settlement Agreement, his award of the contract to Crystallite must be set aside.

Breach of the Settlement Agreement

79 The question then is what effect the setting aside of Chan's award to Crystallite has on the Settlement Agreement.

80 The usual consequence of a successful challenge to an expert's determination is that it is a nullity and does not bind any of the parties: *Oriental Insurance* at [84]. Usually, the court will direct that the expert come to a new decision in accordance with the instructions as clarified by the court: *Expert Determination* at para 14.18.3. For example, in *Oriental Insurance*, the expert was found to

have materially departed from his instructions such that it amounted to a manifest error. Chan J thus remitted the determination to the expert for his re-consideration and provided the expert with a detailed computation guide (*Oriental Insurance* at [223]–[225]). However, the courts have also substituted alternative machinery for the contractual machinery in appropriate cases. For example, in *Macro v Thompson* (see [58] *supra*) the court considered that a revaluation by the expert auditor would be inappropriate given his lack of expertise in the relevant area and directed that new valuations be conducted.

81 In the present situation, the way forward is obstructed by the fact that there are allegations on both sides that the other party is in repudiatory breach of the Settlement Agreement. First, there is the Defendants' argument that they were entitled to terminate the Settlement Agreement because the Plaintiff had breached an implied term in the Settlement Agreement not to interfere with or influence the professional engineer in his course of work. Second, there is the Plaintiff's claim that the Defendants failed to comply with the Settlement Agreement by refusing to pay for Chan's fees and the costs of the Rectification Works. Third, there is the Defendants' argument that the Plaintiff breached a fundamental term of the Settlement Agreement by filing a complaint to the PEB on 16 August 2012 (see [14] *supra*).

Implied term not to interfere with the expert's independence

82 It was not in dispute that there was an implied term in the Settlement Agreement that the parties would not seek to interfere with the professional engineer's independence or influence the professional engineer in his course of work. [note: 83] The dispute is over whether the Defendants have adduced sufficient evidence of unlawful influence or interference by the Plaintiff in Chan's work.

83 In my judgment, there is insufficient evidence of such unlawful influence or interference in this case. I have already found that there is no evidence that the Plaintiff and/or his agents had controlled Chan's professional fees (see [61] *supra*). I have also found at [71] above that any bias or partiality towards the Plaintiff on the part of Chan was because he had misconstrued his role under the Settlement Agreement and not because the Plaintiff had acted improperly.

84 The only evidence of any "interference" with Chan's work was that Madam Kok had brought Chan around the Property during his site visits on 3 and 4 April 2012 to point out some defects which were not contained in the Consultants' Reports, and that she had made some requests for additional rectification works to Chan and/or the potential contractors during the First and Second Site Show-rounds. [note: 84] However, I do not regard the Settlement Agreement as prohibiting any communication between the Plaintiff and his family members and the professional engineer or would-be contractors who came to inspect the Property which they were unfamiliar with and which the Plaintiff and his family were living in. It would have been reasonable to expect some communication to take place on those occasions and if the parties intended to prohibit this, the Settlement Agreement would have stated it explicitly. In this regard, I note that Koh, on behalf of the Defendants, had himself made a telephone call to Chan on either 6 or 7 June 2012 regarding Chan's evaluation of the tenders received from the first tender exercise. [note: 85] While the contents of the telephone conversation were disputed, what was not in dispute was the fact that there were communications between Koh and Chan which were initiated by Koh and which did not involve the Plaintiff.

85 The issue is therefore whether Madam Kok's conduct in communicating with Chan and/or the potential contractors went beyond what was acceptable and amounted to an improper attempt to influence Chan or interfere with his independence.

86 There is nothing to suggest that Madam Kok knew that she was pointing out defects to Chan which were not in the Consultants' Reports or that she was trying to get Chan to include in the Rectification Works additional works that should not have been the Defendants' responsibility. As I have stated above at [24], Madam Kok was an honest and candid witness. At that time, she was living in a house that had numerous defects as a result of the Defendants' failure to carry out the A&A Works properly. In those circumstances, it is understandable that she would have been eager to point out all the defects to Chan during his visits to the Property. Her primary goal was to get her house fixed and knowing that Chan was supposed to be the professional, she would not have been particular about whether or not a specific defect was within the scope of the original A&A Works and Consultants' Reports. There is no evidence of any impropriety on her part or that her actions, from an objective point of view, were the type of actions which would have impaired Chan's ability to independently determine the issue in exercise of his professional judgment.

87 As for the communications made by Madam Kok during the First and Second Site Show-rounds relating to certain things to be done on the Property, Chan characterised these as "requests" [note: 86] and there is no evidence that any of these "requests" were made in a manner which would have impaired Chan's professional judgment in assessing whether they should be properly acceded to. More detailed testimony of these "requests" was given by Wee, a project manager of Winning Flag and a witness for the Defendants, but the reliability of his testimony is doubtful. First, in Wee's AEIC, it was unclear whether the requests came from Dallan, Dallon, Madam Kok or Chan. [note: 87] Second, in Wee's oral testimony, he did not appear entirely sure about the attribution of instructions to Madam Kok. [note: 88] Third, his recollection of almost everything which he said he was told to do during either the First or Second Site Show-rounds or the Tender Interview was, according to him, based upon "impressions" he had which were unconfirmed. [note: 89] Moreover, in the one instance where he did go into some detail explaining the basis of his "impression", which was in relation to an alleged instruction by either Dallan or Dallon to replace the glass panels in the lift instead of re-using them, his explanation was quite unconvincing: [note: 90]

> A Er, the actual wording by---I don't remember the actual wording. Er, what I was given was the impression that---because I---I, er, I cannot remember the actual wordings said during the tender, the second tender showround. But we were given the impression because they asked something like, "You think you can---you think that, er, by---by shifting in, er, you think that you can still reuse back or not?" That's what they say, something like that. The tonality is that, er, once it's been taken outright, it, er, cannot be reused back, what. That's our impression. …

88 Similarly, there was no or (for the reasons set out above) insufficient evidence that the Plaintiff, Dallan or Dallon had made improper attempts to influence Chan or interfere with his independence. Chan may have expanded the scope and specifications of the Rectification Works beyond the Consultants' Reports or even after the Tender Document was finalised but this in itself is not proof that the Plaintiff and/or his agents acted in breach of the obligation under the Settlement Agreement not to interfere with Chan's independence. I should also reiterate that my finding is not that Chan acted fraudulently or in collusion with the Plaintiff and/or his agents, but that he acted on a mistaken view as to his proper function under the Settlement Agreement.

Defendants' failure to pay and Plaintiff's complaint to the PEB

89 A brief chronology of events is useful here. Chan awarded the contract for the Rectification Works to Crystallite on 6 July 2012 and the letter of award was copied to *inter alia* Low, who was the

Defendants' solicitor at that time. [note: 91] In an e-mail dated 6 July 2012, Low wrote to Chan to inform him that the Defendants had "serious reservations on the award of this contract, and the events leading to the award" and to reserve the Defendants' rights pending fuller instructions. [note: 92] The Plaintiff's solicitor, Mr Chew, replied via an e-mail dated 12 July 2012, asking for further details of the Defendants' "reservations" and informing Low that the Plaintiff would not hesitate to commence legal action if the Property was not rectified speedily. [note: 93] On the same date, Mr Chew sent a letter on behalf of the Plaintiff to the Defendants demanding payment of the contract sum for the Rectification Works, the balance of Chan's fees, as well as rental and storage expenses which the Plaintiff had proceeded to incur (having informed the Defendants of these expenses via an earlier letter but apparently receiving no response from the Defendants). [note: 94] On 20 July 2012, Low wrote to Mr Chew, setting out certain areas of concern and requesting mediation pursuant to clause 14 of the Settlement Agreement, which stipulated that any disputes arising from the agreement had to be referred first to the Mediator for further mediation before any legal action was commenced. [note: 95] There was then some further discussion between the parties regarding the further mediation, which eventually took place before the Mediator on 6 August 2012. The further mediation session was unsuccessful. On 16 August 2012, the Plaintiff commenced the present suit and also filed a complaint to the PEB.

90 The issue is whether the Defendants were in repudiatory breach of the Settlement Agreement by refusing to pay the balance of Chan's fees and the costs of the Rectification Works. In the light of my decision to set aside Chan's award of the contract to Crystallite on the grounds that Chan had not acted impartially in the discharge of his responsibilities, this claim cannot succeed. As regards the balance of Chan's fees, this was to be paid on or after his completion of Tender Document at the earliest [note: 96] and the preparation of that document was tainted by his lack of impartiality.

91 I then turn to consider the Defendants' argument that the Plaintiff breached a fundamental term of the Settlement Agreement by filing a complaint to the PEB, contrary to his obligations under clause 12 of the Settlement Agreement which provided as follows:

> 12. This settlement agreement represents a full and final settlement of all claims the [Plaintiff] has or may have against the [Defendants]. The [Plaintiff] **shall not file any complaints with the Professional Engineers Board** and shall forthwith inform the Building and Construction Authority that the matter has been resolved and another Professional Engineer will be taking over the conduct of the matter.
>
> [emphasis added in bold]

92 Much was made by the Defendants of the importance to them of the Plaintiff refraining from making such a complaint and the fact that all the parties were aware of this before and during the negotiations leading to the Settlement Agreement. The Defendants alleged that the Plaintiff had, in fact, used the threat of a complaint to drive a hard bargain during the negotiations. However, I do not need to make a determination on whether the obligation not to complain to the PEB was a fundamental term of the contract. This is because, in my judgment, clause 12 of the Settlement Agreement, insofar as it seeks to prohibit the Plaintiff from making a complaint to the PEB, is illegal and unenforceable because it allows a professional engineer to effectively contract out of regulatory oversight of his professional conduct by the PEB under the Professional Engineers Act (Cap 253, 1992 Rev Ed) ("the Professional Engineers Act").

93 The Defendants' arguments on this point were fivefold. [note: 97] First, they submitted that the

Plaintiff had not pleaded that clause 12 of the Settlement Agreement was contrary to public policy. I am not persuaded by this argument. The unenforceability of a particular contractual term on public policy grounds cannot be dependent on the pleadings of the parties. Public policy considerations are, by their very nature, overriding factors which the court has to take into account regardless of the positions which the parties may take. As Lindley LJ stated in *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 at 728: "It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him."

94 The second contention of the Defendants was that there was nothing in the Professional Engineers Act or the relevant subsidiary legislation that compelled any person to file a complaint to the PEB under any circumstances, unlike in s 424 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") which imposed a duty to give information of certain offences. An agreement not to make a report in relation to an offence set out in s 424 of the CPC would thus be unenforceable because it would be an agreement to resile from a legal duty or obligation. The Defendants thus submitted that in the absence of any legal duty or obligation to report any act or offence to the authorities, an agreement not to report such an act or offence was enforceable. Third, the Defendants argued that clause 12 of the Settlement Agreement was akin to a compromise by a party not to commence legal proceedings against another party in exchange for adequate compensation, which was valid and enforceable. Fourth, the Defendants also likened the obligation in clause 12 to an agreement not to volunteer to give evidence, which was upheld in the English case of *Barrett v Universal-Island Records Ltd & Ors* [2006] EWHC 1009 (Ch) ("*Barrett*"). Finally, the Defendants highlighted that public policy also required that contracts freely entered into be upheld.

95 I address the second and last points raised by the Defendants first. As I understand it, the Defendants' argument on the second point was essentially that because the Professional Engineers Act *allows* for complaints to be made to the PEB but does not *compel* complaints to be made, it would not be contrary to the said Act for parties to contract out of their rights to complain against a professional engineer to the PEB. The fallacy of this argument is clearly demonstrated by the well-known case of *Johnson v Moreton* [1980] AC 37 ("*Johnson v Moreton*") where the House of Lords held that a particular statutory provision in relation to agricultural holdings gave a tenant an option to serve a counter-notice in response to a notice to quit served on him by his landlord and that the words and policy of that statute made it clear that the tenant could not by agreement exclude his right to serve a counter-notice under that statutory provision. Simply because the Professional Engineers Act does not impose a duty on persons to make complaints but allows for complaints to be made is thus not conclusive; the essential inquiry is parliamentary intention and the purpose of the statute. As for the Defendants' last point on freedom of contract, while this general principle cannot be denied, this is not the end of the inquiry. Indeed, in *Johnson v Moreton*, Lord Hailsham of St Marylebone noted the maxim that a person may renounce a right which exists solely for his own use or benefit but that the key to the interpretation of this maxim was in determining "whether the particular liberty or right conferred by the statute or rule of law is entirely for the benefit of the person purporting to renounce it. If there is a public as well as a private interest a contrary Latin maxim applies" (at 58).

96 As regards the remaining submissions of the Defendants, these submissions overlook the fact that the legislative intent of the Professional Engineers Act is to make an engineer accountable for his professional conduct not only to his client but also to a statutory body whose functions include the maintenance of standards of professional conduct and ethics of the engineering profession (see s 6(*d*)). This reflects the wider public interest which is to prevent misconduct on the part of those who hold themselves out to the public at large as professional engineers.

97 I note that the Defendants have attempted to draw an analogy between clause 12 of the Settlement Agreement and contracts not to commence legal proceedings or not to give evidence which have been held to be valid. The examples raised by the Defendants are instances of contracts to stifle a prosecution or contracts that tend to oust the jurisdiction of the courts, and the Defendants are right to point out that the prohibition only applies to contracts which adversely affect the *public* interest; it does not affect a contract in which the relevant offence or wrong is essentially a matter of *private* interest. Hence the distinction drawn between contracts stifling the prosecution of compoundable offences (which are not opposed to public policy) and contracts which pertain to non-compoundable offences (which are illegal and against public policy): see *AJT v AJU* [2011] 4 SLR 739 at [20]. The rationale for this is that conduct which tends to undermine the wider public interest should be left to the administration of the law and not to private individuals. As Cotton LJ observed in the English Court of Appeal decision of *Windhill Local Board of Health v Vint* (1890) 45 Ch D 351 at 363:

> … [T]he court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public. It would be the case of persons taking into their own hands the determining what ought to be done; and that ought not to be taken into the hands of any individuals … but ought to be left to the due administration of the law, and to the Judges, who can determine what in the particular case ought to be done. I think it goes beyond saying, that in the particular case there can be or cannot be any evil to the public; but you are taking the administration of the law, and the object which the law has in view, out of the hands of the judge and putting it into the hands of a private individual. That to my mind is illegal.

98 I do not however think that the examples raised by the Defendants assist them in the present case. Unlike the CPC which classifies certain offences as compoundable, there is no provision in the Professional Engineers Act which allows professional engineers to release or exempt themselves from disciplinary proceedings by paying compensation. In any case, clause 12 of the Settlement Agreement seeks to prohibit all complaints to the PEB without drawing any distinction between minor and serious forms of misconduct. I note moreover that the complaint which the Plaintiff lodged to the PEB alleged *inter alia* that Koh "[w]as both the qualified person supervising the additions and alterations … and the builder of the said works" and that he had "[d]emolished part of the pile cap without confirming the structural integrity of the same". [note: 98] These are serious allegations as they pertain to a conflict of interest on the part of Koh in the discharge of his duties as a professional engineer as well as the safety of certain works undertaken by him. Misconduct of this character can hardly be regarded as a matter which can be excluded from oversight by the PEB by an agreement between private parties.

99 It should be noted that there is a difference between the situation where a contracting party undertakes not to file a complaint in future and a complainant undertaking to write to a disciplinary body already seised of jurisdiction informing that body that he is desirous of withdrawing his complaint or that the parties have amicably settled the matter. The difference lies in the effect of the contractual undertaking on the statutory regime governing the professional's conduct. In the latter situation, unless the relevant legislation provides otherwise, the disciplinary proceedings already commenced are not affected by the subsequent withdrawal of the initial complaint: see *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 4 SLR 483 at [5] on similar disciplinary proceedings against solicitors under the Legal Profession Act (Cap 161, 2009 Rev Ed). It will then be up to the disciplinary body to determine how it will dispose of the matter, taking into consideration the information it has received from the complainant. Accordingly, I would have had no difficulty upholding that portion of clause 12 which required the Plaintiff to "forthwith inform the Building and

Construction Authority that the matter has been resolved and another Professional Engineer will be taking over the conduct of the matter". By contrast, the offending portion of clause 12 of the Settlement Agreement imposes an unqualified prohibition on making complaints to the PEB. While a complaint to the PEB under the Professional Engineers Act can be made by persons other than the client of the professional engineer, it has to be borne in mind that a large proportion of instances of misconduct by professional engineers will only be brought to the attention of the PEB through complaints from their clients. To allow a professional engineer to enter into a contract with his client to prohibit the client from lodging any complaint to the PEB would significantly curtail the extent to which the professional accountability envisaged by the Act can be achieved. Even if there was a countervailing public policy consideration in allowing business to be transacted freely and in upholding commercial bargains (as was alluded to in *Barrett*), this would be outweighed by the need to uphold professional accountability in the present situation.

100 Since this part of the clause is illegal and unenforceable, it follows that the Plaintiff cannot be regarded to have acted in breach of it. I should, however, add that my finding of illegality does not render the entire Settlement Agreement void because the offending portion of clause 12 can be severed from the rest of the agreement. This is because I do not regard the Plaintiff's obligation in the offending portion as constituting the whole of his consideration for the Settlement Agreement. The fact that the Plaintiff entrusted a determination of exactly how much he would be paid for the Rectification Works to an independent third party is, on its own, sufficient consideration on his part. The failure of consideration therefore does not stand in the way of the doctrine of severance applying in this case. The requirement that the court must be able to run a "blue pencil" through the offending portion without altering the meaning of or rendering senseless the rest of clause 12 of the Settlement Agreement (see *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [127]) in order for this doctrine to apply would also clearly be satisfied in this case.

Damages

101 It follows that neither party can be said to be in breach of the Settlement Agreement, let alone in repudiatory breach of it. What has taken place instead is that Chan's award of the tender to Crystallite has been set aside through no fault of either party. Although the Settlement Agreement did not expressly provide for what would happen in this situation, I cannot imagine that the parties would have contemplated either: (a) that the entire Settlement Agreement they had reached through mediation would simply unravel and they would be left to pursue their original claims against each other; or (b) that the matter could be remitted to the same professional engineer who had been found to have acted partially for a fresh, impartial determination. The essence of the contractual bargain between the parties was that the Defendants would pay the Plaintiff the reasonable costs of rectification works with a neutral third party determining the scope of the rectification works and the costs of such works being primarily determined by the tender process carried out by that neutral third party. If the parties had, at the time of the negotiations, applied their mind to the present scenario, they would in all likelihood have said, "he must be replaced" and a replacement professional engineer appointed in a similar manner. I therefore find that there would have been an implied term in the Settlement Agreement to that effect.

102 I should add that even if I were wrong about there being such an implied term in the Settlement Agreement, the court does have the power substitute alternative machinery for the contractual machinery in appropriate cases (see [80] *supra*). In *Macro v Thompson* (see [58] *supra*), Walker J accepted that in that case the circumstances justified an order for new valuations done by a different expert, although he cautioned that this was not a general rule (at 69):

> … The decision of the House of Lords in *Sudbrook Trading Estate Ltd v Eggleton* [1982] 3 All ER 1, [1983] 1 AC 444 establishes or clarifies the principle that where contractual machinery for the ascertainment of value is frustrated, the court has jurisdiction to resolve the difficulty by prescribing alternative machinery, **provided that the contractual machinery** (for instance, the nomination of a single expert valuer) **was not an essential and indispensable part of the contractual bargain**. … In this case, therefore, without laying down any general rule, I conclude that the court can and should provide alternative machinery. [emphasis added in bold]

103 The proviso above that the contractual machinery must not be an essential or indispensable part of the contractual bargain does not, in my judgment, apply to prevent the court from substituting alternative machinery in the present case. As I have indicated at [101] above, the contractual bargain in this case was that the Defendants would pay the Plaintiffs the reasonable costs of rectification works, the scope and costs of which would be determined by a neutral professional engineer and a tender process undertaken by him. It was not important to the parties that Chan in particular had to be appointed as the professional engineer. This was not like the case where, for example, the agreement was to sell at a price fixed by a valuer who was named, or who, by reason of holding some office such as the auditor of a company whose shares were to be valued, would have special knowledge relevant to the question of value, in which case the prescribed machinery may well be regarded as essential: *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 483–484. Rather, what was important to the parties in this case was simply that the professional engineer be neutral and qualified for the task. There is thus no reason why another professional engineer should not be appointed in the proper manner to undertake the relevant tasks under the Settlement Agreement.

104 The only gaps which need to be filled are the deadlines for the appointment of the replacement professional engineer and for the work to be carried out by him upon his appointment. In this vein, I note that the Settlement Agreement envisaged short timelines. I therefore direct as follows:

> (a) The parties shall, within one week of the date of this judgment submit three names to the Mediator, who shall thereafter appoint the Professional Engineer from among the names submitted to him within a further one week thereafter. If the Mediator fails to appoint a Professional Engineer by then, either party is at liberty to apply to the court to make the appointment.
>
> (b) The appointed Professional Engineer shall act in accordance with clauses 6–10 of the Settlement Agreement, save that the joint site visit referred to in clause 6 shall be undertaken within one week of his appointment by the Mediator or the court and the scope and specifications of the rectification works to be prepared pursuant to clause 6 is to be set out within one week of the said site visit.

105 The Defendants are under an obligation to pay to the Plaintiff the costs set out in clause 11 of the Settlement Agreement resulting from this new appointment with the following qualifications:

> (a) The payment of $20,000 as compensation for moving and costs need not be paid as the Defendants have already paid this sum; and
>
> (b) As for the fees of the replacement professional engineer which the Defendants have to pay to the Plaintiff, credit is to be given for the $11,260 which had been paid earlier by them as the first instalment of Chan's fees. From the documents, it is clear that the contract of appointment of Chan as the professional engineer pursuant to which his fees were payable was one to which only the Plaintiff and Chan were parties and to which the Defendants were strangers. It will thus be for the Plaintiff to claim such refund from Chan of the fees which have

been paid by the Defendants on the Plaintiff's behalf although I express no view as to the extent of his legal entitlement to do so;

(c) For the avoidance of doubt, the "duration of the Rectification Works" in clause 11(c) of the Settlement Agreement is to be regarded as referring to the duration of the Rectification Works as determined by the replacement professional engineer. The Plaintiff cannot claim against the Defendants for the rental and storage costs which he has already incurred given that these were referable to the duration of the work to be done pursuant to the tender award which I have set aside. As to whether the Plaintiff may claim these costs from Chan under the contract between them, this is not an issue which is before me in the present case. These observations also apply with respect to any liability incurred by the Plaintiff pursuant to the contract which Chan awarded to Crystallite. [note: 99]

Alleged conspiracy between Chan and the Plaintiff

106 While the Defendants initially pleaded both lawful and unlawful conspiracy, only unlawful conspiracy was pursued in their written submissions. The alleged unlawful means was the Plaintiff's breach of the Settlement Agreement.

107 The Defendants' claim on conspiracy fails *in limine* since I have found that there was no evidence of collusion on the part of Chan and the Plaintiff and/or his agents.

The Defendants' counterclaims

108 To recapitulate, the First Defendant counterclaimed the sum of $35,260 from the Plaintiff comprising: $20,000 paid to the Plaintiff as compensation for moving and costs under the Settlement Agreement; $11,260 being the first instalment of Chan's fees; and $4,000 being the outstanding professional fees due in relation to the Additional Works. The Second Defendant counterclaimed the total sum of $146,215.50 (including GST) for the Additional Works, as well as damages to be assessed in relation to the Plaintiff's complaint to the PEB.

109 In the light of my earlier findings, it is clear that the only items in the Defendants' counterclaims that remain to be considered relate to the Additional Works.

110 The Defendants' case was that the Additional Works had taken place between July 2010 and April 2011. There were no quotations, invoices or other documentation for the Additional Works, which Mui Ling said were undertaken based on trust between the parties. [note: 100] Nevertheless, the Defendants submitted that the Second Defendant had clearly mentioned its intention to claim for the costs of these Additional Works in the Defendants' summary of facts which was submitted prior to and for the purpose of the mediation. [note: 101]

111 I find that the Defendants are not entitled to their counterclaims in respect of the Additional Works. It was expressly stated in the Settlement Agreement that "[t]he Parties wish to enter into this Settlement Agreement to achieve a full, final and complete settlement of all claims, issues and/or disputes (actual or potential, present or future) among them in respect of the Contract", the "Contract" being the contract for the A&A Works. [note: 102] The Defendants' counterclaim would have been part of the claims which were the subject of the compromise under the Settlement Agreement. The reference to them in the Defendants' summary of facts puts beyond doubt the fact that the Additional Works were covered by the mediation and the Settlement Agreement. The parties had, in my judgment, agreed that all claims or disputes would be superseded by the Settlement

Agreement which would now encompass the parties' entire agreement as to matters arising out of the A&A Works.

Conclusion

112 While the Plaintiff did not succeed in any of his claims, the Defendants only succeeded in their claim to set aside the award of the contract to Crystallite by Chan. However, a significant part of the proceedings concerned the evidence pertaining to this issue. In the circumstances, I order the Plaintiff to pay to the Defendants half of the Defendants' costs, to be agreed or taxed.

[note: 1] ABD 7–8.

[note: 2] ABD 14–16.

[note: 3] ABD 17; Transcript of Evidence dated 20 November 2013 at p 35.

[note: 4] ABD 31–168.

[note: 5] ABD 169–275.

[note: 6] ABD 278–286.

[note: 7] ABD 276–277.

[note: 8] ABD 320.

[note: 9] ABD 313.

[note: 10] ABD 330–331.

[note: 11] ABD 332.

[note: 12] ABD 341, 343.

[note: 13] Transcript of Evidence dated 14 November 2013 at p 94; DW1 AEIC at para 54.

[note: 14] ABD 345–348.

[note: 15] ABD 349–351; PW5 AEIC at para 31.

[note: 16] ABD 373-413.

[note: 17] ABD 428–430, 434.

[note: 18] ABD 604.

[note: 19] PW5 AEIC at para 109; DW3 AEIC at para 11.

[note: 20] ABD 665–669.

[note: 21] ABD 753–754.

[note: 22] BOP 8–9 (Writ of Summons at paras 15–17).

[note: 23] Transcript of Evidence dated 26 September 2013 at p 24.

[note: 24] Transcript of Evidence dated 26 September 2013 at pp 24–25, 27–28.

[note: 25] BOP 147 (Defence and Counterclaim (Amendment No. 3) at para 26).

[note: 26] BOP 139 (Defence and Counterclaim (Amendment No. 3) at para 10).

[note: 27] Transcript of Evidence dated 20 September 2013 at pp 19–20, 30–31.

[note: 28] Transcript of Evidence dated 14 November 2013 at pp 54–56.

[note: 29] Transcript of Evidence dated 20 November 2013 at p 48.

[note: 30] Transcript of Evidence dated 20 November 2013 at pp 56, 67.

[note: 31] Defendants' Closing Submissions dated 13 December 2013 at para 137; Plaintiff's Reply Submissions dated 27 December 2013 at para 117.

[note: 32] ABD 318–319.

[note: 33] ABD 323–324.

[note: 34] Defendants' Closing Submissions dated 13 December 2013 at paras 178–179.

[note: 35] Defendants' Closing Submissions dated 13 December 2013 at para 138.

[note: 36] ABD 313.

[note: 37] ABD 325–327.

[note: 38] PW5 AEIC at para 18; Transcript of Evidence dated 14 November 2013 at pp 101–102.

[note: 39] Defendants' Closing Submissions dated 13 December 2013 at paras 149–160.

[note: 40] Defendants' Closing Submissions dated 13 December 2013 at paras 161–163.

[note: 41] Defendants' Closing Submissions dated 13 December 2013 at paras 164–167.

[note: 42] Defendants' Closing Submissions dated 13 December 2013 at paras 168–171.

[note: 43] Plaintiff's Closing Submissions dated 13 December 2013 at para 66.

[note: 44] Defendants' Closing Submissions dated 13 December 2013 at para 149; Defendants' Reply Submissions dated 27 December 2013 at para 10–11.

[note: 45] Defendants' Closing Submissions dated 13 December 2013 at para 153; Defendants' Reply Submissions dated 27 December 2013 at para 12.

[note: 46] Plaintiff's Reply Submissions dated 27 December 2013 at paras 129–130.

[note: 47] ABD 313.

[note: 48] ABD 278–286, 291–302; Transcript of Evidence dated 24 September 2013 at p 19.

[note: 49] Transcript of Evidence dated 21 November 2013 at p 58.

[note: 50] Transcript of Evidence dated 28 November 2013 at pp 60–61.

[note: 51] Defendants' Closing Submissions dated 13 December 2013 at para 162.

[note: 52] Plaintiff's Reply Submissions dated 27 December 2013 at paras 18–19, 21.

[note: 53] Defendants' Closing Submissions dated 13 December 2013 at para 144; Plaintiff's Reply Submissions dated 27 December 2013 at para 117.

[note: 54] Defendants' Closing Submissions dated 13 December 2013 at paras 172–173.

[note: 55] Defendants' Closing Submissions dated 13 December 2013 at paras 174, 176.

[note: 56] Defendants' Closing Submissions dated 13 December 2013 at paras 193–197.

[note: 57] Defendants' Closing Submissions dated 13 December 2013 at para 198.

[note: 58] Transcript of Evidence dated 26 November 2013 at pp 4–5; Transcript of Evidence dated 28 November 2013 at pp 80–81.

[note: 59] Transcript of Evidence dated 28 November 2013 at p 82.

[note: 60] DW6 AEIC at paras 6–11.

[note: 61] Transcript of Evidence dated 28 November 2013 at p 87.

[note: 62] Transcript of Evidence dated 14 November 2013 at p 93.

[note: 63] Transcript of Evidence dated 14 November 2013 at p 52.

[note: 64] Defendants' Closing Submissions dated 13 December 2013 at para 195; Transcript of Evidence dated 14 November 2013 at pp 56–57.

[note: 65] ABD 325–326.

[note: 66] ABD 325–327.

[note: 67] PW5 AEIC at paras 45, 78.5, 93.4, 110.2, 122.6.

[note: 68] PW5 AEIC at para 45.

[note: 69] PW5 AEIC at para 110.2.

[note: 70] Transcript of Evidence dated 15 November 2013 at pp 7–9.

[note: 71] ABD 389; Transcript of Evidence dated 19 November 2013 at p 67.

[note: 72] PW5 AEIC at paras 112–113.

[note: 73] Transcript of Evidence dated 15 November 2013 at pp 13–14, 32–34.

[note: 74] PW5 AEIC at paras 91, 93; Transcript of Evidence dated 15 November 2013 at pp 76–77.

[note: 75] Transcript of Evidence dated 15 November 2013 at p 76.

[note: 76] Transcript of Evidence dated 15 November 2013 at p 111.

[note: 77] Transcript of Evidence dated 18 November 2013 at p 12.

[note: 78] Transcript of Evidence dated 19 November 2013 at p 55.

[note: 79] Transcript of Evidence dated 14 November 2013 at p 114.

[note: 80] Transcript of Evidence dated 14 November 2013 at p 84.

[note: 81] Transcript of Evidence dated 18 November 2013 at pp 60–61.

[note: 82] Transcript of Evidence dated 19 November 2013 at p 58.

[note: 83] Plaintiff's Closing Submissions dated 13 December 2013 at para 145.

[note: 84] PW5 AEIC at paras 77, 112–114; Transcript of Evidence dated 18 November 2013 at p 23.

[note: 85] PW5 AEIC at para 91; DW1 AEIC at paras 79–83.

[note: 86] PW5 AEIC at paras 112–114.

[note: 87] DW3 AEIC at paras 38–39.

[note: 88] Transcript of Evidence dated 27 November 2013 at pp 147–148.

[note: 89] Transcript of Evidence dated 27 November 2013 at pp 129–132.

[note: 90] Transcript of Evidence dated 27 November 2013 at p 130.

[note: 91] ABD 665–669.

[note: 92] ABD 670.

[note: 93] ABD 678.

[note: 94] ABD 679–681.

[note: 95] ABD 694–695.

[note: 96] ABD 331.

[note: 97] Defendants' Further Submissions dated 23 January 2014.

[note: 98] ABD 756.

[note: 99] Plaintiff's Reply Submissions dated 27 December 2013 at paras 204–205.

[note: 100] Transcript of Evidence dated 28 November 2013 at pp 28–29.

[note: 101] Defendants' Reply Submissions dated 27 December 2013 at para 110; ABD 307–308.

[note: 102] ABD 312.