ANC Holdings Pte Ltd *v* Bina Puri Holdings Bhd
[2013] SGHC 97

Case Number : Suit No 599 of 2011/D

Decision Date : 03 May 2013

Tribunal/Court : High Court

Coram : Vinodh Coomaraswamy JC

Counsel Name(s) : P E Ashokan and Sheryl Cher (KhattarWong LLP) for the plaintiff; Chia Foon Yeow (Loo & Partners LLP) for the defendant.

Parties : ANC Holdings Pte Ltd — Bina Puri Holdings Bhd

Contract – Agent's entitlement to commission – Whether agent effective cause of event to be procured

Contract – Illegality – Whether court obliged to take cognisance of illegality when not pleaded as a defence

Contract – Illegality – Bribery

3 May 2013 Judgment reserved.

Vinodh Coomaraswamy JC:

Overview

1 This is an action in contract for a fixed sum of money. Pursuant to a written agreement between the plaintiff and the defendant, the plaintiff agreed to assist a subsidiary of the defendant in securing housing construction projects in Saudi Arabia. In consideration for that, the defendant agreed to pay the plaintiff a commission of 5% of the value of the projects that the subsidiary secured. The plaintiff's case is that it fulfilled its obligation under the agreement. It therefore claims from the defendant its commission in the sum of S$4,632,273.81.

2 On the pleadings, the plaintiff's claim turned entirely on the single question of whether the plaintiff's services were the effective cause of the defendant's subsidiary securing the projects. During the trial, however, an issue arose entirely outside the pleadings. The defendant's witnesses gave evidence that it had been the joint intention of both the plaintiff and the defendant in entering into the agreement that the plaintiff's assistance to the defendant's subsidiary would consist of paying bribes to secure the projects. The defendant contends – on the basis of this evidence – that the plaintiff is precluded from enforcing its claim by the doctrine *ex turpi causa, non oritur actio* ("*ex turpi causa*"). The defendant contends that the plaintiff is so precluded even though the defendant has never pleaded either this defence or the necessary underlying facts. The plaintiff, not unnaturally, strenuously denies the defendant's allegation of fact and also its entitlement in law to rely on *ex turpi causa*.

Background facts

3 The plaintiff is a company incorporated in Singapore. It was incorporated on 6 April 2010. [note:

[1] Chan Lai Thong ("Chan"), a Singaporean, is its managing director and a shareholder. Dr Abdallah Adel M Alfageer ("Dr Abdallah") is a Saudi national and a director and shareholder of the plaintiff.

4 The defendant is a public company incorporated in Malaysia. It is listed on the Kuala Lumpur Stock Exchange. Through its subsidiaries, the defendant is in the business of holding investments, civil and building engineering management and property development, amongst other business. [note: 2] The defendant's key personnel are:

(a) Matthew Tee Kai Woon ("Tee"), Executive Director.

(b) Lee Seng Fong ("Lee"), General Manager for Projects.

(c) Syed Nasser bin Syed Omar ("Syed Nasser"), Group Chief Operating Officer, Projects & Business Development.

(d) Tan Kwe Hee ("Tan"), Group Senior Chief Operating Officer, Finance Credit Control & Legal.

5 The defendant has business interests outside Malaysia. One of those interests is a 50 percent interest [note: 3] in a Saudi Arabian company, Bina Puri Saudi Co Ltd ("Bina Puri Saudi"). The remaining 50 percent interest in Bina Puri Saudi is held by the defendant's Saudi partner. [note: 4] Bina Puri Saudi's key personnel are:

(a) Magendran Ramaiah ("Magendran"), General Manager. He left the employment of Bina Puri Saudi in December 2010.

(b) Abdulkarim Ibrahim Al-Maayouf ("Abdulkarim"), a director.

(c) Abdul Basit, a member of Magendran's team.

6 On 8 April 2010, a meeting took place between the plaintiff, represented by Chan, and three representatives of the defendant, including Lee ("the April Meeting"). Also in attendance were two of Chan's business associates, one of whom was Ahmad Subri bin Abdullah ("Subri"), a Malaysian. Chan gave the defendant a general presentation on construction projects in Saudi Arabia, including plans that the Saudi General Housing Authority ("the Authority") had to construct public housing projects in various parts of the country. Chan then represented that the plaintiff, which he and Dr Abdallah had incorporated two days earlier, could help the defendant to secure such projects. [note: 5] After this meeting, on the same day, Lee sent Chan an e-mail expressing the defendant's willingness to collaborate with the plaintiff [note: 6]. Sporadic negotiations followed, *via* phone and e-mail, as to the terms and form of a written agreement between the plaintiff and the defendant. Much of these negotiations concerned the amount of commission that the defendant was to pay the plaintiff for its services.

7 On 7 September 2010, another meeting took place in Kuala Lumpur ("the September Meeting"). This time, the meeting was between Chan, Subri, Lee, Tee, and Wong Yee Hian ("Jason Wong"). It was Jason Wong who had brought Chan into contact with Tee. [note: 7] On 4 October 2010, Chan was in Riyadh, Saudi Arabia for a meeting ("the October Meeting") with representatives of Bina Puri Saudi, namely, Magendran and Abdulkarim. [note: 8]

8 The plaintiff and the defendant eventually entered into a written agreement dated 15 October

2010 ("the Agreement"). Under the Agreement, the defendant appointed the plaintiff to render assistance to the defendant and its subsidiaries and associated companies in a bid for two specific projects from the Authority ("the Projects"). The first of the two Projects was the construction of 359 public housing units in Tabuk ("the Tabuk Project"). The second of the two Projects was the construction of 308 public housing units in Al Dawadmy ("the Al Dawadmy Project"). For its assistance, the defendant agreed to pay the plaintiff a commission amounting to 5% of the total contract value of the Projects [note: 9].

9 On 2 November 2010, Bina Puri Saudi submitted to the Authority a bid of SAR145,499,080 (approximately S$47.5m at the exchange rate effective in July 2011) for the Tabuk Project. A week later, on 9 November 2010, Bina Puri Saudi submitted a bid of SAR139,082,912 (approximately S$45.5m) for the Al Dawadmy Project. [note: 10] In accordance with the bidding process, Bina Puri Saudi was required to provide the Authority with bonds ("the Bid Bonds"), by way of letters of credit, amounting to a total of SAR3,996,580 [note: 11] (approximately S$1.3m).

10 By a notice dated 2 January 2011, the Authority awarded the Tabuk Project to Bina Puri Saudi at a contract value of SAR145,492,080. [note: 12] By a notice dated 9 January 2011, the Authority awarded the Al Dawadmy Project to Bina Puri Saudi at a contract value of SAR137,746,079. [note: 13] The total contract value of both Projects was SAR283,238,159. The 5% commission claimed by the plaintiff therefore amounts to SAR14,161,907.95 (equivalent to precisely S$4,632,273.81).

11 Having been awarded the Projects, Bina Puri Saudi was required to furnish to the Authority further letters of credit, amounting to 5 percent of the total contract value of the Projects, as a bond to guarantee performance ("the Performance Bond"). Bina Puri Saudi was obliged to do this within ten days from receiving the notices of the awards. Bina Puri Saudi failed to do this. This failure persisted despite extensions of time from the Authority. As a result, the Authority cancelled the awards of the Projects to Bina Puri Saudi in April 2011. In cancelling the awards, the Authority also forfeited the Bid Bonds, as it was entitled to do. [note: 14]

12 The defendant eventually refused to pay the commission which the plaintiff claimed. So the plaintiff commenced this action on 26 August 2011.

Issues for decision

13 The plaintiff submits, and the defendant does not dispute, that the applicable law on the plaintiff's entitlement to the commission claimed is as set out in the Court of Appeal's decision of *Emporium Holdings (Singapore) Pte Ltd v Knight Frank Cheong Hock Chye & Baillieu (Property Consultants) Pte Ltd* [1994] SGCA 147 at [17]:

> "Where an agent is entitled to commission upon his procuring the happening of a future event, the entitlement to commission arises only when the event occurs and it is shown that the agent's services were the effective cause of the event occurring."

14 It was not in dispute that the future event which the plaintiff was to procure in order to trigger its entitlement to the commission under the Agreement was the Authority's award of the Projects to Bina Puri Saudi. It was also not in dispute that that triggering event occurred. The plaintiff's original pleaded case included a *quantum meruit* claim. The plaintiff later amended its pleadings to withdraw that claim. Accordingly, the single issue that arose on the pleadings was an issue of fact: was the plaintiff the effective cause of the triggering event under the Agreement.

15 The apparent simplicity of the single factual issue before me on the pleadings lasted until the defendant's case. That was when the defendant's witnesses gave evidence in cross-examination that, from the outset of the Agreement, it was the common intention of both the plaintiff and the defendant that the plaintiff would bring about the triggering event under the Agreement by paying bribes. The defendant never pleaded this allegation. It appears nowhere in the defendant's affidavits of evidence in chief. It appears nowhere in the defendant's opening statement. It was not put to any of the plaintiff's witnesses when the plaintiff presented its case. But in its closing submissions, the defendant relies on *ex turpi causa* as an additional reason for dismissing the plaintiff's claim. Even now, this defence appears nowhere in its pleadings. Nor has the defendant applied to amend its pleadings to raise this defence or the underlying facts necessary to support it.

16 These developments raised a number of additional issues. The threshold issue is whether the defendant is prevented from relying on the defence of *ex turpi causa* because of its continued failure to plead it as a defence. Then there is the factual issue of whether the defendant has proven, on a balance of probabilities, that it was indeed the common intention of both parties that the plaintiff would use bribery to secure the Projects for Bina Puri Saudi. If they had that common intention, the final additional question is whether the intended illegality of bribery renders the plaintiff's claim unenforceable under the doctrine of *ex turpi causa*.

17 I should emphasise that the only factual issue which the *ex turpi causa* defence raises before me is as to the common intention of the plaintiff and defendant. In order to determine whether the *ex turpi causa* defence is available, I do not need to make any findings as to whether the plaintiff followed through on that common intention by actually making corrupt payments.

18 Bearing that in mind, the four issues for decision in this matter are as follows:

(a) Whether the plaintiff was the effective cause of the Authority awarding the Projects to Bina Puri Saudi;

(b) Whether the defendant is precluded from relying on *ex turpi causa* as a defence by reason of its failure to plead it;

(c) Whether the plaintiff and the defendant had the common intention to secure the award of the Projects to Bina Puri Saudi by the plaintiff paying bribes; and

(d) Whether the parties' common intention to secure the award of the Projects to Bina Puri Saudi by the plaintiff paying bribes renders the plaintiff's claim unenforceable under the *ex turpi causa* doctrine.

Witnesses called and submissions tendered

19 At trial, four witnesses gave evidence for the plaintiff and five witnesses gave evidence for the defendant. The plaintiff's witnesses, in order, were: (1) Dr Abdallah, (2) Subri, (3) Magendran, and (4) Chan. It is noteworthy that Magendran gave evidence for the *plaintiff* despite having been assigned to work at Bina Puri Saudi by the *defendant*. The defendant's witnesses, in order, were: (1) Lee, (2) Abdulkarim, (3) Syed Nasser, (4) Tee, and (5) Tan. Tan was the only witness who did not file an affidavit of evidence-in-chief ("AEIC"). Jason Wong, who facilitated interaction between Chan and Tee (see [7] above), filed an AEIC in support of the plaintiff, but was not called as a witness at trial.

20 The parties tendered written submissions after the trial by way of two rounds of simultaneous exchange. The first round consisted of closing submissions, and the second consisted of reply

submissions in response to the other party's closing submissions.

21 I had regard to all of the parties' submissions and all of the material placed before me. However, I do not intend in this judgment to address each and every one of the many arguments and allegations made by the parties. In my view, little turned on some of these arguments and allegations. I confine myself to what in my view were the more important arguments and allegations.

22 I now consider the issues in the order in which I listed them at [18] above.

Was the plaintiff the effective cause of the triggering event

23 The plaintiff claims to have been the effective cause of Bina Puri Saudi securing the Projects in two specific ways:

(a) The plaintiff informed the defendant of potential construction projects in Saudi Arabia; and

(b) The plaintiff advised Bina Puri Saudi on how to price its bids competitively for the Projects.

I will deal with each of these claims in turn.

Chan's presentation at the April Meeting

24 The plaintiff claims that it informed the defendant of potential construction projects in Saudi Arabia through Chan's presentation at the April Meeting on housing construction projects planned by the Authority. [note: 15] The plaintiff relies on an e-mail sent by Lee to Chan shortly after the April Meeting. In that email, Lee said that he "would appreciate if [Chan] could arrange meeting in Saudi for further discussion to find out more about the project". [note: 16] This, the plaintiff argues, suggests that prior to the April Meeting, neither the defendant nor Bina Puri Saudi were aware of construction projects planned by the Authority, let alone intending to bid for these projects. [note: 17]

25 The defendant's response is that Bina Puri Saudi knew about the Projects quite apart from the plaintiff. Chan's presentation at the April Meeting was about construction projects in Saudi Arabia generally, and not about the Projects specifically. Further, Chan made his presentation to representatives of the *defendant*, not to representatives of *Bina Puri Saudi*. [note: 18] Before the plaintiff even came on the scene, Bina Puri Saudi had already taken steps to ensure that it would be "prequalified" to bid for the Authority's projects. [note: 19] Bidding for the Authority's projects was on an invitation-only basis, making pre-qualification necessary. According to Abdulkarim, Bina Puri Saudi submitted its application to be prequalified at the end of February 2010. [note: 20] It is not in dispute that the plaintiff was not involved in Bina Puri Saudi being prequalified.

26 I accept the defendant's submissions. The plaintiff itself accepts that Chan's presentation at the April Meeting was made to the defendant, not to Bina Puri Saudi. I am willing to assume that the plaintiff is correct to say that the *defendant* did not know about construction projects planned by the Authority before the April Meeting. This would not be surprising, since the defendant is a Malaysian company with its office and personnel in Malaysia and not in Saudi Arabia. But it is a leap of logic to assert, as the plaintiff does, that the defendant's lack of knowledge as to the Authority's projects was shared by Bina Puri Saudi. This leap of logic is not warranted on the evidence. On the contrary, the plaintiff did not challenge Abdulkarim's evidence that Bina Puri Saudi was already working to prequalify itself for the Authority's projects months before the April Meeting. I accept Abdulkarim's evidence. I therefore find that the plaintiff was not the effective cause of Bina Puri Saudi knowing of

the construction projects planned by the Authority. Hence, Chan's presentation at the April Meeting was not the effective cause of Bina Puri Saudi securing the Projects.

Plaintiff's advice on pricing the bids

27 The second way in which the plaintiff claims to have assisted Bina Puri Saudi in securing the Projects is that it advised Bina Puri Saudi on pricing the bids for the Projects. According to the plaintiff, its advice enabled Bina Puri Saudi to arrive at the winning bid amounts of SAR145,499,080 for the Tabuk Project and SAR139,082,912 for the Al Dawadmy Project. [note: 21]

Summary of the plaintiff's case on its assistance in pricing

28 The plaintiff's argument on this point proceeds in two stages. Stage one is that the plaintiff in fact advised Bina Puri Saudi on the pricing of the bids. Stage two is that there was a causal connection between the plaintiff's advice and the winning bid amounts because Magendran, having control over the pricing of the bids, prepared Bina Puri Saudi's bids in accordance with the plaintiff's advice.

29 According to the plaintiff, stage one of the argument is supported by the following evidence:

(a) According to Chan's AEIC, he and Dr Abdallah decided after some discussion that the bids should not be priced at more than SAR1,900 per square metre. Chan then conveyed this advice to Magendran. [note: 22]

(b) Magendran gave evidence that he and Chan did indeed discuss pricing strategy for the bids. [note: 23] These discussions took place in the second half of October 2010 *via* phone calls and "Skype". [note: 24]

(c) Chan's telephone bills show that Chan and Magendran spoke on the telephone on four occasions from 14 October to 1 November 2010. [note: 25] Given the temporal proximity between the telephone calls and the submission of the bids on 2 and 9 November 2010, [note: 26] these telephone conversations must have involved Chan advising Magendran on pricing the bids.

(d) Dr Abdallah and Magendran both gave evidence that they met each other in late October 2010, [note: 27] with Dr Abdallah adding under cross-examination that he talked about pricing the bids at that meeting. [note: 28]

(e) Dr Abdallah's evidence was that he had years of experience at the Ministry of Interior and in the construction and civil engineering industry in Saudi Arabia, and holds a PhD in civil engineering from Pittsburgh University in the United States of America, which would make him well-qualified to advise on pricing the bids. [note: 29]

30 Stage two of the plaintiff's argument was that there was a causal connection between the plaintiff's advice and the winning bid amounts. Stage two may be further broken down into two parts as follows:

(a) Magendran was in a position to control, or at least influence, Bina Puri Saudi's pricing of the bids. The plaintiff argues that a number of factors demonstrate this, including: (1) The appearance of the words "Prepared by: R Magendran" on the cover pages of the bid documents;

[note: 30] (2) Syed Nasser's evidence that "[t]he preparation of the tender documents and working out the tender prices were carried out ... under the supervision of [Magendran] the country manager"; [note: 31] (3) Syed Nasser's reluctance to approve Magendran's absence from Saudi Arabia during the submission of the bids, demonstrating Magendran's importance to Bina Puri Saudi; [note: 32] (4) Magendran's authoritative tone in September 2010 e-mails to Syed Nasser, in which he told Syed Nasser of the bid amounts he had worked out and instructed Syed Nasser to prepare the required documentation; [note: 33] and (5) Abdulkarim's evidence that Magendran was part of the team "tasked with working out the detailed costing and pricing"; [note: 34] and that Magendran was involved in a "technical role", which, by Abdulkarim's definition, involved "pricing". [note: 35]

(b) Magendran acted in accordance with Chan's advice in pricing Bina Puri Saudi's bids. In support, Magendran gave evidence that he arrived at the winning bid amounts after receiving feedback from Chan. [note: 36]

Summary of the defendant's case on the plaintiff's assistance in pricing

31 The defendant argues that the plaintiff had nothing to do with the pricing of Bina Puri Saudi's bids for the Projects. It argues that Bina Puri Saudi worked out the winning bid amounts in collaboration with a local Saudi contractor without assistance from the plaintiff. It cites in support a number of e-mails between Magendran, Syed Nasser, Abdulkarim and personnel from Bina Puri Saudi. These e-mails reflect changes in the proposed pricing of the bids over time. [note: 37] Abdulkarim's evidence was that the bids were priced according to information indirectly received from the Minister of Finance that the bid amount should not exceed SAR2,000 per square metre. [note: 38]

32 Further, the defendant argues that the plaintiff's claim that Chan and Dr Abdallah gave advice on pricing should not be believed for the following reasons:

(a) The evidence given by the plaintiff's witnesses lacks detail. Although Chan mentioned a specific figure of SAR1,900 per square metre, which he claims formed the content of his advice, Magendran and Dr Abdallah do not mention this figure in their AEICs. [note: 39]

(b) When Tee put Magendran in touch with Chan, Tee did not instruct Magendran to seek Chan's advice on pricing the bids. [note: 40]

(c) Magendran gave Chan information on the bids only on 30 October 2010, as seen in e-mails between Chan, Magendran and Abdul Basit. [note: 41] This was three days before submission of the Tabuk Project bid. It is unlikely that Chan could have given advice on pricing within that short space of time, especially since the documented communication between Chan and Magendran during that period was limited to two brief telephone calls. [note: 42]

(d) A day later, on 1 November 2010, Syed Nasser instructed Magendran to seek his permission before giving Chan any information on the bids. [note: 43] Magendran, in consequence, seems not to have given Chan any further information. [note: 44]

(e) If Chan's advice did indeed result in changes made to the pricing of the bids, many consequential amendments to the bid documents would have resulted, generating a paper trail.

The fact that no such trail was adduced in evidence suggests that Chan gave no such advice on pricing. [note: 45]

33 Finally, the defendant argues that, even if Chan did give Magendran advice on pricing the bids, there could not be a causal connection between this advice and the winning bid amounts because Magendran could not have incorporated the advice into the pricing of the bids. In the first place, Magendran did not have much control over the pricing of the bids; he acknowledged [note: 46] that, in the organisational hierarchy of Bina Puri Saudi, he was subordinate to Syed Nasser. [note: 47] According to Syed Nasser, no one person in Bina Puri Saudi could decide the bid amounts unilaterally. [note: 48] Further, Magendran was not in Saudi Arabia when the bids were submitted; by his own evidence, any changes to the bid documents would have to be made through Abdul Basit, who was in Saudi Arabia. [note: 49] The plaintiff could have called Abdul Basit as a witness to testify to this, but did not do so. The defendant submitted that I should draw an adverse inference against the plaintiff for its failure to do so. [note: 50]

Plaintiff's response in reply submissions

34 The plaintiff put forward several responses in its reply submissions.

35 First, the defendant is wrong to say that just because Chan received information about the bids for the Projects only on 30 October 2010, three days before submission of the Tabuk Project bid, he could not have advised on pricing the bids. Rather, Chan's evidence was that, when he sought "key [information] on... tender bid" in an e-mail to Magendran dated 30 October 2010, [note: 51] this was so that Chan could check that his advice on pricing the bids had been followed by Magendran. [note: 52] In other words, the plaintiff argues that Chan's advice on pricing the bids preceded his request for "tender bid information" on 30 October 2010.

36 Second, even though there had been internal discussions as to pricing of the bids within Bina Puri Saudi, this is not inconsistent with Chan subsequently giving advice on pricing the bids. According to Chan, he started giving Magendran advice in mid-October 2010. [note: 53] At that time, Bina Puri Saudi had not yet finalised the pricing of its bids and therefore had time to take on board Chan's advice. Furthermore, argues the plaintiff, it was Chan's advice that enabled Bina Puri Saudi to correct an error in its bid pricing calculations. Magendran's evidence is that Bina Puri Saudi had omitted from its calculations the cost of excavation works and building mosques. In other words, Bina Puri Saudi calculated its bids taking into account the cost of building only the villas. Magendran's evidence was that it was Chan who pointed out this mistake. [note: 54] Syed Nasser admitted under cross-examination that there was a change made to the pricing of the bids even after 30 October 2010, such change being necessitated by "human error" in failing to take into account the cost of building the mosques. [note: 55]

37 Third, even though Magendran was subordinate to Syed Nasser in Bina Puri Saudi's organisational hierarchy, this does not mean that Magendran did not have authority to change the pricing of the bids unilaterally. [note: 56] Magendran's evidence was that he did have that authority, [note: 57] provided that Syed Nasser did not dispute the pricing of the bids for "any valid reason". [note: 58] This is supported by the fact that Tee had put Chan directly in touch with Magendran without going through Syed Nasser. [note: 59]

38 Fourth, no adverse inference should be drawn against the plaintiff for not calling Abdul Basit as a witness, because (1) Abdul Basit, a foreigner, is out of the jurisdiction and is not a compellable witness; (2) the evidence that Abdul Basit might supply is not material; and (3) the defendant did not cross-examine the plaintiff's witnesses on their reasons for not calling Abdul Basit as a witness. [note: 60]

Dispute as to authenticity of evidence

39 It should be noted at this juncture that the plaintiff disputes the authenticity and the truth of the contents of two e-mails (and their attachments) sent by Abdul Basit to Syed Nasser: one on 31 October 2010 and the other on 1 November 2010 [note: 61]. The reason for this is that Abdul Basit, the maker of the two e-mails, was not called as a witness by the defendant. [note: 62] The plaintiff argues that the defendant has failed to discharge the burden of proving the authenticity of both emails and that that burden lies on the defendant because it is the defendant who seeks to rely on the e-mails.

40 The defendant's response is that, by reason of section 67(1)(a)(ii) read with section 68(2)(f) of the Evidence Act (Cap 97, 1997 Rev Ed), it does not need to call Abdul Basit to prove the authenticity of the documents because Abdul Basit, being in possession of the e-mails, is either out of the reach of the Singapore courts or not subject to the process of the Singapore courts [note: 63]. In any event, as regards the e-mail of 1 November 2010, Magendran confirmed under cross-examination that he had received that e-mail [note: 64] and the plaintiff made reference to the same e-mail in its own cross-examination of Syed Nasser [note: 65].

My analysis

41 I will first resolve the evidential dispute described above at [39]-[40].

42 Dealing first with the e-mail of 1 November 2010, in my view, the plaintiff is not entitled to dispute the authenticity of this e-mail because it made use of this e-mail in its cross-examination of Syed Nasser. Furthermore, Magendran, a witness for the plaintiff, did acknowledge having received that e-mail. Where correspondence as a matter of historical fact was received by an opposing witness who is available for cross-examination and where he acted upon it on the basis that it is authentic, it would be highly artificial – at least in a civil case – to insist on calling the maker. It was not disputed that Magendran received a copy of this email and that, having received the email, he treated it as authentic. That to me suffices.

43 As for the e-mail of 31 October 2010, I do not rely on it at all in arriving at my findings of fact. Therefore, I need not and do not express any view on its authenticity.

44 I move on to the factual dispute. In my judgment, the plaintiff has failed to prove, on a balance of probabilities, that its advice on the pricing of the bids was the effective cause of Bina Puri Saudi arriving at the winning bid amounts and securing the Projects. I go further and say that the plaintiff has failed to prove that its representatives gave Bina Puri Saudi any advice at all on pricing the bids.

45 The entire content of the plaintiff's advice on pricing the bids seems to have been that the bid amounts should be below SAR1,900 per square metre. But on Chan's own evidence, when he allegedly gave Magendran this advice, Bina Puri Saudi was already looking at a bid amount of between SAR1,850 to SAR1,950 per square metre. [note: 66] In an e-mail dated 11 October 2010, Magendran

reported that one Dr Shiddi – an adviser to Bina Puri Saudi independent of the plaintiff – had advised him to bring the bid amounts down to SAR1,850 per square metre. [note: 67] Chan's alleged advice, therefore, would have added little, if anything, to Bina Puri Saudi's pricing of the bids.

46 Moreover, Abdul Basit's e-mail of 1 November 2010 [note: 68] makes it clear that the winning bid amounts – or at least the winning bid amount for the Tabuk Project – was arrived at on the advice of one Dr Ahmed Al Shiddy (this is presumably the Dr Shiddi to whom Magendran refers in his e-mail of 11 October 2010 at [45] above), and that Chan had no part to play in pricing of the bids. I reproduce the relevant excerpts as follows:

> My initial tender sum was [***SAR] 154,999,899.00 (SR 1,919 per sq m excluding mosque)*** , but after having a discussion with Dr Ahmed Al Shiddy, he advised me to reduce the price to [***SAR] 145,499,080.00 ([SAR] 1,800 per sq m excluding mosque).***
>
> ...
>
> My personal opinion, we should just stay with Dr Ahmed Al Shiddy for [the Tabuk Project] and no need to give this information to [Tee] and [Chan].
>
> [bold italics in original]

47 As I have said at [42] above, I accept the authenticity of this e-mail. Against this contemporaneous correspondence which strongly suggests that Chan did not advise Bina Puri Saudi on pricing the bids, the only contrary evidence that the plaintiff can offer is the evidence of Chan and Magendran. This comprises evidence given after the event by way of AEIC and orally in cross-examination. The plaintiff points to documentary records of telephone calls between Chan and Magendran between 14 October and 1 November 2010. That only proves the fact that calls were made. The documentary records can obviously say nothing about the contents of those calls. These records can, at most, be evidence supporting other more direct evidence. For that direct evidence, the plaintiff ultimately rely on Chan's and Magendran's *ex post facto* evidence to submit that the telephone calls involved Chan giving advice to Magendran on pricing the bids. Consequently, I give far greater weight to the contemporaneous correspondence than I do to evidence after the event given by the plaintiff's witnesses.

48 Furthermore, I find wholly unconvincing the evidence of Chan and Magendran as to how Chan's advice helped Bina Puri Saudi to arrive at the winning bid amounts. Chan's and Magendran's evidence was that Bina Puri Saudi had made errors in its bid pricing calculations which Chan's advice corrected. As alluded to at [36] above, each of the Projects broadly consisted of three components: construction of villas, construction of mosques, and external or excavation works. Chan and Magendran alleged that, because the Bina Puri Saudi team worked out the bid amounts by setting a price per square metre and multiplying this figure by the total area of *only* the villas, they ended up making an error because they left out of their calculations the cost of building the mosques and the excavation works. [note: 69] Chan explained that, as a result of this mistake, Bina Puri Saudi could not win the projects because its bids would not be low enough. [note: 70] But an e-mail of 7 October 2010 [note: 71] from Abdul Basit – the authenticity of which is not disputed – clearly shows that Bina Puri Saudi had already taken into account the mosques and excavation works in calculating the bid amounts at least a week before the earliest instance of Chan's alleged advice.

49 To support its allegation that Bina Puri Saudi had made a mistake in its initial calculations (*ie* the mistake that Chan's advice purportedly corrected), the plaintiff points to Syed Nasser's concession

that a change was made to the bid amounts after 30 October 2010 because of a "human error" in the calculations (see [36] above). Syed Nasser indeed made such a concession. But I give no weight to it because, in my view, the concession was induced by an error in cross-examination by Mr Ashokan, counsel for the plaintiff. Mr Ashokan referred Syed Nasser to Abdul Basit's e-mail of 1 November 2010, [note: 72] in which Abdul Basit stated that the bid amount for the Tabuk Project was "[SAR]145,499,080 ([SAR]1,800 per sq m excluding mosque)". This clearly means that the sum of SAR145,499,080 takes into account at least the villas and mosques. In other words, leaving out the cost of building the mosques, the villas are priced at SAR1,800 per square metre. However, Mr Ashokan led Syed Nasser to confirm that the e-mail meant that the sum of SAR145,499,080 leaves out rather than takes into account the mosques. It was this erroneous confirmation which caused Syed Nasser to concede a "human error" was made in the calculations [note: 73]:

> Q Yes. So the price he mentions for [the Tabuk Project] here [in the e-mail of 1 November 2010] is 145,499,080.00 excluding mosque, but Mr Nasser, the price eventually tendered for this project is 145,499,080 including mosque. Would you confirm that?
>
> A I think I believe so, Sir.
>
> Q Thank you. So there was still some final changes made after 1st November, it appears. Do you agree with me? In view of your earlier answer?
>
> A Can you please, ah---
>
> Q In view of your earlier answer, all right, I'm asking whether you'd agree that there was still some final changes made because one is excluding mosque and the final tender including mosque, so there was a change made, yes?
>
> A I---I believe it was, ah---
>
> Q Thank you.
>
> A ---hu---human error.
>
> Q Human error.

50 My view of the evidence is supported by the arithmetic. If the sum of SAR145,499,080 leaves out the mosques, then the villas would be priced at SAR1,825.63 per square metre (being SAR145,499,080 divided by 359 villas of 222 square metres each). Abdul Basit's 1 November 2010 e-mail, however, states a per square metre price of SAR1,800. It is therefore apparent that the sum of SAR145,499,080 takes into account, rather than leaves out, the mosques. It follows that there was no such "human error" as Syed Nasser mistakenly conceded, and it follows further that the bid amounts for the Projects were not changed after 1 November 2010 as the plaintiff says they were.

51 I therefore cannot find on the balance of probabilities that Chan gave Bina Puri Saudi advice on pricing the bids for the Projects. The plaintiff cannot change tack to say that the plaintiff gave the advice through Dr Abdallah rather than Chan. On the plaintiff's own case, Chan was the one conveying any advice from Dr Abdallah to Magendran. [note: 74] Magendran and Dr Abdallah both said in evidence that they met in late October 2010, but they did not say that Dr Abdallah advised on pricing the bids during this meeting. Dr Abdallah did say in evidence that he "talked about the pricing" with Magendran, [note: 75] but this comes right after he confirmed that he gave his advice on pricing

to Chan, and not to Magendran or Bina Puri Saudi directly. [note: 76]

52 I therefore find that the plaintiff has failed to establish, on the balance of probabilities, that it gave any advice on the pricing of the bids to Bina Puri Saudi. Even assuming that the plaintiff gave any such advice, it has not established the causal connection between its advice and the winning bid amounts. Given Magendran's admitted absence from Saudi Arabia in the days preceding the submission of the Tabuk Project bid on 2 November 2010, I was not persuaded that Magendran could have incorporated any advice from the plaintiff into the pricing of the bids. Magendran says that he instructed Abdul Basit to make changes to the bid amounts based on Chan's advice, but there is no contemporaneous or independent evidence of any such instruction. Furthermore, I am not convinced that Magendran had the authority unilaterally to alter the bid amounts, even if his authority is taken as being subject to Syed Nasser's veto for valid reasons. The e-mail discussions among Bina Puri Saudi personnel support Syed Nasser's claim that working out the bid amounts was very much a team effort, with no single person being able to make changes without first consulting his colleagues.

53 Looking at the evidence in totality, the true state of affairs, in my view, was that Bina Puri Saudi worked out the pricing for the bids without any input at all from the plaintiff but from internal and external resources at its disposal independent of the plaintiff. The contemporaneous evidence demonstrates incontrovertibly that Bina Puri Saudi had been working on the pricing of the bids since 2 September 2010, about a month and a half before the plaintiff's alleged involvement. Bina Puri Saudi did receive advice on pricing from Dr Shiddi (or Shiddy), as Magendran acknowledged in his e-mail dated 11 October 2010 (see [45] above). Had there been any advice of such a nature from Chan or Dr Abdallah, it is most unlikely that there would be no contemporaneous evidence at all of that advice. I cannot believe, for instance, that there would be no correspondence at all in which Magendran apprised Bina Puri Saudi's personnel of Chan's or Dr Abdallah's advice.

54 The plaintiff's claim that its advice was the effective cause of Bina Puri Saudi arriving at the winning bid amounts therefore fails.

Surrounding circumstances

Plaintiff's submissions

55 Besides the two specific ways in which it claimed to have assisted Bina Puri Saudi (at [24] and [27] above), the plaintiff also points to surrounding circumstances and argues that those circumstances lead to the inference that it was the effective cause of Bina Puri Saudi's securing the Projects.

56 First, Chan visited the Authority in Saudi Arabia in June and October 2010. Chan's passport shows that he was in Saudi Arabia during those months. [note: 77] The inference urged by the plaintiff is that this visit was made in connection with the proposed collaboration between the plaintiff and the defendant. [note: 78]

57 Second, the plaintiff argues that the defendant repeatedly looked to the plaintiff for assistance:

(a) After the April Meeting, Lee indicated that the defendant was interested in working with the plaintiff.

(b) Chan and Subri gave evidence that, at the September Meeting, Tee said that Bina Puri Saudi was having difficulty securing projects in Saudi Arabia, and sought the plaintiff's assistance

in securing the Projects. [note: 79]

(c) Bina Puri Saudi was incorporated in 2006. But from then until the time of the September Meeting, it had managed to secure at most only two projects since its incorporation. The value of these projects was a fraction of the value of the Projects. [note: 80] Yet, Bina Puri Saudi secured the Projects. The only thing that changed after the September Meeting was the plaintiff's involvement.

(d) Tee proceeded to put Chan into contact with Magendran, [note: 81] which shows the seriousness of Tee's request for the plaintiff's assistance. [note: 82]

(e) Even after Chan declined to assist Bina Puri Saudi following the October meeting, on grounds of conflict of interest, [note: 83] and even though Syed Nasser opined that Bina Puri Saudi did not need the plaintiff's assistance, [note: 84] the defendant nevertheless subsequently entered into the Agreement with the plaintiff. [note: 85]

58 Third, the plaintiff argues that the defendant's conduct following the submissions of the bids for the Projects was consistent with the plaintiff having assisted Bina Puri Saudi:

(a) Despite Abdulkarim informing Tee that Bina Puri Saudi's bid for the Tabuk Project was the lowest of all the bids, [note: 86] Tee later sent an e-mail to Chan asking about the status of the Projects. [note: 87] This suggests that Chan played a key role in the success or failure of the bids.

(b) Chan gave evidence that Tee asked to meet Chan's Saudi partners after Bina Puri Saudi was awarded the Projects. [note: 88] This demonstrates Tee's recognition of the efforts of Chan's Saudi partners. [note: 89]

(c) Chan further claimed that, at dinner with Tee in January 2011, the two of them discussed developing a long-term relationship between both parties. [note: 90]

(d) A February 2011 e-mail from Chan to the new General Manager of Bina Puri Saudi, in which Chan alludes to a specific new project, shows that Bina Puri Saudi was still working together with the plaintiff even after the award of the Projects. This suggests that the defendant was satisfied with the plaintiff's services in respect of the Projects.

(e) When it appeared likely that the Bid Bonds put up by Bina Puri Saudi would be forfeited by the Authority, Tee asked Chan and Dr Abdallah to help to minimise the amount of the Bid Bonds forfeited. [note: 91]

59 Fourth, the plaintiff argues that its own conduct after Bina Puri Saudi submitted the bids, and after the Projects were awarded, was consistent with the plaintiff having helped Bina Puri Saudi to win the bids:

(a) After the bids were submitted, Chan followed up by asking for and checking through the bid documents. [note: 92]

(b) By his own account, Chan also visited the Authority to seek clarification on related

matters. [note: 93]

(c) After the Projects were awarded to Bina Puri Saudi, the plaintiff helped the defendant in the latter's attempt to procure subcontractors and the Performance Bond, as shown in e-mails. [note: 94] This conduct shows the plaintiff had an interest in ensuring that Bina Puri Saudi carried out the Projects. This interest could only be that, if Bina Puri Saudi failed to carry out the Projects, the plaintiff's goodwill and reputation would be affected. The fact that its goodwill and reputation would be affected suggests that it was involved in Bina Puri Saudi's bid for the Projects. This suggests, in turn, that it did assist Bina Puri Saudi. [note: 95]

60 Fifth, the plaintiff argues that the defendant accepted the plaintiff's entitlement to commission all along, disputing such entitlement only after the Authority cancelled the award of the Projects. In a December 2011 e-mail, Jason Wong informed Chan that Tee was asking for a reduction in the quantum of commission, [note: 96] which indicates Tee's acknowledgement that the plaintiff was, in the first place, entitled to some amount of commission. [note: 97] Even when the plaintiff's entitlement was later denied by Tee, the initial denials were based on reasons other than that the plaintiff had not rendered assistance to Bina Puri Saudi. [note: 98] In various e-mails sent in April and May 2011, Tee said that the plaintiff was not entitled to commission because the Projects had been cancelled. [note: 99]

Defendant's submissions

61 In relation to the plaintiff's first point at [56] above, the defendant argues that there is no evidence that Chan visited the Authority in October 2010. The defendant argues that even if he did visit the Authority, there is no evidence that he did anything to further Bina Puri Saudi's bids for the Projects while he was there. [note: 100]

62 In relation to the plaintiff's second point at [57] above, the defendant's response is that this is irrelevant. The issue is whether the plaintiff did in fact assist Bina Puri Saudi. It does not advance the plaintiff's case to say that the defendant sought the plaintiff's assistance. [note: 101]

63 In relation to the plaintiff's third and fourth points at [58] and [59] above, the defendant denies that it ever thanked the plaintiff for its assistance to Bina Puri Saudi. [note: 102] Apart from that, the defendant does not deny the existence of the surrounding circumstances relied on by the plaintiff. Instead, the defendant argues that events occurring after the submission of the bids are irrelevant. It is irrelevant that the defendant seemed interested in continuing to work with the plaintiff after the submission of the bids, or that the defendant appeared to thank the plaintiff for its efforts. [note: 103] It is also irrelevant that the plaintiff sought to assist Bina Puri Saudi in matters arising from its securing of the Projects: the plaintiff's entitlement to commission depends entirely on whether it rendered assistance prior to submission of the bids and not thereafter. [note: 104]

64 In relation to the plaintiff's fifth point at [60] above, the defendant denies that Tee ever asked that the quantum of commission be reduced. The defendant further argues that, even if Tee did make such a request, no significance can be attached to that request. The request cannot mean that Tee waived his right subsequently to dispute the plaintiff's entitlement to commission. [note: 105] Similarly, the law does not prevent the defendant from disputing the plaintiff's entitlement to commission on the ground that the plaintiff was not the effective case of Bina Puri Saudi securing the Projects just because the defendant previously failed to dispute the plaintiff's entitlement on that ground. [note:

106]

65 The defendant further argues that, for all the surrounding circumstances cited by the plaintiff, it has not produced any documentary evidence of assistance rendered to Bina Puri Saudi. Chan would have been expected to document such assistance because he was an experienced businessman [note: 107] who, according to Dr Abdallah, was "very thorough", [note: 108] and also because Chan had expressly stated that he wanted to avoid misunderstanding as to the plaintiff's role. [note: 109] In addition, Chan put other matters into writing, such as his attempts to procure subcontractors and the Performance Bond after the Projects were awarded to Bina Puri Saudi. [note: 110] The lack of documentary evidence therefore strongly suggests that no assistance was in fact rendered. Furthermore, when responding *via* e-mail to Tee's refusal to pay the plaintiff's commission, Chan did not at any point refer to the assistance that the plaintiff had allegedly rendered. [note: 111]

Plaintiff's response

66 In relation to the defendant's point on the absence of documentary evidence of the plaintiff's assistance to Bina Puri Saudi (immediately above at [65]), the plaintiff argues that such absence should not be given much weight. Instead, due regard should be accorded to the evidence given by Chan, Magendran and Dr Abdallah as to the plaintiff's assistance. [note: 112] Although Chan did want to avoid misunderstanding as to the plaintiff's role, this concern was adequately assuaged by having the Agreement in writing, and hence there is no significance to the lack of subsequent documentation as to the plaintiff's assistance. [note: 113] And, although Chan did put other matters into writing, such as his attempts to procure subcontractors and the Performance Bond, this is only to be expected because the plaintiff had no authority to engage subcontractors, which would necessitate e-mail exchanges between the plaintiff, the defendant and Bina Puri Saudi. Just because Chan put certain matters (such as attempting to procure subcontractors) in writing, but not others (such as the plaintiff's assistance), it does not mean that the former is true while the latter is not. [note: 114]

My analysis

67 Although I have set out the parties' arguments in some detail, I can dispose of their arguments with a broad brush without going into the factual intricacies.

68 I do not think that the defendant can simply dismiss as irrelevant the surrounding circumstances pointed out by the plaintiff. The fact is that the defendant repeatedly sought the plaintiff's assistance, the defendant seemed desirous of continuing to work with the plaintiff after the Projects had been secured and the plaintiff assisted the defendant in related matters after the Projects had been secured. In my view, all these facts are circumstances from which a court could infer that the plaintiff was the effective cause of Bina Puri Saudi's securing of the Projects. Two examples will suffice to demonstrate this. First, why would the defendant be desirous to continue working with the plaintiff? The inference is that the defendant was pleased with the plaintiff's assistance in securing the Projects. From this inference would follow the further inference that the plaintiff did in fact render assistance. Second, why would the defendant not dispute the plaintiff's entitlement to commission on the ground that the plaintiff did not render any assistance at all? The inference, similarly, is that the plaintiff did in fact render some form of assistance.

69 But having said that, I do not think that the plaintiff can discharge its burden of proof by relying exclusively on inferences generated by surrounding circumstances. These inferences are supporting points at best and are not sufficiently strong in themselves to constitute circumstantial

evidence sufficient to discharge the plaintiff's burden of proof. Without even some idea of *how* it assisted Bina Puri Saudi in securing the Projects, I cannot hold that it was the effective cause of Bina Puri Saudi's securing of the Projects. Put another way, if the plaintiff did assist Bina Puri Saudi, I cannot fathom why it cannot tell me how it did so. It has described only two ways in which it claims to have rendered assistance (at [24] and [27] above), and because I have rejected both of these, I do not have before me even one specific way in which the plaintiff rendered assistance.

Conclusion

70 As a result, even though I acknowledge that there are surrounding circumstances consistent with the plaintiff's case, these circumstances are not strong enough in themselves to bear the entire burden of the plaintiff's case. I am unable to find that the plaintiff has shown to me that it is more likely than not that the plaintiff was the effective cause of Bina Puri Saudi's securing of the Projects.

Can the defendant rely on *ex turpi causa* without pleading it?

71 At the outset of the analysis on the issues and subsidiary issues relating to the *ex turpi causa* defence, I emphasise again that my analysis and findings in this part of my judgment relate to – and *only* to – the common intention of the plaintiff and defendant. I cannot and do not make any findings as to whether the plaintiff followed through on that common intention by actually making corrupt payments to procure the award of the Project to Bina Puri Saudi. The defendant does not go so far as to make that allegation. It contents itself with the allegation that bribery was intended as the common purpose of the Agreement, and submits that that in itself suffices to afford it an additional defence to the plaintiff's claim. For me to find that the plaintiff actually paid bribes would be to make findings of very serious wrongdoing against individuals who are not before me. I have no intention of doing that. Nothing of what I say in the following paragraphs should therefore be taken as going that far.

Plaintiff's submissions

72 The plaintiff advances two arguments in support of its position that the defendant is precluded from relying on *ex turpi causa* as a defence because of its failure to plead that defence.

73 The plaintiff's first argument relies on four propositions set out in *Edler v Auerbach* [1950] 1 KB 359 ("*Edler*") at 371, which were expressed in *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd* [2008] 1 SLR(R) 375 ("*Koon Seng Construction*") at [31] in the following terms:

> (a) Where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not.
>
> (b) Where the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded.
>
> (c) Where facts not pleaded which taken by themselves show an illegal objective, have been revealed in evidence (because, perhaps no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it.
>
> (d) Where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the

facts were pleaded or not.

74 The plaintiff argues that the Agreement is not *ex facie* illegal. It also argues that the defendant has failed to show that the Agreement has an illegal object. It then argues that the present case "does not fall under any of the 4 propositions approved by the Court in *Koon Seng Construction*". Therefore, the court cannot or should not even consider the issue of illegality. [note: 115]

75 The plaintiff's second argument is that the court should not make a finding on the defendant's allegation as to the parties' common intention to make corrupt payments because not all the necessary facts have been placed before the court. The plaintiff acknowledges that *Sim Tony v Lim Ah Ghee (trading as Phil Real Estate & Building Services)* [1994] 2 SLR(R) 910 ("*Sim Tony*") at [60]-[61] is authority for the proposition that the court is not only entitled, but also has a duty, to take cognisance of illegality despite its not having been pleaded; and that this is notwithstanding the requirement in O 18 r 8 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to plead specifically any matter or fact showing illegality. [note: 116] The plaintiff's response is that *Sim Tony* nevertheless contains the qualification that the requirement to plead illegality under O 18 r 8 is only displaced when all the necessary facts are placed before the court.

76 The plaintiff then contends that not all necessary facts have been placed before the court because the plaintiff was taken completely by surprise by the defendant's allegations of illegality, and was thus unable to respond adequately to the allegations. In support, the plaintiff makes the following points:

(a) The plaintiff had very little time to prepare its response. [note: 117]

(b) The plaintiff does not even know the exact nature of the allegations made against it, including the exact nature of the alleged bribery, the amount of the bribe, the giver and receiver of the bribe, and whether the bribe was actually given. [note: 118]

(c) The lack of pleading meant that the plaintiff was ill-prepared to cross-examine the defendant's witnesses and rebut their allegations of bribery. [note: 119]

(d) The defendant has not bothered to apply for leave to amend their pleadings so as to plead illegality and the particulars thereof. [note: 120]

(e) *Sim Tony* can be distinguished from this case. In *Sim Tony*, the allegation of illegality was clear and straightforward, *viz* that there had been a breach of the instruction manual governing the conduct of public servants. In *Sim Tony*, there was no dispute of fact and the court was, in effect, dealing with a question of law as to whether the breach of the instruction manual could be considered illegal.

(f) The defendant is wrong to argue – as it does [note: 121] – that it suffices that the facts of the Agreement, the commission payable under the Agreement, and the objective of the Agreement have all been pleaded. This is because there is nothing in those facts that reveals illegality. For instance, there are innumerable non-illegal ways in which the Agreement could have been performed. [note: 122]

Defendant's submissions

77 The defendant does not respond to the plaintiff's first argument. As for the plaintiff's second argument, the defendant contends that the plaintiff had ample opportunity to respond to the allegations of bribery, and that, therefore, the court has before it all the facts necessary to make a finding on the parties' common intention. In support of this contention, the defendant raises the following points:

(a) The plaintiff had the opportunity to cross-examine the defendant's witnesses on their evidence relating to bribery. [note: 123]

(b) The plaintiff was given and took the opportunity to recall Chan to the stand after all the defendant's witnesses had given evidence, in order that Chan might respond to their allegations of bribery. [note: 124]

(c) The plaintiff chose not to call any other witnesses after the defendant's witnesses had given evidence. The plaintiff, for instance, chose not to call Subri, who was in court on the final day of the trial, nor did it call the plaintiff's corporate representative Paul Goh Ju Poh. [note: 125]

(d) The plaintiff did not seek leave to adduce documentary evidence to rebut the allegations of bribery. [note: 126]

(e) The plaintiff did not apply for adjournment of the trial on the basis that it needed time to address the allegations of bribery. [note: 127]

My analysis

7 8 *Ex turpi causa* is often referred to as a defence. It probably does not harm to do so provided that it is always remembered that strictly speaking, *ex turpi causa* is not a defence. In adversarial litigation, a defence becomes a live issue only if a party to the litigation raises it. *Ex turpi causa* is in truth a doctrine, not a defence, and a doctrine founded not on principle but on high policy. Applying the doctrine and upholding the underlying policy has the effect of affording a defendant a defence, but only incidentally so.

79 The starting point is the judgment of Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341 at 343:

> No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* . . . there the court says that he has no right to be assisted. It is on this ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

80 The best modern statement of the policy underlying the ex turpi causa doctrine is found in McLachlin J (as she then was) in Hall v Hebert (1993) 101 DLR (4th) 129 at 165:

> . . . to allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with

the other, would be to 'create an intolerable fissure in the law's conceptually seamless web': Weinrib – "Illegality as a Tort Defence" (1976) 26 UTLJ 28, 42. We thus see that the concern, put at its most fundamental, is with the integrity of the legal system.

81 There are three points to note about this doctrine. The first point is that the *ex turpi causa* doctrine is a fundamental doctrine of general application to all areas of the law. It therefore applies to contract as it does to tort. It applies at law as it does in equity. It applies to personal claims as it does to proprietary claims.

82 Second, the *ex turpi causa* doctrine is often called the doctrine of "illegality". But according to Lord Mansfield CJ, the doctrine is triggered by "an immoral or an illegal act". So a criminal wrong can, of course, trigger the doctrine. But so too can a civil wrong. So too, can behaviour which is reprehensible or grossly immoral even if it is not otherwise a criminal or civil wrong: *United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] 4 SLR 214 at [52] and [57]. But it is equally clear that not every civil or criminal wrong will trigger the doctrine: where the wrong is a criminal wrong of strict liability and the plaintiff is unaware of it, the doctrine may not be engaged. The common thread is that – as the doctrine's maxim implies – the plaintiff's behaviour must involve turpitude or culpability: *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391 at [24] ("*Stone & Rolls Ltd*"). The word "illegality" where it appears in the cases, and also in the following analysis in this judgment, should be understood in this modified sense.

83 The final point to note from this passage is that Lord Mansfield CJ expressly contemplated that the evidence of the turpitude may arise either from the plaintiff's own statements "or otherwise". So, the *ex turpi causa* doctrine is engaged regardless of the manner in which it come to the court's attention that the plaintiff's claim arises out of his own turpitude.

84 It is for this reason that O 18 r 8 has no application to the *ex turpi causa* doctrine. O 18 r 8 obliges a party to plead specifically any fact showing illegality if that party wishes to rely on such illegality as a *defence*. That rule of civil procedure cannot govern the public policy underlying the *ex turpi causa* doctrine. A court is entitled to take cognisance of illegality which emerges from the evidence even if it does not emerge from the pleadings. Indeed, the *ex turpi causa* doctrine goes much further than that. The policy underlying it imposes on the court a positive *duty* to take cognisance of evidence of illegality, even if the parties are content for their own reasons to let that evidence pass without comment. *Sim Tony* at [60] furnishes the authority for that proposition.

85 This position may seem unfair to a plaintiff against whom the defence of *ex turpi causa* is asserted. Why should a defendant who deliberately omits to plead illegality, and who takes the plaintiff by surprise with allegations of illegality sprung in cross-examination at trial, nonetheless benefit from the court's application of the *ex turpi causa* doctrine? Nevertheless, the position must be correct. The court is duty-bound to uphold Singapore's laws and public policy. The court cannot allow a litigant involved in turpitude to call in aid the court's coercive powers to advance or benefit from his turpitude. This is so even if the defendant was complicit with the plaintiff in the turpitude. Whether the turpitude is pleaded or not cannot change the court's duty.

86 Having said this, I take note of the second proposition in *Edler*, which is proposition (b) in *Koon Seng Construction* (at [73] above). The second *Edler* proposition is that, where the illegality is not apparent on the face of the contract, evidence of extraneous circumstances tending to show illegality should not be admitted unless the circumstances relied on are pleaded. During cross-examination of Chan, Mr Ashokan, counsel for the plaintiff, objected to a line of questioning by Mr Chia, counsel for the defendant, because it was heading towards a suggestion of bribery on Chan's part. [note: 128] Mr Chia took the objection on board and abandoned that line of questioning. [note:

[129] In my view, Mr Ashokan was perfectly entitled to make the objection. And Mr Chia was right to defer to that objection. But the third and fourth propositions in *Edler* make it clear that, once there is evidence of turpitude – however that evidence might have emerged – the court cannot disregard the evidence. In the present case, the allegations of bribery emerged from the evidence of the defendant's witnesses under cross-examination by Mr Ashokan, as well as from documentary correspondence that the plaintiff itself adduced in evidence. I cannot shut my eyes to all that evidence.

87 Before I address the plaintiff's arguments, I pause here to consider whether my analysis thus far is in any way inconsistent with the House of Lords decision of *Tinsley v Milligan* [1994] 1 AC 340 ("*Tinsley*"). In *Tinsley*, the plaintiff and the defendant jointly purchased a property but placed it in the sole name of the plaintiff. They did so deliberately in order to enable the parties to perpetrate a fraud on the Department of Social Security. The plaintiff eventually brought proceedings claiming sole ownership, based on the legal title being in her sole name. The defendant counterclaimed, asserting an entitlement to an equal share in the property by reason of a resulting trust. In response, the plaintiff contended that the defendant's resulting trust claim must fail because of illegality, *ie*, the parties' fraud on the Department of Social Security.

88 The House of Lords, by a majority of three to two, held in favour of the defendant. Lord Browne-Wilkinson delivered the principal speech. He distilled the following principle from the authorities: "A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality" (at 375C). He then explained why the defendant Miss Milligan was entitled to recover an equal share in the property (at 376F–G):

> Miss Milligan established a resulting trust by showing that she had contributed to the purchase price of the house and that there was common understanding between her and Miss Tinsley that they owned the house equally. She had no need to allege or prove *why* the house was conveyed into the name of Miss Tinsley alone, since that fact was irrelevant to her claim: it was enough to show that the house was in fact vested in Miss Tinsley alone. The illegality only emerged at all because Miss Tinsley sought to raise it. Having proved these facts, Miss Milligan had raised a presumption of resulting trust. There was no evidence to rebut the presumption. Therefore Miss Milligan should succeed. [emphasis in original]

89 Lord Browne-Wilkinson noted that it was "[o]nly in the reply and the course of Miss Milligan's cross-examination [that] such illegality emerge[d]" (at 372A). From this it may be deduced that the plaintiff did not plead illegality from the outset but sought eventually to rely on it to defeat the defendant's resulting trust claim. It might appear, then, that the majority in *Tinsley* effectively ignored or disregarded clear evidence of illegality even though it was on the facts of that case admitted. And it might also appear that *Tinsley* is authority for the proposition that the court may ignore or disregard allegations of illegality that have not been pleaded.

90 But there is a vital point of distinction. *Tinsley* was a case involving ownership, not obligation. It is quite understandable that rights of ownership – property rights – are treated by the law as stronger than rights of mere obligation – personal rights. On that basis, it is not surprising that the policy underlying the *ex turpi causa* principle may operate somewhat differently in relation to property rights, whether real property or personal property and whether at law or in equity. Indeed in *Stone & Rolls Ltd*, the House of Lords held at [21] that:

> "The House in *Tinsley v Milligan* did not lay down a universal test of *ex turpi causa*. It was dealing with the effect of illegality on title to property. It established the general principle that, once title has passed, it cannot be attacked on the basis that it passed pursuant to an illegal transaction.

If the title can be asserted without reliance on the illegality, the defendant cannot rely on the illegality to defeat the title. This principle had been applied in the case of personalty in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65. The House held that it also applied in the case of both legal and equitable title to realty. The House did not hold that illegality will never bar a claim if the claim can be advanced without reliance on it. On the contrary, the House made it plain that where the claim is to enforce a contract the claim will be defeated if the defendant shows that the contract was for an illegal purpose, even though the claimant does not assert the illegal purpose in making the claim: see *Alexander v Rayson* [1936] 1 KB 169, approved by Lord Browne-Wilkinson at p 370.

91 Further, what is important in the present case is that *Tinsley* is not authority for the proposition that the court ignores allegations of illegality *because* they are not pleaded. Nothing in any of the five speeches in *Tinsley* suggests that the outcome there would have been any different had the plaintiff pleaded illegality from the outset. For this reason, *Tinsley* is not *necessarily* inconsistent with my view that I must have regard to the allegations of illegality which the defendant in the present case did not plead but which emerged in evidence during the trial.

92 Further, even if one treats *Tinsley* as being of general application, all that it establishes is that if a plaintiff needs to rely on his own illegality in order to establish his claim, the courts will never entertain that claim. It does not establish the converse: that if a plaintiff need not rely on his own illegality in order to establish his claim, the court will entertain that claim and permit it to succeed.

93 I now consider the plaintiff's first argument that the Agreement in this case was not one which had an illegal object. The plaintiff does not put forward an alternative characterisation of the Agreement, but it argued that there were innumerable non-illegal ways in which the Agreement could have been performed (see [76(f)] above). The plaintiff must be taken to characterise the Agreement as a lawful contract which merely might have been performed in an illegal manner. The plaintiff's argument must be founded on the judgment of Devlin J (as he then was) in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 ("*St John Shipping*"). In that case, a ship was overloaded causing its load line to be submerged, which contravened a statute. When the ship unloaded at port, the defendant took delivery of its cargo on board, but refused to pay the whole of the freight to the shipowners on the ground that the shipowners had committed an illegality which prevented them from enforcing the contract of carriage (at 280). Devlin J held that the defendant was not entitled to withhold payment. He rejected, on principle and authority, the wide proposition that a party is precluded from suing on a contract, however lawful the contract may be, so long as the contract is performed in an illegal manner (at 286). The plaintiff would argue that, just as *St John Shipping* distinguished between a contract entered into with the object of committing an illegal act (at 283) and a contract without an illegal object that just so happens to involve some illegality in its performance, so the present case comes within the latter category rather than the former.

94 I unhesitatingly reject that argument. If the defendant's allegations are true, the Agreement must be characterised as a contract with an illegal object. I cannot hold that the Agreement is not a contract with an illegal object just because the words of the Agreement do not anywhere mention bribery and the Agreement can be performed in innumerable legal ways. In other words, I do not think I am confined to the express words of the Agreement to draw a distinction between a contract which is illegal in its purpose and a contract which is illegal only in its performance.

95 Rather, I can – and indeed must – have regard to the intention of the parties even if it is not recorded in the contract. It cannot be otherwise. Parties who have any semblance of intelligence and who intend to commit illegal acts will never record their intention in writing, whether in the contract or elsewhere. And so, if I find that both parties intended from the outset that the plaintiff's obligation

under the Agreement would be performed through the use of bribery, I can and must characterise the Agreement as a contract with an illegal object. This would mean that this case comes within the fourth proposition of *Edler*, which is proposition (d) in *Koon Seng Construction* (at [73] above). This in turn would mean that, even if the pleadings contain no facts supporting an allegation of illegality, the court may – and indeed, must – have regard to the illegality and refuse to enforce the contract if it is satisfied that all the relevant facts are before it.

96 In any event, even if the Agreement was illegal only as to its performance but not as to its purpose, it does not follow that the defendant cannot rely on illegality which has not been pleaded. This is because the plaintiff's reliance on the propositions in *Edler* is misconceived. The plaintiff's argument (as summarised at [74] above) assumes that the four *Edler* propositions set out exhaustively the situations in which a party can rely on illegality despite not having pleaded it. In other words, the plaintiff assumes that, outside those situations described in the four propositions in *Edler*, illegality can never be relied on if not pleaded. This assumption, however, is wrong.

9 7 *Edler* was a case in which the contract had an illegal object, *ie* leasing premises for non-residential purposes without the housing authority's consent when such consent was required. The principles expounded in *Edler* are therefore directed to cases involving contracts which, while not *ex facie* illegal, have an illegal object. *Edler* says nothing about a contract that, being neither *ex facie* illegal nor having an illegal object, is to be performed in an illegal manner. That is how the plaintiff must characterise the Agreement, if they were to assume without admitting the defendant's allegations (see [93] above). Specifically, *Edler* does *not* stand for the proposition that if a contract is not *ex facie* illegal or does not have an illegal object, the court cannot have regard to the illegal performance of that contract if such illegal performance is not pleaded.

98 As a matter of principle, the court's ability to take cognisance of illegality that has not been pleaded should not depend on the characterisation of the illegality – that is, it should not depend on whether the contract is alleged to be *ex facie* illegal, or alleged to have an illegal object, or alleged to have been performed in an illegal manner. In *Edler*, Devlin J said that the third and fourth propositions – that is, propositions (c) and (d) in *Koon Seng Construction* (at [73] above) – could be distilled into a single principle: in order for the court to be satisfied of the illegality of the transaction, it must be satisfied that it has before it all relevant facts. What this demonstrates is that, if there is any judicial reluctance to allow a party to rely on illegality when that party has not pleaded it, the reluctance is attributable solely to the court's concern that the court may have been deprived of relevant facts and not because of possible procedural unfairness to the other party. Hence the statement in *Sim Tony* at [60] that the requirement to plead illegality under O 18 r 8 is displaced only when all the necessary facts are before the court. That judicial reluctance is not at all attributable to the characterisation of the illegality involved. Therefore, in a case where the contract is alleged to have been performed in an illegal manner, the court should be just as able to take cognisance of illegality not pleaded as in a case where the contract is alleged to have an illegal object, *provided that* the court is satisfied that it has all the relevant facts before it. I am of the view that all this is consistent with what the Court of Appeal said in *National Aerated Water Co Pte Ltd v Monarch Co, Inc* [2000] 1 SLR(R) 74 at [22].

99 This brings me to the plaintiff's second argument (described at [75] above). The question here is simply, am I satisfied that I have all the relevant facts before me such that it would be safe to make a finding on whether the defendant's allegation as to the parties' common intention is correct?

100 I am so satisfied. The plaintiff was given and took the opportunity to recall Chan to the witness stand so that he could address the allegations of illegality. The plaintiff was given liberty to call or recall any other witnesses it might wish to, but it did not do so. Even though the plaintiff might have

been caught by surprise by the allegations of bribery arising only at trial and only after it closed its case, I am satisfied that it was given and had sufficient opportunity to respond.

101 I reject the plaintiff's argument that the allegations of bribery are so vague and unclear that it cannot be expected to respond to them. It is true that the defendant has provided no specifics. The defendant's witnesses did not testify as to the amount of the bribe, or the identity of the receiver of the bribe, or whether the bribe was in fact given. But the defendant's evidence of the allegation that the plaintiff had to respond to was clear enough: that both parties intended that the plaintiff would perform its part of the Agreement through bribery. That is the only allegation which the plaintiff had to respond to, and as I have said, I am satisfied that it has had sufficient opportunity so to respond.

Conclusion

102 I therefore hold that the defendant's failure to plead illegality does not preclude it from raising and relying on the *ex turpi causa* doctrine. I emphasise that I do not do this for the sake of permitting the defendant to rely on an additional defence. I do it because I have a duty to uphold the policy underlying the *ex turpi causa* doctrine by taking cognisance of evidence of illegality which emerged in the course of proceedings before me.

Was it the common intention of the parties to procure the Projects through bribery?

103 I shall start with the defendant's contentions, since it is the defendant who alleges that both parties intended all along that the plaintiff would use bribery to assist Bina Puri Saudi in securing the Projects. It should be noted at the outset that some of the arguments advanced by the defendant on this issue will appear to repeat arguments already considered in my analysis of whether the plaintiff was the effective cause of the award of the Projects to Bina Puri Saudi. This is because the defendant, at times, argues that the same evidence, or lack of evidence, can be explained in only two ways: either the plaintiff did not render any assistance at all, or that assistance was intended to be of an illegal nature. [note: 130]

Defendant's submissions

104 I now summarise the defendant's contentions.

105 First, the defendant points to evidence given by its own witnesses that Chan planned to secure the Projects for Bina Puri Saudi by means of bribery, with the defendant's knowledge. According to Lee, Chan told him that the amount of the plaintiff's commission could not be reduced because some of that amount was to be used to bribe officials in the Authority. [note: 131] Syed Nasser's evidence was that he knew of Chan's intention to use bribery and that he advised Tee not to enlist Chan's assistance. [note: 132] Tee, besides claiming that he knew Chan intended to pay bribes, [note: 133] also gave evidence that Syed Nasser resisted entering into the Agreement with the plaintiff for the reason that it would involve bribery. [note: 134] The defendant argues that all of this evidence is reliable because it is self-incriminating. [note: 135]

106 Second, the defendant argues that an intention to use bribery or other illegal means can be inferred from Chan's various e-mails and his evidence:

(a) In three separate e-mails to Tee, Chan alluded to "commitments" that the plaintiff had to its Saudi partners. [note: 136] Under cross-examination, Chan explained that this referred to

payments to be made to Dr Abdallah's Saudi partners for their services. [note: 137]

(b) In an e-mail to Lee on 15 April 2010, Chan contrasted an "'arranged project' subject to negotiation" with a "tender project", and explained that the former required a higher commission to be paid to the plaintiff. [note: 138] Chan's evidence under cross-examination was that an "arranged project" was one arranged directly between the awarding authority and the contractor. [note: 139] But the defendant argues that this is unconvincing because neither the Tabuk Project nor the Al Dawadmy Project were arranged directly between the Authority and Bina Puri Saudi, and yet a higher rate of commission was charged for assistance in respect of the Projects. [note: 140]

(c) Chan gave evidence under cross-examination that part of the commission received by the plaintiff would be "allocated for the Saudi side". [note: 141] He gave evidence that he knew fees would be paid to locals for "market intelligence" provided by them. [note: 142] He gave evidence that the phrase "third party fees" used by Lee in an e-mail of 8 April 2010 [note: 143] referred to "fees paid to the Saudi side" to secure the award of the Projects to Bina Puri Saudi. [note: 144]

(d) In an e-mail to Tee on 9 November 2010, [note: 145] Chan gave the assurance that Bina Puri Saudi would get at least one of the Projects. But in an e-mail on 30 November 2010 [note: 146] Chan felt able to assure Tee that Bina Puri Saudi would get *both* Projects. The defendant argues that this constitutes a representation that the plaintiff could influence the outcome of the award even after submission of the bids, which suggests illegal methods. [note: 147]

(e) In an e-mail to Tee on 9 November 2010, Chan used the phrase "inside key digit". [note: 148] He explained under cross-examination that this referred to someone inside the Authority who could provide information some of which "may not be publicly known". [note: 149] This contravenes Article 3 of the "Government Tenders and Procurement Law" in Saudi Arabia, [note: 150] which provides that all persons interested in dealing with the Government shall be treated equally. [note: 151]

107 Third, the defendant argues an intention to pay bribes can also be inferred from allusions to Dr Abdallah's "contacts" or "connections" in Saudi Arabia. To begin with, Dr Abdallah's own evidence was that his role involved making use of his "contacts" and the people that he knew. [note: 152] Subri's evidence also emphasised Dr Abdallah's connections and relationships. [note: 153] Chan's evidence indicated his intention to use Dr Abdallah's personal relationships, including relationships with people within the Authority. [note: 154] Dr Abdallah did not possess the ability to render technical assistance. [note: 155]

108 Fourth, the defendant argues that the plaintiff's reticence as to the exact nature of the assistance it allegedly rendered to Bina Puri Saudi invites the inference that the assistance was illegal. If indeed the parties' common intention was for the plaintiff to render technical or other assistance to Bina Puri Saudi, it would be expected that the Agreement would elaborate on the nature and scope of that assistance. However, the Agreement was entirely silent on that issue. [note: 156] By way of contrast, during the negotiations leading up to the Agreement, the defendant forwarded to the plaintiff a draft Memorandum of Understanding, clause 5 of which sets out several specific areas

in which the plaintiff could assist the defendant, including facilitation of logistic requirements and procuring of resources. [note: 157] The corresponding lack of specificity in the Agreement is even more suspicious given Chan's concern about avoiding misunderstanding as to the plaintiff's role. [note: 158] Outside of the Agreement, there is an absence of documentary evidence of the plaintiff's assistance. [note: 159]

109 Fifth, the defendant argues that, given that Bina Puri Saudi was already working on the bids for the Projects, and the plaintiff has not shown that it could have provided technical assistance in any way, the inference is that the plaintiff offered a means to secure the Projects other than through bidding, and that means was bribery. [note: 160]

110 Sixth, the defendant argues that when Tee disputed the plaintiff's entitlement to commission, Chan did not justify the plaintiff's entitlement by detailing all the technical assistance it had given to Bina Puri Saudi – which would have been the natural response of one who had actually assisted. Instead, it continually emphasised the end-result, *ie* that Bina Puri Saudi had been awarded the Projects. This leads to the inference that the assistance was illegal. [note: 161]

111 Seventh, the defendant points out that the plaintiff omitted to reflect the commission in its accounts filed with the Accounting and Corporate Regulatory Authority (ACRA). The defendant submits that this suggests that the commission was earned through illegal means. [note: 162] Chan's explanation was that, as advised by his accountant, the commission was not reflected in the accounts because it was disputed, [note: 163] but there is no evidence of such alleged advice from the accountant. Also, when the defendant sought disclosure of the plaintiff's accounts in order to ascertain whether the commission was reflected there [note: 164], the plaintiff refused to make the disclosure sought. [note: 165]

Plaintiff's submissions

112 I now summarise the plaintiff's contentions.

113 First, the plaintiff reiterates that it assisted Bina Puri Saudi by giving advice on pricing of the bids for the Projects, rather than by paying bribes. If Chan had intended to secure the Projects through bribery, there would have been no reason for him to correspond with Magendran at all, especially during the period from mid-October 2010 to the submission of the bids for the Projects. The fact that Chan and Magendran did correspond thus suggests that they were working together to secure the Projects through legitimate means. [note: 166]

114 Second, the plaintiff argues that there is an absence of documentary evidence of bribery. For instance, there are no e-mails sent by personnel from the defendant or Bina Puri Saudi expressing their concerns about the alleged bribery. [note: 167]

115 Third, the plaintiff points out that its witnesses have denied that the plaintiff intended to secure the Projects through bribery. When Chan returned to the witness stand to address the allegations of bribery, he strenuously denied these allegations. [note: 168] Subri gave evidence that, at the September Meeting, there was no discussion at all about payment of fees to people who would award the Projects to Bina Puri Saudi. [note: 169] This counters Tee's evidence that, at the September Meeting, he was informed of Chan's intention to pay bribes. [note: 170]

116 Fourth, the plaintiff argues that the defendant is wrong to infer bribery from the phrase "arranged project" in Chan's e-mail to Lee on 15 April 2010. [note: 171] Chan's evidence was that this phrase referred to a project that was directly negotiated between the government and the contractor. [note: 172] In any case, neither the Tabuk Project nor the Al Dawadmy Project was an "arranged project" notwithstanding that the commission was 5 percent rather than 2 percent. This is supported by Chan's evidence, and there is nothing in the Agreement indicating that either one was an "arranged project". [note: 173] Further, when the phrase "arranged project" was used, the plaintiff and defendant had not yet contemplated the Projects specifically, hence the phrase cannot refer to the Projects. [note: 174] There is no warrant to infer an intention to pay bribes just because the commission of 5 percent might be considered by some to be on the high side. [note: 175]

117 Fifth, the plaintiff argues that allusions to payments made to persons in Saudi Arabia refer not to bribes, but to legitimate payments made to Dr Abdallah's Saudi contacts in consideration of their provision of market intelligence on pricing strategy, among other things. [note: 176] According to Chan's evidence, the fees "requested by the Saudi side" mentioned in his e-mail to Lee on 15 April 2010 refers to compensation to Saudi locals for market intelligence and guidance. [note: 177] As for Chan's use of the words "commitments" in e-mails to Tee [note: 178], Chan's evidence was that this, likewise, referred to payment to persons in Saudi Arabia for their services to Dr Abdallah, including gathering market intelligence. [note: 179]

118 Sixth, the plaintiff argues that the defendant is wrong to infer illegality from the use of the phrase "inside key digit" in Chan's e-mail to Tee on 9 November 2010 [note: 180]. There is no evidence that it was illegal to obtain information and guidance from someone inside the Authority. And in fact, argues the plaintiff, Abdulkarim gave evidence that he too had obtained information from the "head of projects" at the Authority, which suggests that some information from the Authority is freely available. [note: 181] Neither has the defendant shown that the "Government Tenders and Procurement Law", which the plaintiff is alleged to have breached, has the force of law in Saudi Arabia such that a breach of it would be illegal. [note: 182]

119 Seventh, the plaintiff argues that the defendant is wrong to argue that its witnesses should be believed because their evidence of the illegal purpose was against their own interests. On the contrary, the defendant's witnesses seemed eager to give the evidence. At the very least, the evidence was not given reluctantly or extracted by severe pressure of cross-examination. This suggests that, since they saw no cause for fear or concern in making allegations of bribery, they would have no qualms about doing so. [note: 183] The defendant's evidence of illegality, it was said, was self-serving rather than self-incriminatory.

120 Eighth, the plaintiff argues that the reliability of the defendant's witnesses should be questioned because of inconsistency among them as to which of them knew about Chan's intention to pay bribes. [note: 184] Lee's evidence was that only he and Tee possessed that knowledge, [note: 185] but this differs from Syed Nasser's claim that he also had that knowledge, [note: 186] as well as Tee's evidence that all the defendant's witnesses except for Abdulkarim had that knowledge. [note: 187]

121 Ninth, the plaintiff argues that Syed Nasser's evidence should not be believed because his unreliability as a witness is demonstrated by the following inconsistencies:

(a) He stated in his AEIC that he first heard of the plaintiff in October 2010, [note: 188] but, as

early as April 2010, he was copied on e-mails concerning the proposed agreement between the plaintiff and the defendant. [note: 189] Lee also gave evidence that he forwarded to Syed Nasser certain materials he had received from Chan at the April meeting, [note: 190] and that, in August 2010, he and Syed Nasser had advised Tee against collaborating with the plaintiff. [note: 191] Syed Nasser's explanation was that he must have forgotten about the plaintiff until October 2010. [note: 192]

(b) Syed Nasser said under cross-examination that Chan's name came up around 30 October 2010, a few days before submission of the Tabuk Project bid. [note: 193] But, on 15 October 2010, Syed Nasser received from Tee an e-mail forwarding Chan's proposals for the Agreement, to which Syed Nasser replied. [note: 194]

(c) Syed Nasser said in his AEIC that he met Chan once in October 2010. [note: 195] Under cross-examination, he said that he first heard of Chan around 30 October 2010. [note: 196] This means that Syed Nasser must have met Chan on 31 October 2010, but this cannot be the case because Chan was in Singapore at the time [note: 197], as shown by Chan's telephone bills. [note: 198]

(d) In his AEIC, Syed Nasser said that the bids for the Projects were prepared under Magendran's "supervision", [note: 199] but, in his oral evidence, he disagreed with that statement in his AEIC, [note: 200] then sought to explain that the bids were prepared with Magendran's collaboration or coordination. [note: 201]

(e) In an e-mail on 1 November 2010, Syed Nasser instructed Magendran to seek his clearance before releasing information on the bids. [note: 202] The explanation given for this instruction in the e-mail differs from the explanation that Syed Nasser gave in re-examination, [note: 203] which was that he did not want to facilitate the plaintiff's use of bribery. [note: 204]

122 Tenth, the plaintiff argues that Tee's evidence is also open to doubt. Tee admitted under cross-examination that the defendant had engaged in corrupt business practices in the past. [note: 205] Therefore, Tee's integrity is suspect. He would have no moral reservations about falsely accusing the plaintiff of bribery. [note: 206] Also, Tee said in re-examination that he learnt about the intention to pay bribes at the September meeting, [note: 207] but this is not mentioned in his AEIC. [note: 208] And in any event, Tee's evidence is at odds with Subri's, who denied any mention of bribery at the April meeting. [note: 209] Tee's evidence is also unsupported by Lee, who said only that Chan informed him of bribery through two telephone calls. [note: 210] Further, Tee said in cross-examination that Chan had used the word "bribery" in their conversations. But seconds later in the cross-examination, he said that he could not remember whether that word had been used. [note: 211]

123 Eleventh, the plaintiff argues that the reliability of Lee's evidence is undermined by the following inconsistencies:

(a) Lee's evidence initially was that he first learnt about Chan's intention to pay bribes during a telephone call in April 2010. [note: 212] But he subsequently gave evidence that he first learnt of

the intended bribes at a meeting in April 2010 that took place after the April meeting. [note: 213] Both these versions conflict with Tee's evidence that Lee first learnt of the intended bribes at the April meeting. [note: 214]

(b) Lee's evidence was that Chan spoke to him about the intended bribery a second time in October 2010. [note: 215] But according to the defendant's contentions, [note: 216] Lee had already "dropped out of the picture" in August or September 2010 because Chan started to deal directly with Tee. [note: 217]

(c) When asked what he meant by the phrase "third party fees expectation" in his e-mail to Chan on 8 April 2010, [note: 218] Lee's evidence under cross-examination was that he could not remember. [note: 219] In re-examination, Lee said that the phrase referred to bribes. [note: 220]

124 Twelfth, the plaintiff argues that the defendant has cast an unjustifiably sinister light on events and circumstances which, instead, have a more innocent interpretation:

(a) It is too much of a stretch to infer an intention to pay bribes from the lack of specificity in the Agreement as to the scope and nature of the plaintiff's assistance to Bina Puri Saudi. This is particularly so because the draft Memorandum of Understanding forwarded by the defendant to the plaintiff, [note: 221] which the defendant cites as an example of the degree of specificity that is expected of a written agreement, is itself not very specific. For instance, it simply provides that the plaintiff is to "procure Projects in the Kingdom of Saudi Arabia on Direct Negotiation Basis with a reasonable profit margin" [note: 222] without further elaboration. [note: 223]

(b) It is likewise too much of a stretch to infer an intention to pay bribes from Chan's failure to detail the plaintiff's assistance when Tee challenged the plaintiff's entitlement to commission. After all, the defendant's challenge was not based on denying that the plaintiff had assisted, and the plaintiff would expect the defendant to know the details of the assistance. [note: 224]

(c) Chan's e-mail on 30 November 2010 [note: 225] assuring Tee that Bina Puri Saudi would be awarded both Projects does not constitute a representation that the plaintiff could influence the outcome of the award of the Projects even after submission of the bids. [note: 226] On the contrary, in that e-mail, Chan alluded to the possibility of the Projects being "hijacked", and in an earlier e-mail on 9 November 2010, Chan mentioned the need to ensure a "level playing field". [note: 227] These are not concerns that Chan would have if there had been an intention to pay bribes. [note: 228]

(d) There is nothing wrong with Dr Abdallah having contacts and connections in Saudi Arabia, and with using these contacts to obtain market intelligence. [note: 229]

(e) Chan's explanation as to why the commission was omitted from the plaintiff's accounts filed with ACRA, *ie* that he was acting on the advice of his accountant, was a spontaneous answer under cross-examination and should be believed. [note: 230]

Defendant's response

125 The defendant's sole argument in response was that the lack of documentary evidence of

bribery should not be given much weight, because the clandestine nature of bribery is such that little, if any, documentary evidence would normally be available. Hence, indirect and circumstantial evidence should suffice to prove that the plaintiff did intend to secure the Projects through bribery. [note: 231]

My analysis

126 The defendants bear the burden of proving, on the balance of probabilities, that the parties' common intention in entering into the Agreement was that the plaintiff would use bribery to assist Bina Puri Saudi in securing the Projects.

127 I have no doubt that both parties intended that the plaintiff would make some form of payments to third parties in Saudi Arabia pursuant to the Agreement and for the purpose of securing the Projects. This is clear from the references in the contemporaneous correspondence to "commitments" and "third party fees". The plaintiff accepts that such payments were intended. It accepts that of the 5% commission the plaintiff was to receive under the Agreement, 3 percentage points – or 60% of the 5% – was to go to Saudi third parties. That would leave only 2% – or 40% of the 5% – for the plaintiff. Instead, the central thrust of the plaintiff's argument is that these intended payments were entirely legitimate. It says that these payments were intended as legitimate compensation to Dr Abdallah's Saudi partners for market intelligence and other assistance rendered in connection with Bina Puri Saudi's bid.

128 To be blunt, I do not believe the plaintiff. After the allegations of bribery had been made, Chan was afforded an opportunity under cross-examination to explain the nature of the legitimate services rendered by the Saudi partners to earn more than half of the commission that the plaintiff was to be paid under the Agreement. He was unable to do so, as the following excerpt shows: [note: 232]

> Q Now what would the Saudi side do to earn the 3%?
>
> A Okay, they are---Your Honour, Saudi side, er, would---would the---their connection would do the market intelligence, the pricing, er, level, the pricing strategy, the---establishing the relationship, the goodwill between the---er, with the customers, er, and all necessary the re---er, related activities in Saudi Arabia.
>
> ...
>
> Q So the Saudi side was responsible to provide all these elements you mentioned to earn the 3%?
>
> A That's right.
>
> Q Now you claimed that you eventually provided technical assistance by way of advice, we will not go into details, which part of it that technical assistance or the advice did you gain, did you obtain from the Saudi side?
>
> ...
>
> A For example, I wouldn't have known, er, in details the way the projects were structured, how many mosques were there, what kind of excavation work to be done, how many unit---I wouldn't know the details of this. Er, number two, I wouldn't know what the authority has in plan for each site, whether there are additional units to be built, erm, I wouldn't be able to know what is the condition of the---the area itself.

Q Weren't all these contained in the tender documents issued by the Housing Authority?

...

A I believe some of them would have been in there.

129 I have found that the plaintiff did not give Bina Puri Saudi advice on pricing the bids. I see no evidence before me showing or even tending to show some other way in which the plaintiff rendered assistance to Bina Puri Saudi. Consequently, I have found that it is more likely than not that the plaintiff rendered no assistance to Bina Puri Saudi in its bid for the Projects. I therefore do not believe in the slightest that the plaintiff intended its payments to the Saudi third parties as compensation for services advancing Bina Puri Saudi's bid. As a result, I can see no possible legitimate explanation for the plaintiff's intended bribes.

130 I am fortified in this view by the reference in the contemporaneous correspondence to "an 'arranged project'". I reproduce here an excerpt from Chan's e-mail of 15 April 2010 [note: 233] :

> Fees - for tender project, 2% is reasonable but this is an "arranged project" subject to negotiation. 3% is minimum requested by Saudi side. Besides there is substantial upside to this relationship if you are operating in KSA.
>
> The 0.5% is for local side - you decide what you deem reasonable.

131 The plaintiff is correct to say that, because the Projects were at this time not within the parties' contemplation, this reference to "arranged projects" was not directly a reference to the Projects. However, I have no doubt that the Projects were "arranged projects" rather than "tender projects", to use Chan's language. As he said, a 2 percent commission would be reasonable for "tender projects". The commission under the Agreement, by contrast, was 2.5 times that. Hence it must be that the Projects were "arranged projects". What could this mean, given that the Projects were awarded through a tender process? It can only mean, in my view, that Chan purported to be able to "arrange" for Bina Puri Saudi to secure the Projects otherwise than through the tender process. And this serves to reinforce my belief that the common intention from the outset was for the plaintiff to use bribery to ensure that Bina Puri Saudi secured the Projects.

132 The evidence of the parties' common intention for the plaintiff to pay bribes was given by Lee, Syed Nasser and Tee. Having observed their demeanour as they gave their evidence, I am satisfied that their evidence in that regard was truthful. Their evidence was consistent with the contemporaneous correspondence. The self-incriminating nature of their evidence does not add the additional weight to their evidence that it would ordinarily do so because I accept that on the facts of this case, the evidence was also self-serving. But it did add some weight to the evidence. I am entitled to and do bear in mind that it is a serious thing to admit an intention to secure contracts by paying bribes. It is especially serious – legally and reputationally – for a public listed company to do so.

133 I give short shrift to the plaintiff's attempts to discredit these witnesses. I do not propose to analyse individually the discrepancies and inconsistencies that the plaintiff alleges demonstrates the falsity of their evidence. I am content simply to say that these discrepancies and inconsistencies are either non-existent or minor, and are attributable not to mendacity, but to lapses of memory concerning what I found to be relatively unimportant details.

134 Moving to the plaintiff's witnesses, as I have said, I am unconvinced by Chan's attempts to

justify the intended payments to the Saudi third parties as legitimate compensation for services rendered. As for Subri's denial of the allegation that fees to third parties were discussed at the September Meeting, even if I accept that denial, that introduces no doubt into my belief that the parties intended the plaintiff to pay bribes. On the evidence, discussions as to fees to third parties took place outside of the September Meeting.

Conclusion

135 I therefore find it more likely than not that both the plaintiff and the defendant had the common intention when they entered into the Agreement that the plaintiff would pay bribes in order to ensure that Bina Puri Saudi secured the Projects. As I have said, these findings relate to – and *only* to – the common intention of the plaintiff and defendant. I cannot and do not make any findings as to whether bribery actually took place. I am in no position to do so.

The effect of the parties' common intention to secure the Projects by paying bribes

136 Having found that the parties' common intention in entering into the Agreement was that the plaintiff would procure contracts for Bina Puri Saudi by paying bribes, the question is whether this precludes the plaintiff from claiming its commission under the Agreement.

137 The plaintiff did not address this point. It appears to have assumed that it had no need to do so because it could prove either that there was no illegality, or that the defendant was precluded from relying on illegality as a defence as it had not been pleaded.

138 The defendant contends that the connection between the Agreement and the plaintiff's use of bribery is sufficient for the Agreement to be tainted with illegality, which means that the Agreement is unenforceable, and it follows that the plaintiff's action cannot succeed. [note: 234]

139 On the findings I have made, it is in my view an understatement to say that the Agreement is "tainted" with illegality. As I have said at [94] above, I characterise the Agreement as a contract entered into with the intention of committing an illegal act. On the authority of the fourth *Edler* proposition, which is proposition (d) in *Koon Seng Construction* (see [73] above), no court can permit the plaintiff to enforce its rights under the Agreement. Accordingly, the plaintiff's claim for commission must fail on this additional ground.

140 For the sake of completeness, I consider an argument that the plaintiff might have made. The plaintiff could challenge my characterisation of the Agreement as a contract with an illegal object. It would seek to characterise the Agreement instead as a lawful contract that could be performed in an illegal manner. It would then argue that it is entitled to sue upon such a contract, on the authority of *St John Shipping*, the facts and holding of which are summarised at [93] above.

141 That argument must fail. *St John Shipping* does not go so far as to say that performance of a lawful contract in an illegal manner can *never* preclude a party from suing on the contract. All *St John Shipping* says is that, on the facts before Devlin J, the illegal performance did not preclude enforcement of the contract. Devlin J in *St John Shipping* acknowledged that in certain circumstances the manner in which a contract is performed can turn it into the sort of contract prohibited by statute, which would render it unenforceable (at 284).

142 Then there is the English Court of Appeal decision of *Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd* [1973] 1 WLR 828. In that case, a lorry owned by the defendant hauliers carried a load in excess of what was permitted under applicable regulations. During the journey, the lorry tipped over

and the load was damaged as a result. It was found that the owners of the load was fully aware that the defendant was breaking the law. The owners claimed damages from the defendant. The defendant resisted the claim on the ground of illegality. The court unanimously held in the defendant's favour, even though a majority of the court found that the contract was a lawful one (Lord Denning MR and Scarman LJ, Phillimore LJ dissenting on this point, although Lord Denning MR also had his doubts). Lord Denning MR held that the plaintiff's participation in the illegal performance of the contract precluded it from suing on the contract (and from suing in negligence). And so, even if the plaintiff in this case before me is correct to characterise the Agreement as a lawful contract that was merely intended to be performed an illegal manner, I would hold that the plaintiff's common intention that the Agreement should be performed in an illegal manner precludes it from enforcing a claim under the Agreement.

143 I conclude my analysis of the *ex turpi causa* doctrine by noting that even though this contract was to be performed outside Singapore and even though, arguably, the illegal intention in question was to be carried out outside Singapore, neither party sought to raise before me any arguments based on Singapore's rules of private international law. Similarly, neither party sought to put before me any evidence of foreign law. That is why I have applied the *ex turpi causa* doctrine in this case as it exists in Singapore law. That is also why I have applied the law of Singapore to determine whether the parties' common intention was an intention to commit an illegal act.

Conclusion

144 I summarise my conclusions:

(a) The plaintiff has failed to establish on the balance of probabilities that it was the effective cause of Bina Puri Saudi's securing of the Projects.

(b) The defendant is not precluded from relying on the *ex turpi causa* doctrine despite its failure to plead it.

(c) I am satisfied that the parties' common intention in entering into the Agreement was that the plaintiff would procure the Projects for Bina Puri Saudi by paying bribes.

(d) The parties' common intention that the plaintiff would pay bribes brings this case within the ex turpi causa doctrine, either as a contract with turpitude as its purpose or a contract to be performed in a manner involving turpitude. In either case, the result is that the plaintiff cannot enforce any claim under the Agreement.

145 I therefore dismiss the plaintiff's claim.

Costs

146 The normal rule in civil litigation is that costs follow the event. In *Nova Management Pte Ltd v Amara Hotel Properties Pte Ltd and another* [1992] 3 SLR(R) 918, GP Selvam JC (as he then was) held (at [32]) that a defendant who successfully raises the defence of illegality should not automatically be deprived of costs merely because of his reliance on illegality. I respectfully agree. The incidence of costs in a case where *ex turpi causa* applies is a matter of discretion, as the incidence of costs always is. On the facts of that case, GP Selvam JC declined to award the defendant the costs of any proceedings prior to amendment of its pleadings (at [33]) because the defendant amended its pleadings to raise the defence of illegality only at a very late stage.

147 Likewise, I decline to award the defendant any costs in the present action. When the parties are *in pari delicto* – as they are here – the parties' losses lie where they fall. That applies to the substance of the claim as well as to the incidence of costs. I therefore make no order as to costs.

[note: 1] AEIC of Chan at para. 3.

[note: 2] AEIC of Tee at paras. 6-7.

[note: 3] Defendant's BOD at 3, 6.

[note: 4] AEIC of Tee at paras. 8-9.

[note: 5] AEIC of Chan at para. 10; AEIC of Lee at para. 10.

[note: 6] Defendant's BOD at 17-18.

[note: 7] AEIC of Chan at para. 15

[note: 8] AEIC of Chan at para. 20; AEIC of Magendran at para. 6; AEIC of Abdulkarim at para. 29.

[note: 9] Plaintiff's BOD at 489-492.

[note: 10] AEIC of Chan Lai Thong at para. 26; AEIC of Matthew Tee at paras. 32-33

[note: 11] AEIC of Matthew Tee at para. 29.

[note: 12] Plaintiff's BOD at 686.

[note: 13] Plaintiff's BOD at 688.

[note: 14] Plaintiff's Opening Statement at paras. 5.9-5.10.

[note: 15] Plaintiff's Closing Submissions at paras. 38-45.

[note: 16] Defendant's BOD at 23.

[note: 17] Plaintiff's Closing Submissions at para. 43.

[note: 18] Defendant's Closing Submissions at paras. 183-187.

[note: 19] Defendant's Closing Submissions at paras. 282-283; AEIC of Abdulkarim at paras. 12-15.

[note: 20] Transcript, Day 3, Page 54 at lines 11-12.

[note: 21] Plaintiff's Closing Submissions at paras. 76-87.

[note: 22] AEIC of Chan at para. 24; Transcript, Day 2, Page 65 at lines 11-21.

[note: 23] AEIC of Magendran at paras. 10, 13.

[note: 24] Plaintiff's Closing Submissions at para. 85.

[note: 25] Plaintiff's BOD at 1009.

[note: 26] Plaintiff's Closing Submissions at para. 84.

[note: 27] AEIC of Dr Abdallah at para. 8; AEIC of Magendran at para. 9.

[note: 28] Plaintiff's Closing Submissions at para. 86; Transcript, Day 1, Page 18 at lines 16-17.

[note: 29] Plaintiff's Reply Submissions at para. 75; AEIC of Dr Abdallah at paras. 4, 9.

[note: 30] Plaintiff's BOD at 604.

[note: 31] AEIC of Syed Nasser at para. 25.

[note: 32] Plaintiff's Closing Submissions at para. 94(c); Defendant's BOD at 385; Transcript, Day 3, Page 88, lines 23-25.

[note: 33] Plaintiff's Closing Submissions at para. 94(e).

[note: 34] AEIC of Abdulkarim at para. 20.

[note: 35] Plaintiff's Closing Submissions at para. 94(f).

[note: 36] Transcript, Day 1, Page 136 at lines 8-9.

[note: 37] Defendant's Closing Submissions at paras. 289-289.11; Defendant's BOD at 358-359, 361, 378-379, 382-383, 390-392, 404-405, 406-408, 416-418, 421-422.

[note: 38] Defendant's Closing Submissions at para. 286; Transcript, Day 3, Page 52 at lines 16-25.

[note: 39] Defendant's Closing Submissions at paras. 192-195, 262.

[note: 40] Defendant's Closing Submissions at paras. 235-236.

[note: 41] Plaintiff's BOD at 55-56.

[note: 42] Defendant's Closing Submissions at para. 261.

[note: 43] Defendant's Closing Submissions at para. 199; Defendant's BOD at 419.

[note: 44] Defendant's Closing Submissions at para. 201; Defendant's BOD at 422.

[note: 45] Defendant's Closing Submissions at paras. 168-169.

[note: 46] Transcript, Day 1, Page 70 at lines 8-9; Day 2, Page 20 at lines 22-30.

[note: 47] Defendant's Closing Submissions at paras. 224-227.

[note: 48] Defendant's Closing Submissions at paras. 238-239; Transcript, Day 3, Page 92 at lines 18-23.

[note: 49] Defendant's Closing Submissions at paras. 204-205.

[note: 50] Defendant's Closing Submissions at paras. 206-212, 223.

[note: 51] Plaintiff's BOD at 54.

[note: 52] Transcript, Day 2, Page 63 at lines 5-10, Page 64 at lines 8-12.

[note: 53] Transcript, Day 2, Page 66 at lines 5-10, Page 68 at lines 21-23.

[note: 54] Plaintiff's Reply Submissions at para. 117; Transcript, Day 1, Page 125 at lines 4-13.

[note: 55] Plaintiff's Reply Submissions at para. 117; Transcript, Day 3, Page 105 at lines 7-13.

[note: 56] Plaintiff's Reply Submissions at para. 122.

[note: 57] Transcript, Day 1, Page 71 at lines 30-32, Page 72 at lines 1-4; Day 2, Page 21 at lines 27-32, Page 22 at lines 1-9.

[note: 58] Transcript, Day 1, Page 72 at lines 3-4.

[note: 59] Plaintiff's Reply Submissions at paras. 134-135; Plaintiff's BOD at 42.

[note: 60] Plaintiff's Reply Submissions at para. 116.

[note: 61] Defendant's BOD at 416-418, 421-422.

[note: 62] Plaintiff's Closing Submissions at paras. 245-246.

[note: 63] Defendant's Reply Submissions at paras. 43-46.3.

[note: 64] Defendant's Reply Submissions at paras. 48-50; Transcript, Day 1, Page 94 at lines 17-25.

[note: 65] Defendant's Reply Submissions at para. 51; Transcript, Day 3, Page 104 at lines 7-32, Page 105 at lines 1-13.

[note: 66] Transcript, Day 2, Page 66 at lines 19-23.

[note: 67] Defendant's BOD at 406.

[note: 68] Defendant's BOD at 421-422.

[note: 69] Transcript, Day 1, Page 125 at lines 6-13; Day 2, Page 67 at lines 10-18.

[note: 70] Transcript, Day 2, Page 67 at lines 18-27.

[note: 71] Defendant's BOD at 404-405.

[note: 72] Defendant's BOD at 421-422.

[note: 73] Transcript, Day 3 Page 104 at line 32, Page 105 at lines 1-13.

[note: 74] Plaintiff's Closing Submissions at para. 86.

[note: 75] Transcript, Day 1, Page 18 at lines 16-17.

[note: 76] Transcript, Day 1, Page 18 at lines 12-15.

[note: 77] Plaintiff's BOD at 1086-1095.

[note: 78] Plaintiff's Closing Submissions at para. 56.

[note: 79] AEIC of Chan at para. 18; AEIC of Subri at para. 10.

[note: 80] Transcript, Day 3, Page 60 at lines 15-18; Page 82 at lines 12-23.

[note: 81] AEIC of Chan at para. 19; Transcript, Day 3, Page 114 at lines 7-9.

[note: 82] Plaintiff's Closing Submissions at para. 46.

[note: 83] Plaintiff's BOD at 44-45.

[note: 84] Defendant's BOD at 409.

[note: 85] Plaintiff's Closing Submissions at para. 60.

[note: 86] Defendant's BOD at 424.

[note: 87] Plaintiff's BOD at 52.

[note: 88] AEIC of Chan at para. 32.

[note: 89] Plaintiff's Closing Submissions at para. 111.

[note: 90] AEIC of Chan at para. 36.

[note: 91] Transcript, Day 4, Page 35 at lines 16-18.

[note: 92] Transcript, Day 2, Page 84 at lines 20-21; Plaintiff's BOD at 57.

[note: 93] Transcript, Day 2, Page 84 at lines 15-24.

[note: 94] Plaintiff's BOD at 260-261, 425-426.

[note: 95] Plaintiff's Reply Submissions at para. 166.

[note: 96] Plaintiff's BOD at 251-252.

[note: 97] Plaintiff's Closing Submissions at para. 107.

[note: 98] Plaintiff's Closing Submissions at paras. 121-130.

[note: 99] Plaintiff's BOD at 432-433, 435.

[note: 100] Defendant's Closing Submissions at para. 188-190.

[note: 101] Defendant's Reply Submissions at para. 16.

[note: 102] Defendant's Closing Submissions at paras. 270-271.

[note: 103] Defendant's Reply Submissions at paras. 25-26, 29.

[note: 104] Defendant's Closing Submissions at paras. 215-217, 272; Defendant's Reply Submissions at paras. 22-24, 27, 29.

[note: 105] Defendant's Closing Submissions at paras. 267-269.

[note: 106] Defendant's Closing Submissions at paras. 273-279.

[note: 107] Defendant's Closing Submissions at para. 165.

[note: 108] Defendant's Closing Submissions at para. 167; Transcript, Day 1, Page 19 at line 32.

[note: 109] Defendant's Closing Submissions at paras. 162-164; AEIC of Chan at para. 20; Plaintiff's BOD at 51.

[note: 110] Defendant's Closing Submissions at para. 166.

[note: 111] Defendant's Closing Submissions at paras. 170-175.

[note: 112] Plaintiff's Reply Submissions at paras. 103-104.

[note: 113] Plaintiff's Reply Submissions at para. 103.

[note: 114] Plaintiff's Reply Submissions at para. 105.

[note: 115] Plaintiff's Closing Submissions at paras. 184-186; Plaintiff's Reply Submissions at paras. 11, 16.

[note: 116] Defendant's Closing Submissions at paras. 9-14.

[note: 117] Plaintiff's Closing Submissions at para. 189.

[note: 118] Plaintiff's Closing Submissions at para. 189.

[note: 119] Plaintiff's Reply Submissions at para. 15(ii).

[note: 120] Plaintiff's Reply Submissions at para. 13(v).

[note: 121] Defendant's Closing Submissions at para. 16.1.

[note: 122] Plaintiff's Reply Submissions at para. 15(i).

[note: 123] Defendant's Closing Submissions at para. 16.2.

[note: 124] Defendant's Closing Submissions at para. 16.3.

[note: 125] Defendant's Closing Submissions at para. 16.4.

[note: 126] Defendant's Closing Submissions at para. 16.4.

[note: 127] Defendant's Reply Submissions at para. 35.3.

[note: 128] Transcript, Day 2, Page 36 at lines 24-31.

[note: 129] Transcript, Day 2, Page 37 at lines 1-4.

[note: 130] Defendant's Closing Submissions at paras. 40-40.2.

[note: 131] Transcript, Day 3, Page 11 at lines 3-15, Page 14 at lines 20-29.

[note: 132] Transcript, Day 3, Page 98 at lines 10-23.

[note: 133] Transcript, Day 4, Page 42 at lines 24-29.

[note: 134] Transcript, Day 4, Page 59 at lines 3-20.

[note: 135] Defendant's Closing Submissions at paras. 117-118.

[note: 136] Plaintiff's BOD at 425, 433, 444.

[note: 137] Transcript, Day 2, Page 38 at lines 18-22.

[note: 138] Plaintiff's BOD at 5.

[note: 139] Transcript, Day 4, Page 86 at lines 6-12.

[note: 140] Defendant's Closing Submissions at paras. 75-78; Transcript, Day 4, Page 86 at lines 20-22, Page 87 at lines 11-14.

[note: 141] Transcript, Day 2, Page 31 at lines 25-28.

[note: 142] Transcript, Day 2, Page 31 at line 32, Page 32 at lines 1-6.

[note: 143] Plaintiff's BOD at 1.

[note: 144] Transcript, Day 2, Page 33 at lines 1-3.

[note: 145] Plaintiff's BOD at 52.

[note: 146] Plaintiff's BOD at 250.

[note: 147] Defendant's Closing Submissions at paras. 92-93.

[note: 148] Plaintiff's BOD at 52.

[note: 149] Transcript, Day 2, Page 39 at lines 18-32.

[note: 150] Plaintiff's BOD at 694.

[note: 151] Defendant's Closing Submissions at para. 91.

[note: 152] Transcript, Day 1, Page 24 at lines 26-32, Page 25 at lines 1-4.

[note: 153] Transcript, Day 1, Page 28 at lines 14-26.

[note: 154] Transcript, Day 2, Page 30 at lines 15-32.

[note: 155] Defendant's Closing Submissions at paras. 94-98.

[note: 156] Defendant's Closing Submissions at paras. 26-27.

[note: 157] Defendant's Closing Submissions at paras. 28-30; Plaintiff's BOD at 13.

[note: 158] Defendant's Closing Submissions at paras. 32-34.

[note: 159] Defendant's Closing Submissions at paras. 38-45.

[note: 160] Defendant's Closing Submissions at paras. 66-67.

[note: 161] Defendant's Closing Submissions at paras. 46-51.

[note: 162] Defendant's Closing Submissions at paras. 108-111.

[note: 163] Transcript, Day 2, Page 40 at lines 28-32.

[note: 164] Tab-4 of Annex to Defendant's Closing Submissions.

[note: 165] Tab-5 of Annex to Defendant's Closing Submissions.

[note: 166] Plaintiff's Reply Submissions at para. 32.

[note: 167] Plaintiff's Closing Submissions at paras. 200-201.

[note: 168] Plaintiff's Closing Submissions at para. 196; Transcript, Day 4, Page 82 at lines 23-31.

[note: 169] Plaintiff's Closing Submissions at para. 199; Transcript, Day 1, Page 29 at lines 18-23.

[note: 170] Transcript, Day 4, Page 41 at lines 21-28.

[note: 171] Plaintiff's BOD at 5.

[note: 172] Plaintiff's Reply Submissions at para. 56; Transcript, Day 4, Page 84 at lines 12-14.

[note: 173] Plaintiff's Closing Submissions at para. 212; Plaintiff's Reply Submissions at para. 60.

[note: 174] Plaintiff's Reply Submissions at para. 59.

[note: 175] Plaintiff's Closing Submissions at para. 213; Plaintiff's Reply Submissions at para. 58.

[note: 176] Plaintiff's Closing Submissions at paras. 209, 214-217; Plaintiff's Reply Submissions at para. 46.

[note: 177] Transcript, Day 2, Page 31 at lines 29-32, Page 32 at lines 1-2, Page 38 at lines 11-17; Day 4, Page 89 at lines 23-28.

[note: 178] Plaintiff's BOD at 425, 433, 444.

[note: 179] Transcript, Day 2, Page 38 at lines 15-22.

[note: 180] Plaintiff's BOD at 52.

[note: 181] Plaintiff's Reply Submissions at paras. 68-69.

[note: 182] Plaintiff's Reply Submissions at para. 70.

[note: 183] Plaintiff's Reply Submissions at paras. 82-83.

[note: 184] Plaintiff's Closing Submissions at para. 220.

[note: 185] Transcript, Day 3, Page 12 at lines 21-23.

[note: 186] Transcript, Day 3, Page 98 at lines 18-22.

[note: 187] Transcript, Day 4, Page 42 at lines 13-19.

[note: 188] AEIC of Syed Nasser at para. 33.

[note: 189] Plaintiff's Closing Submissions at para. 221; Plaintiff's BOD at 9.

[note: 190] Plaintiff's Reply Submissions at para. 91.1(ii); Transcript, Day 2, Page 128 at lines 24-28, Page 129 at line 1-3.

[note: 191] Plaintiff's Reply Submissions at para. 91.1(iii); Transcript, Day 2, Page 140 at lines 17-26.

[note: 192] Transcript, Day 3, Page 94 at lines 3-7.

[note: 193] Transcript, Day 3, Page 98 at lines 7-10.

[note: 194] Defendant's BOD at 409.

[note: 195] AEIC of Syed Nasser at para. 36.

[note: 196] Transcript, Day 3, Page 98 at lines 7-10.

[note: 197] Plaintiff's Reply Submissions at para. 91.3;

[note: 198] Plaintiff's BOD at 1009.

[note: 199] AEIC of Syed Nasser at para. 25.

[note: 200] Transcript, Day 3, Page 89 at lines 31-32.

[note: 201] Plaintiff's Reply Submissions at para. 91.4; Transcript, Day 3, Page 90 at lines 10-19, Page 93 at lines 5-7.

[note: 202] Defendant's BOD at 419.

[note: 203] Plaintiff's Closing Submissions at paras. 222-223.

[note: 204] Transcript, Day 3, Page 108 at lines 29-32, Page 109 at lines 1-9.

[note: 205] Transcript, Day 4, Page 57 at lines 4-17.

[note: 206] Plaintiff's Closing Submissions at paras. 236-237.

[note: 207] Transcript, Day 4, Page 41 at lines 21-28.

[note: 208] Plaintiff's Closing Submissions at paras. 229-230.

[note: 209] Transcript, Day 1, Page 29 at lines 18-23.

[note: 210] Plaintiff's Closing Submissions at para. 231; Transcript, Day 3, Page 11 at lines 19-29.

[note: 211] Plaintiff's Reply Submissions at para. 94; Transcript, Day 4, Page 59 at lines 21-29.

[note: 212] Transcript, Day 3, Page 11 at lines 16-23.

[note: 213] Transcript, Day 3, Page 14 at lines 31-32, Page 15 at lines 1-5.

[note: 214] Plaintiff's Closing Submissions at paras. 232-233; Transcript, Day 4, Page 42 at lines 8-11.

[note: 215] Transcript, Day 3, Page 11 at lines 25-31.

[note: 216] Defendant's Closing Submissions at para. 122.

[note: 217] Plaintiff's Reply Submissions at para. 85(ii).

[note: 218] Plaintiff's BOD at 1.

[note: 219] Transcript, Day 2, Page 129 at lines 18-22, Page 130 at lines 3-12.

[note: 220] Plaintiff's Closing Submissions at paras. 203-205; Transcript, Day 3, Page 14 at lines 14-28.

[note: 221] Plaintiff's BOD at 10-19.

[note: 222] Plaintiff's BOD at 13.

[note: 223] Plaintiff's Reply Submissions at para. 29.

[note: 224] Plaintiff's Reply Submissions at paras. 44-45.

[note: 225] Plaintiff's BOD at 250.

[note: 226] Plaintiff's Reply Submissions at para. 73.

[note: 227] Plaintiff's BOD at 52.

[note: 228] Plaintiff's Reply Submissions at paras. 71-72.

[note: 229] Plaintiff's Reply Submissions at paras. 76, 79.

[note: 230] Plaintiff's Reply Submissions at para. 80.

[note: 231] Defendant's Reply Submissions at para. 39.

[note: 232] Transcript, Day 4, Page 89 at lines 23-28; Page 90 at lines 1-32.

[note: 233] Plaintiff's BOD at 5.

[note: 234] Defendant's Closing Submissions at paras. 18-19.