IN THE HIGH COURT OF MALAYA AT SHAH ALAM, SELANGOR DARUL EHSAN

CIVIL SUIT NO: 22C-8-04/2015

BETWEEN

LINSUN ENGINEERING SDN. BHD. (Co. No.: 678161-V) … **PLAINTIFF**

AND

SHIN EVERSENDAI ENGINEERING SDN. BHD.
(Co. No.: 274156-X) … **DEFENDANT**

JUDGMENT

(after trial)

A. Three novel issues

1. This judgment concerns a suit (**This Suit**) by the plaintiff company (**Plaintiff**) against the defendant company (**Defendant**) for, among others, payment allegedly due from the Defendant to the Plaintiff for the Plaintiff's supply of manpower and tools to erect and dismantle scaffolding for the Defendant.

2. The interesting feature of this case was that on 12.8.2015 [before the commencement of trial of This Suit (**Trial**)], the Defendant had adduced a joint experts' report dated 6.8.2015 (**Defendant's Joint Experts Report**) [prepared jointly by Mr. Richard John Bray (**Mr. Bray**) and Mr. Neil Sharpe (**Mr. Sharpe**)] to resist This Suit. However, on 8.10.2021, after the close of the Plaintiff's case and in the midst of the defence case, the Defendant has filed an application in court enclosure no. 195 (**Enc. 195**) for an extension of time to file a new expert's report by Mr. Rodney

Martin (**Mr. Martin**) to oppose This Suit. According to the Defendant's affidavit in support of Enc. 195 -

(1) Mr. Bray had returned to United Kingdom (**UK**) and could not testify at the Trial due to "*ongoing work commitments*" in UK; and

(2) Mr. Sharpe could not be contacted.

3. Enc. 195 raises the following three novel questions:

(1) in view of the court's pre-trial case management powers under O 34 r 2(2)(p), (r), O 40A rr 1(1), 5(1), (2) and (3) of the Rules of Court 2012 (**RC**) regarding expert witness(es), can the Defendant apply for an extension of time from the court pursuant to O 3 r 5(1) RC to file an expert's report after the commencement of the Trial?;

(2) Mr. Bray and Mr. Sharpe had each affirmed an affidavit stating, among others, that they understood their duty as experts was to assist the court on matters within their expertise [as provided in O 40A r 2(1) RC]. In view of the "*non-availability*" of Mr. Bray and Mr. Sharpe to testify in this case, whether the duty owed by Mr. Bray and Mr. Sharpe to the court pursuant to O 40A r 2(1) RC had been breached; and

(3) if an expert has breached his or her duty to the court pursuant to O 40A r 2(1) RC, what sanctions can be imposed by the court?

B. Background

4. Alstom Services Sdn. Bhd. had appointed the Defendant to, among others, assemble and erect a boiler for "*1 x 1000 MW Manjung 4 Coal Fired Power Plant*" (**Project**).

5. By way of a "*Supply/Sub-Contract Work Order*" dated 20.3.2013 (**Contract**), the Defendant had appointed the Plaintiff to supply manpower and tools for the erection and dismantling of scaffolding in the Project (**Works**). The Defendant would provide scaffolding materials for the Works (**Scaffolding Materials**).

6. The Contract provided an estimated amount of RM686,348.75 for the Works. However, by way of a letter dated 9.3.2013, the Plaintiff had requested the Defendant to increase the contract value of the Works until the completion of the Project [**Plaintiff's Request (9.3.2013)**]. The Defendant did not reply to the Plaintiff's Request (9.3.2013).

7. The Defendant had sent a facsimile dated 22.4.2014 to the Plaintiff [**Defendant's Termination (Contract)**]. According to the Defendant's Termination (Contract), among others -

   (1) the Plaintiff was "*herewith instructed to completely demobilise*" the Plaintiff's team from the site of the Project (**Site**) with effect from 26.4.2014; and

   (2) the Plaintiff should return to the Defendant all "*loaned Personnel Protective Equipment*" prior to the departure of the Plaintiff's team from the Site.

C. Legal proceedings

8. In view of the Defendant's Termination (Contract), on 12.11.2014, This Suit has been filed. In This Suit, the Plaintiff has claimed for, among others, a sum of RM8,222,464.69 which had not been paid by the Defendant for the Works completed by the Plaintiff (**Completed Works**).

9. The Defendant was initially represented by Messrs Belden with Mr. Belden Premaraj A/L Joseph Rajadurai as its learned lead counsel. Mr. Bray and Mr. Sharpe were appointed as the Defendant's experts when Messrs Belden acted for the Defendant.

10. During the Plaintiff's case, the Defendant changed solicitors and Mr. Sanjay Mohananasundram took over as learned lead counsel for the Defendant.

C(1). Plaintiff's case

11. The Plaintiff has called the following twelve witnesses to testify in support of This Suit:

    (1) Mr. Hobi Sarkar (**SP1**);

    (2) Mr. Md. Babu Abdul Jalil (**SP2**);

    (3) Mr. Kowser Hossain (**SP3**);

    (4) Mr. Chinnam Siva Ram (**SP4**);

    (5) Mr. Tharma Balan A/L Mohamad (**SP5**);

    (6) Mr. Gillai Shyama Sundar Reddy (**SP6**);

(7) Mr. Suren Nair A/L Surish (**SP7**);

(8) Encik Ahmad Lutfi Bin Mohamed (**SP8**);

(9) Encik A. Panirselvam A/L Arumugam (**SP9**);

(10) Dato' Satishkumar A/L Manoharan (**SP10**);

(11) Dato' Natarajen A/L Manoharan (**SP11**); and

(12) Encik Yusup Bin Hajan (**SP12**).

12. According to the evidence adduced by the Plaintiff's witnesses, among others -

(1) the Plaintiff's representative(s) would receive oral instruction from the Defendant's representative(s) to perform the Works;

(2) after the installation of a particular scaffolding by the Plaintiff -

(a) the Plaintiff's representative(s) would fill in details of the Completed Works [**Details (Completed Works)**] in a "*Scaffolding Work Order*" (**SWO**) which had been provided by the Defendant to the Plaintiff.

(b) the Details (Completed Works) included, among others -

(i) the physical dimensions of the Completed Works [**Dimensions (Completed Works)**], namely, the length, breadth and depth of the Completed Works in question; and

(ii) hand-drawn diagrams of the Completed Works; and

(c) the Defendant's authorised representative(s) would -

(i) inspect the Completed Works; and

(ii) measure the Dimensions (Completed Works);

(3) if the Defendant's representative(s) approved the Completed Works, the Defendant's representative(s) would sign the SWO;

(4) if the Plaintiff's representative(s) dismantled a scaffolding, there was no necessity to fill in the Details (Completed Works) in SWOs because the Details (Completed Works) would have earlier been filled up with regard to the installation of the scaffolding;

(5) the Plaintiff would send invoices supported by the relevant SWOs to the Defendant for payment of the Completed Works. A total of 23 invoices (**Plaintiff's 23 Invoices**) together with SWOs had been submitted by the Plaintiff to the Defendant;

(6) the Defendant only paid a total sum of RM4,057,210.00 (**Defendant's Total Part Payment**) wherein -

(a) full payment had been made by the Defendant for the Plaintiff's invoice nos. 1 to 3, 5, 6, 7 and 10; and

(b) there were only part payments for the Plaintiff's invoice nos. 4, 8, 9, 11, 12 and 13; and

(7) the Defendant did not make any payment for the Plaintiff's invoice nos. 14 to 23.

C(2). <u>Case for the Defendant</u>

13. The Amended Defence (**AD**) had resisted This Suit on the following grounds, among others:

(1) the Works were to be carried out by the Plaintiff for the purpose of the Defendant's completion of the Project [**Purpose (Project)**] - paragraph 3 AD. Paragraph 6 AD pleaded that there was an implied term in the Contract that the Plaintiff could only claim for Completed Works which were "*reasonably required*" for the Purpose (Project) [**Alleged Implied Term (Contract)**];

(2) the Works were not "*satisfactorily*" carried out by the Plaintiff - paragraph 8 AD;

(3) the Defendant's Termination (Contract) was made "*due to the discrepancies and exaggerated claims discovered in the Plaintiff's invoices*" and SWOs - paragraph 8 AD;

(4) according to paragraph 9 AD -

(a) not all Completed Works were "*properly and actually witnessed and verified by the Defendant's authorised representatives*"; and

(b) alternatively, not all quantities of Completed Works were "*properly and actually witnessed and verified by the Defendant's authorised representatives*";

(5) alternatively, even if -

(a) the Completed Works were properly and actually witnessed and verified by the Defendant's authorised representatives; and

(b) the quantities of the Completed Works were properly and actually witnessed and verified by the Defendant's authorised representatives

in view of the Alleged Implied Term (Contract), the Plaintiff was not entitled to claim for the Completed Works from the Defendant - paragraphs 6 and 10 AD;

(6) the Plaintiff had failed to submit its claims "*timeously*" in accordance with the Contract - paragraph 11 AD;

(7) in sub-paragraph 14(b) AD, the Defendant pleaded that the Defendant's Total Part Payment had been made under a mistaken or erroneous belief that the Plaintiff's invoices reflected the "*actual volume*" of Completed Works; and

(8) sub-paragraphs 17(a) to (g) AD alleged that the Plaintiff had submitted fraudulent and exaggerated claims to the Defendant.

14. The following four witnesses gave evidence in favour of the Defendant:

(1) Mr. Chandrasegaran A/L SP Uthirapathy (**SD1**);

(2) Mr. Sathiamoorthy A/L Khantasamy (**SD2**);

(3) Mr. Sugadesh Shanker A/L Parameswaran (**SD3**); and

(4) Mr. Pitchai Ganasekaran (**SD4**).

C(3). Enc. 195

15. Enc. 195 was filed in the midst of defence case after -

    (1) the Plaintiff had closed its case; and

    (2) SD1 had given his testimony.

16. Enc. 195 has applied for the court's extension of time under O 3 r 5(1) RC, O 92 r 4 RC and/or the court's inherent jurisdiction for the Defendant to file a "*fresh*" expert's report. Enc. 195 and the two affidavits in support of Enc. 195 did not mention the name of the expert to be appointed by the Defendant to prepare an expert's report in place of the Defendant's Joint Experts' Report. On the hearing day of Enc. 195, for the very first time, Mr. Sanjay informed the court and the Plaintiff's learned lead counsel, Mr. Gurdit Singh, that the Defendant proposed to appoint Mr. Martin to prepare an expert's report

C(3A). Court's power regarding expert witness(es)

17. I reproduce below O 3 r 5(1), O 34 r 2(2)(p), (r), O 40A rr 1, 2, 3(1), 5(1) to (3) and (5) RC:

> "***Extension of time***
>
> *O 3 r 5(1)* ***The Court may, on such terms as it thinks just, by order extend*** *or abridge* ***the period within which a person is required or authorized by these Rules or by any judgment, order or direction, to do any act in any proceedings****.*

Pre-trial case management when directed by the Court

O 34 r 2(1) …

(2) ***At a pre-trial case management, the Court may consider*** *any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and* ***the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including*** *-*

…

(p) ***whether an order should be made limiting the number of expert witnesses****;*

…

(r) ***whether any direction should be given for a discussion between the experts prior to the exchange of their affidavits exhibiting their reports for the purpose of requiring them to identify the issues in the proceedings and where possible, reach agreement on an issue, and if such a direction should be given, whether -***

(i) ***to specify the issues which the experts are to discuss; and***

(ii) ***to direct the experts to prepare a joint statement indicating the agreed issues, the issues not agreed and a summary of the reasons for any non-agreement****;*

…

Limitation of expert evidence

O 40 A r 1(1) ***The Court may, at or before the trial of any action, by order limit the number of expert witnesses who may be called at the trial to such number as it may specify****.*

(2) ***A reference to an "expert" in this Order is a reference to an expert who has been instructed to give or prepare evidence for the purpose of Court proceedings****.*

Expert's duty to the Court

r 2(1) ***It is the duty of an expert to assist the Court on the matters within his expertise****.*

(2) ***This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid****.*

Requirements of expert's evidence

r 3(1) ***Unless the Court otherwise directs, expert evidence to be given at the trial of any action, is to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him testifying that the report exhibited is his and that he accepts full responsibility for the report****.*

…

Discussions between experts

r 5(1) ***The Court may, at any stage, direct a discussion between experts for the purpose of requiring them to -***

(a) ***identify the issues in the proceedings; and***

(b) ***where possible, reach agreement on an issue****.*

(2) ***The Court may specify the issues which the experts shall discuss****.*

(3) ***The Court may direct that following a discussion between the experts, they shall prepare a statement for the Court showing -***

(a) ***the issues on which they agree; and***

(b) ***the issues on which they disagree and a summary of their reasons for disagreeing****.*

…

(5) ***Where the experts reach agreement on an issue during their discussions, the agreement shall not bind the parties, unless the parties expressly agree to be bound by the agreement.***"

(emphasis added).

18. I am of the following view regarding the calling of expert(s) as witness(es) in civil suits under RC:

(1) the three objectives of RC are to ensure a just, expeditious and economical disposal of civil actions [**3 Objectives (RC)**] - please refer to **CELCOM (M) Bhd & Anor v Tan Sri Dato' Tajudin Bin Ramli & Ors and another case** [2017] 4 AMR 418, at [20];

(2) to attain the 3 Objectives (RC), during pre-trial case management (before commencement of trial), the court has the following discretionary powers regarding expert witness(es) -

(a) the court may inquire from parties on whether the parties are calling expert witness(es) and if so, the court may limit the number of expert witness(es) under O 34 r 2(2)(p) read with O 40A r 1(1) RC [**Court's Direction (Number of Expert Witness)**];

(b) if parties are calling two or more expert witnesses at a trial, before the commencement of the trial, the court may give directions for "*hot-tubbing*" of these expert witnesses under O 34 r 2(2)(r)(i) and (ii) read with O 40A r 5(1) to (3) and (5) RC [**Court's Directions (Experts' Hot-Tubbing)**]. The Court's

Directions (Experts' Hot-Tubbing) may include the following directions -

(i) the experts shall identify the issue(s) [**Issue(s) (Expert Opinions)**] for which their expert opinions can assist the court - please refer to O 34 r 2(2)(r)(i) and O 40A r 5(1)(a) RC;

(ii) each expert witness shall file an affidavit pursuant to O 40A r 3(1) RC which exhibits the following documents -

(ii)(a) the *curriculum vitae* (**CV**) of the expert which shows the expert's competence under s 45(1) of the Evidence Act 1950 (**EA**) to assist the court in respect of the Issue(s) (Expert Opinions); and

(ii)(b) the written report of the expert regarding the Issue(s) (Expert Opinions) which complies with O 40A r 3(1) and (2)(a) to (h) RC; and

(iii) meeting(s) among experts, parties and solicitors should be held before the commencement of trial so as to prepare a "*joint statement*" of experts pursuant to O 34 r 2(2)(r)(ii) read with O 40A r 5(1)(a), (b), (2), (3)(a), (b) and (5) RC (**Experts' Joint Statement**). The Experts' Joint Statement should state the agreement or disagreement between the experts on the following matters -

(iii)(a) whether the experts can agree on the Issue(s) (Expert Opinions) to be decided by the court. If

there is no such agreement between the experts, each expert may pose his or her own question for which his or her expert opinion can assist the court;

(iii)(b) whether the expert of one party disputes the competence of the other party's expert to give an expert opinion on the Issue(s) (Expert Opinions) and *vice versa*;

(iii)(c) whether the experts can agree on any one or more of the Issue(s) (Expert Opinions) (**Experts' Agreement**). According to O 40A r 5(5) RC, the Experts' Agreement only bind parties if the parties expressly agree to be bound by the Experts' Agreement; and

(iii)(d) if there is a disagreement between the experts on any one or more of the Issue(s) (Expert Opinions) (**Experts' Disagreement**), the reasons for the Experts' Disagreement - please refer to s 51 EA; and

(c) the court may give directions for the examination-in-chief (**EIC**) and cross-examination (**CE**) of the experts [**Court's Directions (Experts' Testimonies)**] as follows -

(i) all the experts are directed to be present in the same session of the Trial;

(ii) to save time and costs, an expert's affidavit shall be tendered as the expert's evidence-in-chief;

(iii) learned counsel who calls the expert as a witness may apply for leave of court to pose additional oral question(s) to the expert during the EIC [**Oral EIC (Expert)**].

In deciding whether to allow the Oral EIC (Expert) or not, the court should be careful to ensure that the cross-examining party is not prejudiced by the Oral EIC (Expert). This is because the Experts' Joint Statement has already been prepared before the commencement of trial and parties cannot be allowed to resile from the Experts' Agreement. Furthermore, the Oral EIC (Expert) should not be abused to cause a trial by ambush against the party who is going to cross-examine the expert in question;

(iv) an expert's CE is confined to the Experts' Disagreement. The learned cross-examiner is entitled to be assisted by his or her own expert during the CE of the opposing party's expert; and

(v) learned counsel may apply for leave of court to cross-examine an expert on matters beyond the Experts' Disagreement. Once again, the court must be careful to ensure no injustice is caused to the party who has called the expert because all the parties, their experts and solicitors have participated in the hot-tubbing which has led

to the Experts' Joint Statement (which include both the Experts' Agreement and Experts' Disagreement);

(3) in view of the Court's Direction (Number of Expert Witness), Court's Directions (Experts' Hot-Tubbing), Experts' Joint Statement (which include the Experts' Agreement and Experts' Disagreement) and Court's Directions (Experts' Testimonies), as a general rule, the court should not allow a party to call a "*fresh*" expert (who has not prepared a written expert's report and has not participated in a hot-tubbing of experts) after the commencement of a trial (**General Rule**). This General Rule is in consonance with the 3 Objectives (RC).

If the court willy-nilly allows a party (**X**) to call a fresh expert after a trial has begun, this will cause an injustice to the opposing party (**Y**) because Y may not be able to call an expert to rebut the expert evidence of X's expert. Furthermore, this will delay the completion of trial and escalate costs unnecessarily. Lastly, X should not be allowed to circumvent the Court's Direction (Number of Expert Witness), Court's Directions (Experts' Hot-Tubbing) and Court's Directions (Experts' Testimonies) by calling a fresh expert after the commencement of a trial;

(4) there may be exception(s) to the General Rule where the court may allow an expert witness to be called after the commencement of a trial [**Exception (General Rule)**]. For example -

(a) prior to the commencement of the trial -

(i) X's expert (**Z**) has affirmed an affidavit which has exhibited Z's CV and written report;

(ii) Z has participated in the hot-tubbing of experts; and

(iii) the Experts' Joint Statement has been adduced as evidence; and

(b) the trial has commenced but before Z can be called by X to give Z's expert opinion and be cross-examined by Y's learned counsel, Z dies or cannot give expert opinion due to medical reason(s).

In the above exceptional circumstances, in the interest of justice, provided that there is no irreparable prejudice to Y, the court may exercise its discretion allow X to call another expert (**R**) to give expert testimony in place of Z. The application of an Exception (General Rule), regrettably, can only delay the disposal of the case and increase costs. In such an exceptional event -

(a)(i) X should bear all the costs for the invocation of an Exception (General Rule); and

(a)(ii) Y's learned counsel and expert should be given adequate time to prepare and rebut R's expert opinion; and

(5) by virtue of O 40A r 2(1) RC, an "*expert*" [defined in O 40A r 1(2) RC to mean "*an expert who has been instructed to give or prepare evidence for the purpose of Court proceedings*"] owes a duty to assist the court on matters within his or her expertise [**Expert's Duty**

(Court)]. According to O 40A r 2(2) RC, the Expert's Duty (Court) overrides any obligation owed by the expert to the person who has instructed the expert and/or who has paid the expert.

By necessary implication, the Expert's Duty (Court) should include the following two duties owed by an expert to the court [**Expert's Implied Duties (Court)**] -

(a) an expert has a duty to ensure that the solicitor who has instructed the expert (**Instructing Solicitor**) is able to contact the expert for the purpose of the trial in question. Accordingly, an expert should be contactable by the Instructing Solicitor at all times before the expert testifies in the case for which the expert has been appointed; and

(b) an expert is obliged to the court to ensure that the expert is able to give his or her expert evidence in court, either physically or virtually.

The following reasons support the implication of the Expert's Implied Duties (Court) -

(i) the sole purpose for the appointment of an expert in a case is to enable the expert to assist the court by way of his or her expert opinion [**Sole Purpose (Expert Evidence)**]. The Expert's Implied Duties (Court) are necessary so as to attain the Sole Purpose (Expert Evidence);

(ii) a party who has appointed and paid for an expert to testify in a case, may suffer an injustice if the expert is not "*available*"

subsequently to testify for any reason which cannot attributed to the party; and

(iii) if the Expert's Implied Duties (Court) are not implied by the court, this means that an expert who has accepted a party's appointment to give expert evidence in a case and has received payment of his or her expert's fees, can subsequently refuse to testify by making himself or herself "*incommunicado*". Such an outcome is neither just nor desirable.

C(3B). <u>Can Defendant rely on O 3 r 5(1), O 92 r 4 RC, court's inherent jurisdiction and/or power?</u>

19. With regard to the Defendant's reliance on O 3 r 5(1), O 92 r 4 RC and/or the court's inherent jurisdiction to support Enc. 195 -

(1) in view of the reasons explained in the above sub-paragraphs 18(1) to (3), the Defendant should have applied for leave of court in Enc. 195 for the Defendant to call Mr. Martin to testify as an expert witness at the Trial. Enc. 195 cannot merely seek an extension of time from the court for Mr. Martin to file and serve his expert's report;

(2) O 3 r 5(1) RC confers a discretionary power on the court to "*extend … the period within which a person is required or authorized by [RC] or by any judgment, order or direction, to do any act in any proceedings*". The Defendant is neither required nor authorized by RC, judgment, order or court's direction to call Mr. Martin as a witness at such an advanced stage of the Trial; and

(3) the Rules Committee has expressly provided for matters regarding expert witness(es) in O 34 r 2(2)(p), (r), O 40A rr 1 to 3 and 5 RC. Consequently, the Defendant cannot resort to O 92 r 4 RC, the court's inherent jurisdiction and/or court's inherent powers to support Enc. 195. I rely on the following two decisions of our apex courts:

(a) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in **Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors** [1988] 1 MLJ 178, at 181; and

(b) the judgment of Zulkefli FCJ (as he then was) in the Federal Court case of **Majlis Agama Islam Selangor v Bong Boon Chuen** [2009] 6 MLJ 307, at [28].

C(3C). <u>Whether Mr. Bray and Mr. Sharpe had breached duties owed to court</u>

20. I decide that when Mr. Sharpe could not be contacted by the Defendant's solicitors for the purpose of the Trial, he would have breached his implied duty owed to the court as an expert - please refer to the above sub-paragraph 18(5)(a) [**Mr. Sharpe's Breach (Expert's Implied Duty)**].

21. As explained in the above sub-paragraph 18(5)(b), when Mr. Bray refused to testify in This Suit purportedly due to his work commitments, his implied duty owed to the court as an expert (to give expert opinion at the Trial), had been breached [**Mr. Bray's Breach (Expert's Implied Duty)**]. Mr. Bray's Breach (Expert's Implied Duty) is accentuated by the following reasons:

(1) the introduction of s 15A of the Courts of Judicature Act 1964 (**CJA**) and O 33A RC have enabled the court to conduct trials through a "*remote communication technology*" (defined widely in s 3 CJA); and

(2) during the hearing of Enc. 195, I had asked Mr. Sanjay whether he knew that I conduct virtual trials (since the Covid-19 pandemic) where a witness can testify from any place in the world provided that there is internet access and the cross-examining party has a right to send his or her representative or solicitor to the place where the witness is giving evidence online (to avoid the risk that the witness may be "*prompted*" by any person and/or device to answer questions posed during CE). Mr. Sanjay answered that he was aware of the virtual trials conducted by this court.

I then informed Mr. Sanjay that in urgent cases and in the interest of justice, this court conducts virtual trials on weekends and public holidays. This court had even sat after office hours on a work day. If Mr. Bray is busy during work days, I can hold a virtual trial at Mr. Bray's convenience when he is not working on a weekend or public holiday in UK. The court would accommodate Mr. Bray's "*busy*" work schedule and he could have easily testified online from UK at his convenience.

C(3D). <u>Can court sanction breach of Expert's Duty (Court)?</u>

22. I am not able to find any Malaysian case which has discussed whether the court may sanction a breach of the Expert's Duty (Court) [**Breach (Expert's Breach)**].

23. Rule 35.3(1) and (2) of UK's Civil Procedure Rules 1998 (**CPR**) are substantially similar to our O 40A r 2(1) and (2) RC. Hence, we may refer to UK cases with regard to Breach (Expert's Duty).

24. My research of UK cases discloses that the courts in UK may impose the following sanctions if a Breach (Expert's Duty) is committed in respect of the expert's testimony in court:

(1) the expert may be personally liable for costs. In the High Court case of **Phillips & Ors v Symes (A Bankrupt) & Ors (Expert Witnesses: Costs)** [2005] 1 WLR 2043, at [95], Peter Smith J has decided as follows -

> "*[95]* ***It seems to me that in the administration of justice, especially, in the light of the clearly defined duties now enshrined in CPR Pt 35 and the practice direction supplementing Part 35, it would be quite wrong of the court to remove from itself the power to make a costs order in appropriate circumstances against an expert who, by his evidence, causes significant expense to be incurred, and does so in flagrant reckless disregard of his duties to the court.***"
>
> (emphasis added);

(2) the party who has instructed the expert may be liable to the opposing and successful party in the litigation for costs on an indemnity basis. In **Williams v Jervis** [2009] EWHC 1837, at [34] and [37], Roderick Evans J has held as follows in the High Court -

> "*[34]* ***There remain the issues surrounding Dr Gross and Mr Hay without which Mr Grant frankly concedes an***

application for indemnity costs would not have been made. Both these doctors, in their conduct as expert witnesses, justify in the claimant's submission an order for indemnity costs. Each was the subject of severe criticism in the main judgment. Their conduct and the way they addressed their duties as expert witnesses fell well below what can properly be expected from expert witnesses and in my judgment can certainly be described as falling "outside the norm". It is not a question of the evidence of other witnesses being preferred to the evidence of these two doctors or of their merely performing poorly as witnesses during the case. Nor is my assessment of them based on hindsight. The sad fact is that these two doctors did not address their responsibilities or conduct themselves properly as expert witnesses*.*

…

[37] ***I have considered whether the Gross/Hay issues are such that an order for indemnity costs should be made for the case as a whole. I have come, not without hesitation, to the conclusion that the justice of the case can be met by an order that the claimant's remaining costs of the case be paid by the defendant but the claimant's costs attributable to dealing with the evidence of Dr Gross and Mr Hay be assessed on the indemnity basis****. ...*"

(emphasis added);

(3) the court may refer the expert to the relevant professional body for any disciplinary action which may be instituted by the professional body against the expert. This sanction is clear from the following three cases -

(a) in the High Court case of **Pearce v Ove Arup Partnership Ltd (Copying)** (20020 25(2) IPD 25011, at [59] to [61], Jacob J (as he then was) has decided as follows -

> "*[59] ... **Mr Waugh QC's closing written argument sets forth the shortcomings of Mr Wilkey's evidence in painstaking and exhaustive detail. So biased and irrational do I find his "expert" evidence that I conclude he failed in his duty to the court. That duty is set out in CPR Part 35 rule 35.3:***
>
> …
> *[60] **At the end of his report, Mr Wilkey said he understood that duty. I do not think he did. He came to argue a case. Any point which might support that case, however flimsy, he took. Nowhere did he stand back and take an objective view as an architect as to how the alleged copying could have been done. Mr Wilkey bears a heavy responsibility for this case ever coming to trial - with its attendant cost, expense and waste of time, including Mr Koolhaas' loss of professional time.***
>
> *[61] **Now there is no rule providing for specific sanctions where an expert witness is in breach of his Part 35 duty. Nor is there any system of accreditation of expert witnesses such as is proposed by Lord Justice Auld for forensic scientists (see paras. 129–131 of his Review of the Criminal Courts of England and Wales , October 2001). So there is no specific accrediting body to whose attention a breach of the duty can be drawn. Most (but not all) expert witnesses, however, belong to some form of professional body or institute. I see no reason why a judge who has formed the opinion that an expert had seriously broken his***

Part 35 duty should not, in an appropriate case, refer the matter to the expert's professional body if he or she has one. Whether there is a breach of the expert's professional rules and if so what sanction is appropriate would be a matter for the body concerned. Prima facie, therefore, I consider it necessary to refer Mr Wilkey's conduct to his professional body, the RIBA [Royal Institute of British Architects]. But before I do so it is only right that Mr Wilkey should have an opportunity of being heard. So I intend, unless successful representations are made on behalf of Mr Wilkey in the meantime, to ask the defendant's solicitors, after 21 days from the date of this judgment, to send a copy of it, and any necessary papers, to the RIBA. ..."

(emphasis added);

(b) in **Meadow v General Medical Council** [2007] QB 462, at [55], Anthony Clarke MR (as he then was) in the Court of Appeal has affirmed that a trial judge in a civil case is "*free in the past (and will no doubt be free in the future) to refer the conduct of an expert to his professional body*"; and

(c) in the High Court case of **Sayed Hussein v William Hill Group** [2004] EWHC 208, at [31] and [50], the following judgment has been delivered by Hallett J (as she then was) -

"*[31]* ***I will not trouble further with Dr Hussain's evidence as I found it totally unconvincing and very troubling. He too seemed to be prepared to say whatever would advance Mr Hussein's case. This is not something I say lightly given Dr Hussain's qualifications***. …

…

*[50] ... **I am also minded to have a copy of this judgment sent to his professional body and I am considering sending the papers to the Director of Public Prosecutions. I should welcome submissions on those matters**."*

(emphasis added);

(4) the court may cite an expert for contempt of court when the expert gives an opinion without an honest belief in its truth. The Court of Appeal has decided as follows in **Liverpool Victoria Insurance Co Ltd v Khan & Ors** [2019] 1 WLR 3833, at [59] to [61], [63] and [64] -

"*[59] **We say at once, however, that the deliberate or reckless making of a false statement in a document verified by a statement of truth will usually be so inherently serious that nothing other than an order for committal to prison will be sufficient. That is so whether the contemnor is** a claimant seeking to support a spurious or exaggerated claim, a lay witness seeking to provide evidence in support of such a claim, or **an expert witness putting forward an opinion without an honest belief in its truth. In the case of an expert witness, the fact that he or she is acting corruptly and makes the relevant false statement for reward, will make the case even more serious; but it will be a serious contempt of court even if the expert witness acts from an indirect financial motive (such as a desire to obtain more work from a particular solicitor or claims manager), or without any financial motivation at all, and even if the expert witness stands to gain little financial reward by it. This is so because of the reliance placed on expert witnesses by the court, and because of the corresponding importance of the overriding duty which experts owe to the court** (see paras 33–34 above).*

[60] *… **The sum in issue in the proceedings is however relevant, because contempt of court by an expert witness will be even more serious if the relevant false statement supports a claim for a large sum, or a sum which is grossly exaggerated above the true value of any legitimate claim**.*

[61] *… **Without seeking to lay down an inflexible rule, we take the view that an expert witness who recklessly makes a false statement in a report or witness statement verified by a statement of truth will usually be almost as culpable as an expert witness who does so intentionally. This is so, because the expert witness knows that the court and the parties are dependent on his or her being truthful, and has made a declaration which asserts that he or she is aware of his or her duties to the court and has complied with them** (see para 33 above). **To abuse the trust placed in an expert witness by putting forward a statement which is in fact false, not caring whether it be true or not, is usually almost as serious a contempt of court as telling a deliberate lie**.*

…

[63] ***Also relevant to the culpability of an expert witness who commits this form of contempt of court is the extent to which the witness persists in the false statement and/or resorts to other forms of misconduct in order to cover up the making of the false statement. In the present case the judge found that the defendant, having recklessly made a number of false statements in the revised report, tried to cover up what he had done by telling a direct lie in his witness statement of August 2013 and then recklessly made further false statements in advancing a different explanation in his witness statement of October 2013. In our view, the attempted cover-up, and the making of further false statements, significantly increased the defendant's culpability**.*

> *[64]* ***As we have indicated, an order for committal to prison will usually be inevitable where an expert witness commits this form of contempt of court, and counsel for the defendant realistically accepted that it was inevitable in this case****. …* "
>
> (emphasis added); and

(5) the court may refer the expert to the prosecuting authority to consider whether criminal proceedings against the expert (for giving false evidence) should be instituted or otherwise - please refer to **Sayed Hussein**.

C(3E). <u>Whether court should impose sanction for Mr. Sharpe's Breach (Expert's Implied Duty) and Mr. Bray's Breach (Expert's Implied Duty)</u>

25. In this case, I have decided not to impose any sanction regarding Mr. Sharpe's Breach (Expert's Implied Duty) and Mr. Bray's Breach (Expert's Implied Duty) because -

(1) the Plaintiff did not appoint any independent expert to rebut the contents of the Defendants' Joint Experts Report. In other words, the Plaintiff did not have to expend time, money and effort to appoint an independent expert to, among others -

(a) peruse the Defendants' Joint Experts Report and prepare a "*rebuttal report*";

(b) participate in the hot-tubbing of experts; and

(c) prepare an Experts' Joint Statement;

(2) Mr. Sharpe and Mr. Bray did not give any expert testimony in this case. Consequently -

(a) the Defendant cannot rely on the contents of the Defendants' Joint Experts Report. In other words, the Plaintiff did not suffer any injustice due to the contents of the Defendants' Joint Experts Report; and

(b) the Defendant would have presumably incurred expenses, time and efforts in appointing Mr. Sharpe and Mr. Bray to prepare the Defendants' Joint Experts Report;

(3) Mr. Sharpe and Mr. Bray are not members of any Malaysian professional body; and

(4) in Part C(3F) below, I have dismissed Enc. 195 with costs to be paid by the Defendant to the Plaintiff [**Costs (Enc. 195)**]. Costs (Enc. 195) should suffice in this case.

C(3F). <u>Should court allow Enc. 195?</u>

26. I have no hesitation to dismiss Enc. 195 with costs on the following grounds:

(1) the Trial commenced on 18.4.2016 and the Plaintiff had already closed its case. If the court allows the Defendant to call Mr. Martin as its defence witness at the eleventh hour, this will irreparably prejudice the Plaintiff who has to apply for leave of court to -

(a) re-open the Plaintiff's case; and

(b) re-call the Plaintiff's witnesses under s 138(4) EA;

(2) SP3 and SP4 had passed on. There is therefore no possibility for the court to allow the Plaintiff to recall SP3 and/or SP4 pursuant to s 138(4) EA (to rebut Mr. Martin's evidence);

(3) SP6, SP7 and SP8 had left the Defendant's employment. It may be difficult and costly for the Defendant to recall SP6, SP7 and/or SP8 to testify in the Trial;

(4) the Defendant's Joint Experts Report contained the opinions of Mr. Bray and Mr. Sharpe regarding measurement of the Completed Works. It is decided in **Era Kemuncak Jaya (M) Sdn Bhd v Tenaga Switchgear Sdn Bhd** [2022] 1 MLRH 208, at [37], as follows:

> "*[37]* ***Secondly, I am of the view that the court can decide the following three questions (3 Questions) in this case without the assistance of any expert testimony****:*
>
> *(1)* ***the Issue (Breach of Contract);***
>
> *(2)* ***the Issue (Remoteness of Damage) under s 74(1) [Contracts Act 1950]; and***
>
> *(3)* ***the Issue (Quantum of Damages)****.*
>
> ***I acknowledge that there may be exceptional cases when the 3 Questions involve a highly technical matter which is beyond the competence of the court. In such exceptional matters, an expert's opinion may assist the court to decide the 3 Questions.***

In this case, the 3 Questions did not concern any highly technical matter which necessitated the Defendant to adduce any expert view. Regrettably, SD5's Opinion on the 3 Questions unnecessarily protracted the trial and escalated the costs incurred in this case."

(emphasis added).

Premised on **Era Kemuncak Jaya**, the court does not need the assistance of experts to decide the following two main issues in This Suit:

(a) whether the Plaintiff or Defendant had breached the Contract in this case; and

(b) if the Defendant had breached the Contract in this case, what was the value of the Completed Works which could be claimed by the Plaintiff from the Defendant?

Additionally, the Plaintiff had not called any expert to support This Suit. In other words, the contents of the Defendant's Joint Experts Report are irrelevant in this case. Hence, there is no prejudice to the Defendant if Enc. 195 is dismissed;

(5) Mr. Bray could have testified online in this case at his convenience on a weekend or public holiday in UK - please refer to the above sub-paragraphs 21(1) and (2). As such, there is neither rhyme nor reason why Mr. Bray has refused to give his expert evidence online in this case; and

(6) as explained in the above sub-paragraph 18(4), there is no room in this case to apply the Exception (General Rule). On the contrary, the court should invoke the General Rule and dismiss Enc. 195 - please refer to the above sub-paragraphs 18(1) to (3).

D. Issues

27. In addition to the three novel questions posed in the above paragraph 3, the following issues will be determined in this case:

(1) can the court imply the Alleged Implied Term (Contract) into the Contract? This question discusses the cumulative application of the "*officious bystander*" test and "*business efficacy*" test (**2 Cumulative Tests**) as explained by Peh Swee Chin FCJ in the Federal Court case of **Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong** [1998] 3 MLJ 151;

(2) in deciding whether -

(a) the Plaintiff can claim from the Defendant for payment of the Completed Works (**Plaintiff's Claim**);

(b) the Plaintiff's Claim was excessive; or

(c) the Plaintiff's Claim was exaggerated or fraudulent [**Defendant's Allegation (Plaintiff's Exaggerated/Fraudulent Claim)**]

can the court can attach weight to the contents of -

(i) "*Scaffold Requisition Form*" (**SRF**); and

(ii) SWOs?;

(3) whether the Plaintiff had breached the following provisions of the Contract -

(a) clause xiii stated that "*All Work done shall be witnessed and verified by [Defendant's] authorised representative. The verified volume of work done shall be submitted with the monthly claim of the [Plaintiff] and the same shall be a condition precedent for release of payments from [Defendant] to the [Plaintiff]*" (**Clause 13**);

(b) clause xxii provided that "*The [Plaintiff] shall complete the works with [sic] compliance to [sic] the drawings and technical specifications on time, with good safety and high standard quality works*" (**Clause 22**);

(c) according to clause xxxvii, "*The [Plaintiff] shall submit its invoice to [Defendant] once in every 15 days together with the required supporting evidence*" (**Clause 37**); and

(d) clause xlix stated that "*The copy of the Supply Works Order has to be signed and returned to [Defendant], HQ within 14 days and this is condition precedent for payment release to [Plaintiff]*" (**Clause 49**);

(4) if the Plaintiff had breached Clause 13, Clause 22, Clause 37 and/or Clause 49, was the Defendant estopped from relying on such breach(es) in this case?;

(5) did the Defendant's Termination (Contract) breach clauses vi, xli and/or xliv of the Contract (referred to in this judgment as "**Clause 6**", "**Clause 41**" and "**Clause 44**" respectively)?;

(6) whether the court should draw an adverse inference under s 114(g) EA against -

(a) the Plaintiff for not producing the personal note books of the Plaintiff's scaffolders (which had recorded the Works performed by them); and

(b) the Defendant for not calling Mr. Nagendran Manimaran, Mr. P. Vijay A/L Pachiappan and Mr. Rajasegaran A/L Muniandy (**3 Defence Witnesses**) (who had inspected the Completed Works and signed on the SWOs) to testify at the Trial; and

(7) if the court allows This Suit and adjudges a sum to be paid by the Defendant to the Plaintiff (**Judgment Sum**), should the court award pre-judgment interest on the Judgment Sum under s 11 of the Civil Law Act 1956 (**CLA**)?; and

(8) whether the court should enhance costs of This Suit in favour of the Plaintiff under O 59 rr 2(2) and 8(b) RC due to -

(a) the Defendant's Allegation (Plaintiff's Exaggerated/Fraudulent Claim); and

(b) the lengthy cross-examination of most of the Plaintiff's witnesses by Mr. Belden and Mr. Kee Meng Fai (who stood in

for Mr. Belden when Mr. Belden was indisposed) [**Lengthy Cross-Examination (Plaintiff's Witnesses)**].

E. <u>Can Alleged Implied Term (Contract) be implied into Contract?</u>

28. According to **Sababumi**, before the court can imply a term in an agreement, the term has to fulfill the 2 Cumulative Tests. The 2 Cumulative Tests in **Sababumi** have been affirmed by Zulkefli Ahmad Makinudin PCA in the Federal Court in **See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd and another appeal** [2019] 1 MLJ 25, at [74] to [76].

29. Paragraphs 3 and 6 AD had pleaded that the Plaintiff was required to comply with the Alleged Implied Term (Contract), namely, the Plaintiff had to carry out the Works for the Purpose (Project). I am not able to accept this contention because the Alleged Implied Term (Contract) did not fulfil the 2 Cumulative Tests as follows:

    (1) if an officious bystander is asked whether the Plaintiff was required to perform the Works in accordance with the Purpose (Project), the officious bystander would not have unhesitatingly answered in the affirmative. This is because so long as the Defendant had requested the Plaintiff to do the Works and the Works had been performed by the Plaintiff in accordance with the express provisions in the Contract, the Plaintiff would have complied with the Contract; and

    (2) as explained in the above sub-paragraph (1), it was not necessary for the Alleged Implied Term (Contract) to give business efficacy to the Contract.

F. Factual findings

F(1). Should court attach weight to contents of SRFs?

30. Mr. Sanjay has relied on SRFs to resist This Suit as follows, among others:

    (1) some SWOs were not supported by SRFs. In other words, there were no SRFs for certain SWOs regarding parts of Completed Works which had been claimed by the Plaintiff;

    (2) there were discrepancies between the contents of some SRFs and SWO's regarding the same piece of Works. For example -

        (a) the dates of certain SROs pre-dated the corresponding SRFs. A SRF should precede the completion of the Works and issuance of the corresponding SWO;

        (b) the serial numbers of some SWOs did not correspond with the serial numbers of SRFs;

        (c) the names of the "*Requestor*" in certain SRFs were different from the names of the person who signed in the "*Requested by*" section in the corresponding SWOs [**"*Requested by*" Section (SWO)**]. The Defendant's authorised representative who requested for Works in a SRF should be the same requestor in the corresponding SWO; and

        (d) details of "*Location*" and "*Purpose/Reason*" in some SRFs were different from the details of "*Location*" and "*Dimension/Area of*

Scaffolding" in the SWO's which concerned the same piece of Works; and

(3) there were duplications in certain SRFs and SWOs.

31. Firstly, the Contract did not provide for SRFs. Hence, with regard to SRFs, there is no obligation pursuant to the Contract for the Plaintiff to comply.

32. I find as a fact that the contents of SRFs are not reliable. This factual finding is premised on the following evidence and reasons:

(1) SRFs were issued by the Defendant prior to the commencement of the Works. Hence, SRFs would not contain Details (Completed Works), in particular the Dimensions (Completed Works);

(2) the Plaintiff's representatives did not fill in any part of SRFs. Nor did the Defendant's representatives give any opportunity to the Plaintiff's representatives to peruse, let alone verify, the contents of SRFs filled in by the Defendant's representatives;

(3) the Defendant did not give any notice to the Plaintiff at any time that the Plaintiff's Claim was not supported by the contents of SRFs. On the contrary, the Defendant did not object to the Plaintiff's 23 Invoices and SWOs on the ground that the Plaintiff's 23 Invoices and SWOs were inconsistent with the contents of SRFs.

It is to be noted that the Plaintiff's 23 Invoices dated 21.4.2013 to 25.6.2014. In other words, the Defendant had received the Plaintiff's 23 Invoices over a period of more than 14 months and yet, no query

or objection had ever been made by the Defendant regarding the contents of any one of the Plaintiff's 23 Invoices and SWOs;

(4) the Defendant's Total Part Payment was made and the Defendant did not allege that the Defendant's Total Part Payment had been erroneously made. With regard to the Defendant's Total Part Payment, the conduct of the Defendant is relevant under s 8(2) EA which provides as follows -

> "***The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding****, or* ***in reference to any fact in issue therein or relevant thereto****, and the conduct of any person an offence against whom is the subject of any proceeding,* ***is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto****.*"
>
> (emphasis added).;

(5) the Defendant's Termination (Contract) did not allude to any SRF;

(6) in view of the reasons expressed in the above sub-paragraphs (3) to (5), the Defendant's reliance on SRFs is an afterthought to defeat unlawfully This Suit; and

(7) paragraphs 56, 67, 105, 135, 146, 163, 181 and 187 of the Defendant's first written submission (**Defendant's 1st Submission**) had contended that the contents of SRFs (referred in those paragraphs of the Defendant's 1st Submission) were "*flawed*". Furthermore, paragraph 205 Defendant's 1st Submission admitted

that some SRFs had no serial numbers. Accordingly, the Defendant cannot rely on the contents of SRFs to resist the Plaintiff's Claim.

F(2). <u>Effect of SWOs</u>

33. According to Mr. Sanjay, among others -

(1) some SWOs were not returned to the Defendant;

(2) certain SWOs were not signed by the Defendant's authorised representatives;

(3) one Mr. Karthikayan who had filled in the "*Requested by*" Section (SWO) of some SWOs, was not one of the three authorized representatives of the Defendant for the purpose of the Works (**Defendant's 3 Authorised Representatives**);

(4) one Mr. Rajasegaran who filled in the "*Inspected by*" section of SWO [**"*Inspected by*" Section (SWO)**] of certain SWOs, was not one of the Defendant's 3 Authorised Representatives;

(5) the dates in some "*Requested by*" Section (SWO) were after the dates of those SWOs;

(6) the details in the "*Received by*" section of SWO [**"*Received by*" Section (SWO)**], were filled in before the "*Requested by*" Section (SWO). This was because the dates of "*Received by*" Section (SWO) in these SWOs were earlier than the dates of the SWOs themselves;

(7) the Completed Works in the SWOs had not been inspected, verified and approved by the Defendant's 3 Authorised Representatives;

(8) there were certain SWOs which had no particulars in the "*Requested by*" Section (SWO);

(9) some SWOs had been filled in by SP5 on dates when SP5 was attending a course in Malacca; and

(10) one Mr. Rajkumar had filled in the "*Requested by*" Section (SWO) of certain SWOs and he was not one of the Defendant's 3 Authorised Representatives.

34. The Defendant's 1st Submission has contended that the Plaintiff did not return some SWOs to the Defendant. I accept Mr. Gurdit's contention that the Defendant could not now deny receipt of certain SWOs from the Plaintiff. This is because the Defendant had already admitted receipt of all SWOs in paragraph 7 AD (**Defendant's Judicial Admission**). The effect of the Defendant's Judicial Admission has been explained by Suriyadi Halim Omar FCJ in the Federal Court case of **Yam Kong Seng & Anor v Yee Weng Kai** [2014] 4 MLJ 478, at [16], as follows:

> "*[16] … **It is trite law that a judicial admission made in a pleading stands on a higher footing than evidentiary admission (Sarkar's Law of Evidence) with the respondent's admission therein be made the foundation of the rights of the parties (Satish Mohan Bilal v State of UP AIR 1986 All 126, at p 128; 1985 All CJ 507). Any failure on the part of the respondent to rebut the admission to avoid the legal consequences of his admission would entitle the appellants to enter judgment against him.***"

(emphasis added).

35. I have considered Mr. Sanjay's detailed submission regarding the inaccuracies and omission with respect to the contents in SWOs. Nonetheless, this court has no hesitation to make a factual finding that weight should be attached to the contents of SWOs. This decision of fact is supported by the following evidence and reasons:

(1) SWOs were issued by the Defendant (not the Plaintiff);

(2) after the completion of Works -

(a) the Plaintiff's representatives would fill in Details (Completed Works), especially the Dimensions (Completed Works), in SWOs;

(b) SWOs were handed to the Defendant's representatives for the Defendant's representatives to inspect, measure the Dimensions (Completed Works) and approve the Completed Works;

(c) SWOs had the following sections -

(i) "*Actual Area of Scaffolding Done:* ";

(ii) "*Name of the Competent Scaffolding Person:* ":

(iii) "*Date of Completion:* ";

(iv) "*Date of Inspection:* ";

(v) "*Inspected by:*
Name: ";

(vi) "*Check [sic] by:*
Name: "; and

(vii) "*Approved by:* ";
Name: "
[**"*Approved by*" Section (SWO)**]; and

(d) all SWOs submitted together with the Plaintiff's 23 Invoices had at the very least the signature of the Defendant's representative who signed the "*Approved by*" Section (SWO) [**Defendant's Signatory (Approval Section)**].

Despite the litany of complaints by the Defendant regarding the inaccuracies and omission in the contents of SWOs, if the Defendant's Signatory (Approval Section) did not in fact inspect, measure and approve the Completed Works, the Defendant's Signatory (Approval Section) could have easily refused to sign the "*Approved by*" Section (SWO);

(3) the Defendant did not object to the Plaintiff's 23 Invoices and SWOs on the following grounds -

(a) the Defendant's Signatory (Approval Section) had not been authorized by the Defendant to inspect, measure and approve the Completed Works;

(b) the Defendant's Signatory (Approval Section) did not inspect, measure and/or approve the Completed Works;

(c) SWOs had been erroneously approved by the Defendant's Signatory (Approval Section); and

(d) the Plaintiff's Claim was excessive or had been fraudulently made;

(4) the Defendant's Total Part Payment was made without any complaint by the Defendant regarding any of the matters stated in the above sub-paragraphs (3)(a) to (d);

(5) the Defendant's Termination (Contract) did not refer to the grounds stated in the above sub-paragraphs (3)(a) to (d);

(6) when SD1 was cross-examined by Mr. Gurdit, SD1 admitted that all the names stated in SWOs as the Defendant's representatives, had been authorized by the Defendant with regard to the Works. In fact, the Defendant did not at any time allege that the names stated in SWOs as the Defendant's representatives, had not been in fact authorised by the Defendant to inspect, measure and/or approve the Completed Works.

If any person named in SWOs (**T**) had no actual authority to act for the Defendant, the Defendant would have claimed an indemnity or contribution from T under O 16 r 1(1)(a) RC if the Defendant is found by the court to be liable to the Plaintiff regarding SWOs which had been signed by T purportedly on behalf of the Defendant.

Even if it is assumed that T had no actual authority to sign SWOs on the Defendant's behalf, there was no evidence that -

(a) the Plaintiff's representative(s) had actual knowledge of T's lack of authority;

(b) T's lack of authority was so obvious that the Plaintiff's representative(s) had wilfully shut his eyes to T's lack of authority;

(c) the Plaintiff's representative(s) had wilfully and recklessly failed to make inquiries as an honest and reasonable person would have made with regard to T's lack of authority;

(d) the Plaintiff's representative(s) had knowledge of circumstances which would indicate T's lack of authority to an honest and reasonable person; and

(e) the Plaintiff's representative(s) had knowledge of circumstances which would put an honest and reasonable person to inquire whether T had authority from the Defendant to sign SWOs on behalf of the Defendant; and

(7) during the cross-examination of SD4, SD4 testified that the only documents in the Defendant's possession to evidence the Completed Works were SWOs. It is thus clear that the Defendant had possession of SWOs at all times and could have easily -

(a) inquired from the Plaintiff regarding any inaccuracy and/or omission in SWOs; and/or

(b) disputed the veracity of the contents of SWOs.

G. Had Plaintiff breached Contract?

36. Firstly, the Plaintiff had complied with the first part of Clause 13 {*All Work done shall be witnessed and verified by [Defendant's] authorised representative*} when the Defendant's representative signed the "*Approved by*" Section (SWO).

37. With regard to the second part of Clause 13 {*The verified volume of work done shall be submitted with the monthly claim of the [Plaintiff] and the same shall be a condition precedent for release of payments from [Defendant] to the [Plaintiff]*} [**2nd Part (Clause 13)**], I am of the following view:

(1) the 2nd Part (Clause 13) mandatorily required the Plaintiff to submit to the Defendant "*monthly claim*" for payment of the Works and the Plaintiff's monthly claim "*shall be a condition precedent*" for the Defendant's payment of the monthly claim to the Plaintiff;

(2) a contracting party may be estopped from claiming for the breach of a condition of the contract. It is decided in **Lianmark Sdn Bhd v Al-Ambia Sdn Bhd** [2026] MLJU 272, at [26(b) and (g)], as follows -

> "*[26] …*
>
> *(b)* ***if Clause Z is a "condition" in the agreement, by reason of X's Breach, Y has a right of election to terminate or affirm the agreement (Y's Election**). …*
>
> *…*

(g) ***Y may be estopped from relying on X's Breach - please refer to the wide application of the equitable doctrine of estoppel in the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283, at 294 and 295. In the Federal Court case of Usima Sdn Bhd v Lee Hor Fong (trading under the name and style of Pembinaan LH Fong) [2017] 5 MLJ 273, at [50], Balia Yusof FCJ has applied the equitable doctrine of estoppel in a dispute regarding a construction agreement. If Y is estopped from relying on X's Breach, Y has no right to terminate the contract based on X's Breach but can only claim damages for X's Breach****; …**"

(emphasis added); and

(3) notwithstanding the mandatory language of the 2nd Part (Clause 13), the Defendant is estopped from claiming that the Plaintiff had breached the 2nd Part (Clause 13) {**Plaintiff's Breach [2nd Part (Clause 13)]**}. The following reasons support this decision -

(a) the Defendant had received the Plaintiff's 23 Invoices and SWOs without any insistence by the Defendant that the Plaintiff should comply with the 2nd Part (Clause 13);

(b) the Defendant's Total Part Payment had been made without any regard to the 2nd Part (Clause 13);

(c) the Defendant did not send any written notice to the Plaintiff which put the Plaintiff on notice regarding the Plaintiff's Breach

[2nd Part (Clause 13)] and that the Defendant would consequently be electing to -

(i) terminate the Contract due to Plaintiff's Breach [2nd Part (Clause 13)]; or

(ii) affirm the Contract and thereafter claim for damages from the Plaintiff with regard to the Plaintiff's Breach [2nd Part (Clause 13)]

within a reasonable period of time from the Plaintiff's Breach [2nd Part (Clause 13)];

(d) Defendant's Termination (Contract) did not allude to the Plaintiff's Breach [2nd Part (Clause 13)]; and

(e) in This Suit, the Defendant did not counterclaim from the Plaintiff for damages in respect of the Plaintiff's Breach [2nd Part (Clause 13)].

38. As explained in the above sub-paragraphs 37(3)(a) to (e), the Defendant is estopped from alleging that the Plaintiff had breached Clause 37 {*The [Plaintiff] shall submit its invoice to [Defendant] once in every 15 days together with the required supporting evidence*}.

39. Clause 22 {*The [Plaintiff] shall complete the works with compliance to the drawings and technical specifications on time, with good safety and high standard quality works*}. I am not able to find that the Plaintiff had breached Clause 22 because -

(1) the Contract did not provide for the "*drawings and technical specifications*" to be complied with by the Plaintiff in this case; and

(2) the Defendant did not send any notice to the Plaintiff which had alleged that the Completed Works -

(a) had not been completed on time; and

(b) did not comply with "*good safety and high standard*" as required by Clause 22.

Even if it is assumed that the Plaintiff had breached Clause 22 [**Plaintiff's Breach (Clause 22)**], the Defendant is barred by the doctrine of equitable estoppel from relying on the Plaintiff's Breach (Clause 22) - please refer to the above sub-paragraphs 37(3)(a) to (e).

40. Clause 49 {*The copy of the Supply Works Order has to be signed and returned to [Defendant], HQ within 14 days and this is condition precedent for payment release to [Plaintiff]*}. I decide as follows in respect of Clause 49 -

(1) the "*Supply Works Order*" in Clause 49 must refer to SWOs and not SRFs because -

(a) SWOs could only be filled in by the Plaintiff after the completion of the Works by the Plaintiff; and

(b) SWOs contained Details (Completed Works), especially the Dimensions (Completed Works), for the inspection, measurement and approval of the Completed Works by the

Defendant for the purpose of the Defendant's payment to the Plaintiff for the Completed Works; and

(2) Clause 49 mandatorily required the Plaintiff to return SWOs to the Defendant within 14 days from the date the Plaintiff's representatives had signed SWOs. Once again, owing to reasons explained in the above sub-paragraphs 37(3)(a) to (e), the Defendant is estopped in this case from relying on any breach of Clause 49 by the Plaintiff.

H. Whether Defendant had breached Contract

41. The Contract provided in the first page as follows, among others:

> "***PAYMENT TERMS: 45 days against Certified Original Invoice***"
>
> (emphasis added).

42. Premised on the following two Federal Court judgments, the Contract as a commercial agreement, should be construed by the court in a commercially sensible manner:

(1) Gopal Sri Ram FCJ's judgment in **Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd** [2010] 1 MLJ 597, at [10]; and

(2) the decision of Zainun Ali FCJ in **SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor** [2016] 1 MLJ 464, at [78];

43. In my view, a commercially sensible interpretation of the Contract, in particular the "*PAYMENT TERMS*" read with Clauses 13, 27 and 49, is as follows:

(1) once the Defendant's Signatory (Approved Section) had signed the "*Approved by*" Section (SWO) which evidenced the Defendant's inspection, measurement and approval of the Completed Works (as stated in the SWO), the Plaintiff was entitled to submit to the Defendant an invoice supported by the relevant SWOs for the Defendant's payment of the Completed Works which formed the subject matter of the SWOs;

(2) upon the Defendant's receipt of an invoice and supporting SWOs -

(a) the Defendant was not required to certify the Plaintiff's invoice because the Defendant had already confirmed the performance of the Completed Works when the Defendant's Signatory (Approved Section) signed the "*Approved by*" Section (SWO). More importantly, after the Defendant's receipt of the Plaintiff's invoice and SWOs, the scaffolding in question would have been dismantled and there was no possibility for the Defendant to certify the contents of the Plaintiff's invoice; and

(b) the Defendant was bound to pay for the Plaintiff's invoice within 45 days from the date of the Plaintiff's invoice; and

(3) the Contract was prepared by the Defendant. If there is any ambiguity in the "*PAYMENT TERMS*", Clauses 13, 27 and 49, in accordance with the *contra proferentem* rule of construction, such

an ambiguity should be resolved in favour of the Plaintiff against the Defendant - please refer to **Era Kemuncak Jaya**, at [25(3)].

44. In view of the above construction of the "*PAYMENT TERMS*", Clauses 13, 27 and 49, the Defendant had breached the Contract when the Defendant failed to pay to the Plaintiff the amounts stated in the Plaintiff's invoices after the expiry of 45 days from the dates of those invoices [**Defendant's 1st Breach (Contract)**].

45. In the Federal Court's judgment delivered by Hasnah Hashim FCJ in **Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors** [2021] 2 MLJ 374, a contractual provision which provides for a party's right to terminate a contract should be construed strictly against the party who has terminated the contract. It is decided in **Catajaya**, at [2], [63], [64] and [66], as follows:

> "*[2] **On 9 May 2019 this court granted leave in respect of these two questions**:*
>
> ***Question 1: Whether the law in Malaysia should be that termination clauses ought to be construed strictly**; …*
>
> *…*
>
> *[63] Reading the terms of the SSA in its entirety, we find that there is no latent ambiguity; the obligations of the parties are specifically defined. **Termination is not permitted unless as expressly stipulated under SSA. Notice must be given to the appellant to rectify the identified breach and take steps to rectify that breach within the prescribed time as agreed. There must be strict adherence to the clauses in an agreement which relates to termination**.*
>
> *[64] **Termination of an agreement results in the end of the parties obligations. Reading the provisions of sections 11 and 12 of***

the SSA the party in breach must be notified of the identified reason for termination as well as be given the opportunity to rectify the breach. The Federal Court in SPM Membrane emphasised the importance of giving effect to the specific requirements of a termination clause, failing which a notice of termination would be defective*: …*

…

[66] ***For the reasons adverted to above, we take the view that termination clause in an agreement ought to be construed strictly. In light of the foregoing, the first question must be answered in the positive****.*"

(emphasis added).

46. It is the decision of this court that the Defendant had breached the Contract [**Defendant's 2nd Breach (Contract)**] because the Defendant's Termination (Contract) did not comply strictly with Clauses 6, 41 and 44 as follows:

(1) according to Clause 6, the Defendant "*reserves the right to terminate any supplied manpower due to their incompetency, poor health, malpractices, misbehavior and/or indiscipline with immediate effect without referring to*" the Plaintiff. No evidence had been adduced by the Defendant to show any "*incompetency, poor health, malpractices, misbehavior and/or indiscipline*" of the Plaintiff's employees and/or representatives in this case;

(2) Clause 41 stated that in the event the Plaintiff "*is found to have committed any or both of the acts set out in paragraphs xxxix and xl, [Defendant] reserves the right to take any action [Defendant] deems*

appropriate against the [Plaintiff], including without limitation termination of this [Contract]."

Clause xxxix Contract (**Clause 39**) had provided that any act of bribery by the Plaintiff was "*strictly prohibited*". In this case, the Defendant did not allege any bribery had been offered by the Plaintiff.

According to clause xl Contract (**Clause 40**), in case of "*any claim submitted without actual work done by the [Plaintiff], the [Defendant] reserves the right to deduct the same from any monies owing from [Defendant] to the [Plaintiff]*". SD1 to SD4 were not involved in the Works in this case. In other words, SD1 to SD4 had no personal knowledge of the Completed Works and contents of SWOs. SD1 to SD4 could not therefore testify that the Plaintiff had submitted an invoice and SWO "*without actual work done*" by the Plaintiff. In any event, no evidence had been adduced by the Defendant at the Trial to show that no work had been done with regard to any one of the Plaintiff's 23 Invoices and SWOs.

As there was no room to invoke Clauses 39 and 40 in this case, the Defendant cannot consequently rely on Clause 41 to terminate the Contract; and

(3) Clause 44 provided that the Defendant "*may terminate this [Contract] by giving 2 week [sic] notice or reduce the manpower requirements based on [Defendant's] project requirements. The [Plaintiff] shall not be entitled to any claims against [Defendant] in relation to such termination or reduction of manpower.*" The Defendant's

Termination (Contract) did not give two weeks' notice to terminate the Contract. Nor did the Defendant's Termination (Contract) terminate the Contract due to a reduction of manpower which was required for the Project.

47. I should add that the Defendant's Termination (Contract) dated 22.4.2014 (Tuesday), gave only four days for the Plaintiff to demobilise completely from the Site on Saturday, 26.4.2014. In view of the magnitude of the Project, a period of 4 days given in the Defendant's Termination (Contract) was clearly inadequate and proved a lack of *bona fides* on the Defendant's part in terminating unlawfully the Contract.

I. Adverse inference under s 114(g) EA

48. Section 114(g) EA states as follows:

> "***Court may presume existence of certain fact***
>
> *114.* ***The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct,*** *and public* ***and private business, in their relation to the facts of the particular case****.*
>
> ***ILLUSTRATIONS***
>
> ***The court may presume*** *-*
>
> *…*
>
> *(g)* ***that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it****; …*"
>
> (emphasis added).

49. The court may draw an adverse inference under s 114(g) EA against a party who has suppressed material evidence - please refer to the Supreme Court's judgment delivered by Mohd. Azmi SCJ in **Munusamy v Public Prosecutor** [1987] 1 MLJ 492, at 494. In **Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd** [1991] 1 MLJ 33, at 34-35, Hashim Yeop Sani CJ (Malaya) in the Supreme Court has made an adverse inference pursuant to s 114(g) EA against the defendant in a civil case.

I(1). <u>Should adverse inference be made against Plaintiff?</u>

50. Mr. Sanjay has attempted to persuade the court to draw an adverse inference under s 114(g) EA against the Plaintiff because the Plaintiff's scaffolders in this case did not adduce as evidence at the Trial their personal note books in which they had recorded the Completed Works (**Scaffolders' Notebooks**). I am not able to accept this submission. My reasons are as follows:

    (1) the Details (Completed Works), in particular the Dimensions (Completed Works), had been filled in SWOs by the Plaintiff's scaffolders. The Defendant's Signatory (Approval Section) had signed the "*Approved by*" Section (SWO) after the inspection, measurement and approval of the Completed Works. It is thus clear that SWOs (not the Scaffolders' Notebooks) were material evidence in this case; and

    (2) as decided in **Munusamy**, the court can only make an adverse inference pursuant to s 114(g) EA against a party for suppression of material evidence and not any piece of evidence. Accordingly, there

will not be any adverse inference against the Plaintiff for the non-production of the Scaffolders' Notebooks as evidence in the Trial.

51. Any adverse inference drawn by the court pursuant to s 114(g) EA can be rebutted by other evidence - please refer to the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in **Namasiyiam & Ors v Public Prosecutor** [1987] 2 MLJ 336, at 343. Even if it is assumed that an adverse inference is drawn against the Plaintiff for its failure to adduce the Scaffolders' Notebooks as evidence in this case, I decide that such an inference can be rebutted by overwhelming evidence in support of the Plaintiff's Claim as follows:

(1) all SWOs had been approved by the Defendant's Signatories (Approval Section). The Defendant did not call the Defendant's Signatories (Approval Section) as witnesses at the Trial to -

(a) deny that the Defendant's Signatories (Approval Section) had inspected, measured and approved the Completed Works;

(b) testify that the Defendant's Signatories (Approval Section) had erroneously signed SWOs; or

(c) give evidence that the Defendant's Signatories (Approval Section) had been induced by fraud or misrepresentation on the Plaintiff's part to approve the Completed Works;

(2) the Defendant had received the Plaintiff's 23 Invoices and SWOs over a period of more than 14 months without any objection;

(3) the Defendant's Total Part Payment was made without any complaint that the Defendant's Total Part Payment had been erroneously made by the Defendant;

(4) the Defendant's 1st Breach (Contract) and Defendant's 2nd Breach (Contract) [referred collectively in this judgment as the "**Defendant's 2 Breaches (Contract)**"] had been committed - please refer to the above paragraphs 43 to 47;

(5) before the Defendant's Termination (Contract), the Defendant could have asked the Plaintiff to explain, if not justify, details of the Plaintiff's Claim as contained in the Plaintiff's 23 Invoices and SWOs. It is to be borne in mind that Scaffolding Materials had been provided by the Defendant to the Plaintiff and the Defendant could have easily invited the Plaintiff to conduct a joint valuation of the quantum of the Plaintiff's Claim;

(6) the conduct of the Defendant as explained in the above sub-paragraphs (2) to (5), estops the Defendant from denying the Plaintiff's Claim in this case. As decided by Gopal Sri Ram JCA (as he then was) in the Federal Court case of **Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd** [1995] 4 CLJ 283, at 294 and 295, the doctrine of equitable estoppel has a wide application and may support a plaintiff's cause of action against a defendant. I further rely on the application of s 115 EA which provides as follows:

> *"**When one person has by his** declaration, **act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but***

> ***for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.***"
>
> (emphasis added); and

(7) the four witnesses called by the Defendant to give evidence at the Trial (SD1 to SD4) were not involved in the Works and had no personal knowledge of the Completed Works. Accordingly, unlike the testimonies of the Plaintiff's witnesses (who were personally involved in the Completed Works), the Defendant has not adduced any admissible evidence at the Trial to show that the Defendant's representatives had not in fact inspected, measured and approved the Completed Works.

I(2). <u>Did Defendant suppress material evidence in This Suit?</u>

52. The 3 Defence Witnesses had inspected the Completed Works and signed on the SWOs. Despite the fact that the Defendant's solicitors had applied for court subpoenas for the 3 Defence Witnesses to testify at the Trial, no evidence had been adduced by the Defendant regarding the reason(s) why the 3 Defence Witnesses could not give evidence in this case. The mere fact that a subpoena has been obtained by a party (**U**) to compel a material witness to testify in a case, does not prevent the court from drawing an adverse inference under s 114(g) EA against U if U has not adduced any evidence regarding reasonable efforts to serve the subpoena on the witness. In the circumstances, I am constrained to make an adverse inference pursuant to s 114(g) EA against the

Defendant for the suppression of the material evidence which may be given by the 3 Defence Witnesses in this case.

J. Has Plaintiff's Claim been proven?

53. During the Lengthy Cross-Examination (Plaintiff's Witnesses) by Mr. Belden and Mr. Kee, I have informed them of the following matters:

(1) there is a difference between a plaintiff's claim which is merely excessive (**Mere Overclaim**) and an exaggerated or fraudulent claim (**Exaggerated/Fraudulent Claim**); and

(2) if the court dismisses the Defendant's Allegation (Plaintiff's Exaggerated/Fraudulent Claim), the court may consider the Defendant's Allegation (Plaintiff's Exaggerated/Fraudulent Claim) in respect of the determination of the quantum of costs of the Trial [**Costs (Trial)**].

54. I am of the following view regarding a civil monetary claim:

(1) a plaintiff has the legal and evidential burden under ss 101(1), (2) and 102 EA to "*prove*" on a balance of probabilities that there is at least one cause of action in support of the claim (**Cause of Action**). Section 3 EA defines "*proved*" as follows -

> " ***"proved": a fact is said to be "proved" when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists;***"

(emphasis added);

(2) if a plaintiff succeeds to discharge the legal and evidential onus to prove the existence of a Cause of Action, the plaintiff bears the evidential burden to "*prove*" on a balance of probabilities the amount of the claim to which the Plaintiff is entitled [**Quantum (Claim)**]. The evidential onus on a plaintiff to prove the Quantum (Claim), includes the burden on the plaintiff to satisfy the court that the Quantum (Claim) is not a Mere Overclaim; and

(3) if a defendant resists a civil monetary claim by alleging that the claim is an Exaggerated/Fraudulent Claim, the plaintiff has no legal and evidential burden to "*disprove*" the Exaggerated/Fraudulent Claim. According to s 3 EA -

> " ***"disproved": a fact is said to be "disproved" when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist;***"
>
> (emphasis added).

By virtue of s 103 EA, a defendant who raises an Exaggerated/Fraudulent Claim as a defence, has the evidential onus to "*prove*" the Exaggerated/Fraudulent Claim on a balance of probabilities. Section 103 EA states as follows -

"***Burden of proof as to particular fact***

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

(emphasis added).

55. Firstly, no evidence has been adduced by the Defendant to prove the Defendant's Allegation (Plaintiff's Exaggerated/Fraudulent Claim) on a balance of probabilities. In fairness to Mr. Sanjay and to his credit, he did not proceed with the Defendant's Allegation (Plaintiff's Exaggerated/Fraudulent Claim) in this case.

56. Secondly, I find as a fact that the Plaintiff has succeeded to discharge the legal and evidential burden to prove on a balance of probabilities -

    (1) the Defendant's 2 Breaches (Contract) - please refer to the above paragraphs 43 to 47; and

    (2) the Judgment Sum of RM8,025,493.38 has been proven by the Plaintiff as the value of Completed Works which had been performed by the Plaintiff at the Defendant's request and had not been paid by the Defendant to the Plaintiff - please refer to the above sub-paragraphs 51(1) to (3) and (5) to (7). In this regard, the Judgment Sum is adequately supported by the Plaintiff's 23 Invoices and SWOs. In other words, the Plaintiff's Claim did not involve a Mere Overclaim.

The above decision is fortified by the drawing of an adverse inference under s 114(g) EA against the Defendant - please refer to the above Part I(2).

57. Thirdly, save for the judgment of Lim Chong Fong J (as he then was) in the High Court case of **Aston Star Sdn Bhd v Zumo Engineering (M) Sdn Bhd** [2021] MLJU 1798, all the cases cited by Mr. Sanjay do not concern scaffolding works.

58. Lastly, I am of the opinion that **Aston Star** can be easily distinguished from this case. In **Aston Star**, the plaintiff company (**P**) had appointed the defendant company (**D**) to erect and dismantle scaffolding works by way of a "*Letter of Award*" dated 28.4.2014 (**LA**). Unlike the instant case -

(1) P did not terminate the LA in **Aston Star**. In this case, I have found as a fact that the Defendant's Termination (Contract) was not only a breach of the Contract but the Defendant's Termination (Contract) also lacked good faith - please refer to the above paragraphs 45 to 47;

(2) in **Aston Star**, P could lawfully reduce the amount of D's claim by referring to the quantities of scaffolding materials which had been provided by an independent supplier, Unique Steel & Hardware Sdn. Bhd., at [60] and [61]. The Defendant in this case did not adduce any evidence at the Trial regarding the amounts of Scaffolding Materials which had been provided by the Defendant to the Plaintiff;

(3) P had called a witness, PW1, to measure the value of D's works in **Aston Star**, at [63] and [64]. Hence, P was adjudged to have

succeeded to reduce D's total claim in **Aston Star**. In this case, none of the four witnesses called by the Defendant, ie., SD1 to SD4, were involved in the inspection and measurement of the Completed Works; and

(4) P had claimed in **Aston Star** for D to refund overpayment by P to D for the works, at [11(b) and (e)]. In [87] to [91], the High Court decided in **Aston Star** that D should refund an overpayment of RM65,496.98 to P. In this case, with regard to the Completed Works, the Defendant did not counterclaim for any overpayment by the Defendant to the Plaintiff,

K. <u>Whether Plaintiff can claim pre-judgment interest</u>

59. Section 11 CLA and O 42 r 12 RC state as follows:

> "*s 11 CLA* ***Power of Courts to award interest on debts and damages***
> ***In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment****:*
>
> *Provided that nothing in this section -*
>
> *(a) shall authorize the giving of interest upon interest;*
>
> *(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or*

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

O 42 r 12 RC ***Interest on judgment debts***

Subject to rule 12A, except when it has been otherwise agreed between the parties, ***every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied****.*"

(emphasis added).

60. As decided by Raja Azlan Shah FJ (as His Majesty then was) in the Federal Court case of **Lim Kar Bee v Abdul Latif bin Ismail** [1978] 1 MLJ 109, at 120, the court has a discretion under s 11 CLA to award pre-judgment interest on any judgment sum "*at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period … between the date when the cause of action arose and the date of judgment*".

61. The Plaintiff's Claim concerned invoice nos. 4, 8, 9 and 11 to 23. To ease calculation, I exercise my discretion to award interest at the rate of 5% per annum (**pa**) on the Judgment Sum from 12.11.2014 (date of filing of This Suit). In other words, no pre-judgment interest on the Judgment Sum (**Pre-Judgment Interest**) is awarded in this case. I do not see any prejudice to the Plaintiff by not awarding any Pre-Judgment Interest because the post-judgment interest rate of 5% pa is much higher than the bank interest rates which prevailed during the period when the Defendant became liable to pay for the Plaintiff's invoice nos. 4, 8, 9 and 11 to 23.

62. By virtue of O 42 r 12 RC, the Defendant shall pay to the Plaintiff interest at the rate of 5% pa on the Judgment Sum from the date of the oral decision of this case (19.12.2022) until full payment of the Judgment Sum.

L. Costs (Trial)

63. I reproduce below O 59 rr 2(2), 3(2), 8(b), 16(1), (2), (3), 19(1) and (2) RC provide as follows:

> "*O 59 r 2(2)* ***Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Court, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid****.*
>
> *O 59 r 3(2)* ***If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs****.*
>
> ***Special matters to be taken into account in exercising discretion***
> *O 59 r 8* ***The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account -***
>
> *...*
> *(b)* ***the conduct of all the parties, including conduct*** *before and* ***during the proceedings****; …*
>
> ***Basis of assessment***

O 59 r 16(1) ***In assessing the costs payable in relation to any item, the Court shall have regard to all relevant circumstances, and in particular to*** *-*

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) ***the skill, specialized knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel****;*

(c) ***the number and importance of the documents, however brief, prepared or perused****;*

(d) the place and circumstances in which the business involved is transacted;

(e) ***the importance of the cause or matter to the client****;*

(f) ***where money*** *or property* ***is involved, its amount*** *or value;*

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

(2) ***Subject to the other provisions of these Rules, the amount of costs which any party are entitled to recover is the amount allowed after determination of costs on the standard basis where*** *-*

(a) ***an order is made that the costs of one party to proceedings be paid by another party to those proceedings****;*

(b) an order is made for the payment of costs out of any fund; or

(c) no order for costs is required,

unless it appears to the Court to be appropriate to order costs to be determined on the indemnity basis*.*

(3) ***On an assessment of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Court may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these Rules, the term "the standard basis", in relation to the determination of costs, shall be construed accordingly****.***

O 59 r 19(1) ***The amount of costs (excluding disbursement) that are payable shall be at the discretion of the Court and shall be determined upon the conclusion of the trial****.***

(2) ***In fixing the costs payable, the Court shall have regard to the relevant circumstances including but not limited to the factors set out in the rule 16****.*"

(emphasis added).

64. Firstly, in accordance with the rule that "*costs to follow the event*" [as provided in O 59 r 3(2) RC], the Defendant shall pay Costs (Trial) to the Plaintiff.

65. Secondly, Costs (Trial) should be awarded on a "*standard basis*" under O 59 rr 16(2) and (3) read with O 59 r 19(1) and (2) RC because there is no exceptional circumstance in this case which warrants the imposition of costs on an "*indemnity basis*" pursuant to O 59 r 16(2) and (4) read with O 59 r 19(1) and (2) RC.

66. Thirdly, the amount of Costs (Trial) should be enhanced in favour of the Plaintiff against the Defendant under O 59 rr 2(2) and 8(b) RC because -

(1) the Defendant's Allegation (Plaintiff's Exaggerated/Fraudulent Claim) was made without any basis; and

(2) the Lengthy Cross-Examination (Plaintiff's Witnesses).

I should state that after Mr. Sanjay had taken over conduct of the defence in This Suit -

(a) Mr. Sanjay did not proceed with the Defendant's Allegation (Plaintiff's Exaggerated/Fraudulent Claim); and

(b) Mr. Sanjay had conducted a concise cross-examination of the remaining Plaintiff's witnesses (**Mr. Sanjay's Concise Cross-Examination**).

The aforesaid conduct by Mr. Sanjay had greatly assisted the court to complete the Trial and is relevant in the court's determination of the quantum of Costs (Trial).

67. Lastly, I have exercised my discretion to order a sum of RM500,000.00 as Costs (Trial) to be borne by the Defendant due to the following reasons:

(1) the reasons which have been expressed in the above paragraph 66;

(2) the Plaintiff is represented by a senior and experienced counsel, Mr. Gurdit - please refer to O 59 r 16(1)(b) RC;

(3) many documents have been adduced in this case, in particular SRFs and SWOs - please see O 59 r 16(1)(c) RC;

(4) this case is very important to the Plaintiff - please refer to O 59 r 16(1)(e) RC; and

(5) This Suit involved a substantial sum of money owed by the Defendant to the Plaintiff - please see O 59 r 16(1)f) RC.

M. Postlude

68. I must express my gratitude to Mr. Gurdit and Mr. Sanjay for the able assistance rendered by them in this case.

69. This judgment serves as a reminder for parties to be circumspect in the appointment of their experts under O 40A RC and to ensure that their experts do not refuse to testify in court due to various dubious reasons after their appointment, preparation of their expert reports, hot-tubbing and receipt of their experts' fees.

WONG KIAN KHEONG
Judge
Court of Appeal, Malaysia
Putrajaya

DATE: 28 MARCH 2023

Counsel for Plaintiff:	*Mr. Gurdit Singh, Mr. Nashvinder Singh Gill & Mr. Hasvinder Singh Gill (Messrs Sharif & Khoo)*
Counsel for Defendant:	*Mr. Belden Premaraj A/L Joseph Rajadurai, Mr. Kee Meng Fai, Ms. Teoh Yuh Fan (Messrs Belden)* *Replaced subsequently by -* *Mr. Sanjay Mohananasundram, Ms. Tan Jun Ling, Mr. Gobinath Karuppan & Ms. Wong Li-Wei (Messrs Sanjay Mohan)*